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# YEARBOOK *of* ANTITRUST *and* REGULATORY STUDIES

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**YEARBOOK OF ANTITRUST AND REGULATORY STUDIES**
**VOL. 2017, 10(15)**

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# Editorial foreword

The editorial board is pleased to present the 15th volume of the Yearbook of Antitrust and Regulatory Studies (YARS 2017, 10(15)). It contains contributions presented during the 2nd International Conference entitled 'Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective'. The conference was organised by the Faculty of Law of the University of Białystok and the Centre for Antitrust and Regulatory Studies of the University of Warsaw (CARS). It was held on 29–30 June 2017 in Supraśl. This conference was one of the steps in a carefully-mapped out sequence of international and national events related to questions of private enforcement of competition law, which is going to be continued.

The current volume is dedicated to a whole spectrum of topics related to the Damages Directive (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), its scope and implementation in all eleven Central and Eastern European Member States of the EU. The contributors from CEE countries present therein the experiences of their legislatures and/or legal drafters gained during the implementation process of the Directive, their approaches to issues covered by the Directive, as well as the ultimately chosen solutions, their strengths and weaknesses. As a result, and continuing the tradition set by YARS in 2013, the research papers published in the current volume focus not only on Polish national law but also present the national laws of other CEE countries.

The first three papers focus on institutional challenges for private enforcement of competition law in CEE countries (O. Blažo), the scope of the implementation of the Damages Directive in CEE countries (M. Petr) and the implementation of the Directive's provisions on consensual dispute resolution in those countries (M. Modzelewska de Raad). Presented next are five papers discussing substantive rules related to private enforcement of competition law in CEE countries. The first, written by D. Wolski, discusses the types of liability for competition-based damages, an issue which the EU

legislature did not take the risk of harmonizing. Further on, the substantive rules of the Directive are discussed that needed to be transposed into the national laws of CEE countries as well as relevant national provisions (or draft provisions) implementing them. These cover: rules on joint and several liability of competition law infringers (P. Miskolczi Bodnár, R. Szuchy), quantification of harm (V. Mikelėnas, R. Zaščiurinskaitė), passing-on of overcharges (R. Moisejevas) and limitation periods (A. Vlahek, K. Podobnik). Another set of papers covers procedural challenges for the implementation of the Directive in CEE countries. It includes a paper on the disclosure of evidence (I. Druviete, J. Jerņeva, A.U. Ravindran) as well as a paper on the effect of national decisions on actions for competition-based damages (E. Pärn-Lee). The latter problem is particularly significant because of the differences between the interpretations of the Directive's minimum harmonisation clause by the researched countries. The last paper by A. Piszcz refers to collective private enforcement of competition law, something omitted by the Directive, or, rather, left to be decided on by the Member States.

Aside from the above research papers, the current volume of YARS contains also two case comments. First, M. Knapp and P. Korycińska-Rządca critically review the judgment of the Court of Appeals in Cracow (Poland) of 10 January 2014 (Ref. No. I ACa 1322/13) concerning several complex legal issues relating to private enforcement of competition law, which are particularly difficult to be proved by an entity injured by the competition law infringer. Second, R. Zaščiurinskaitė shows – based on the judgment of the Lithuanian Court of Appeals of 3 March 2017 (Case No. e2A-27-464/2017) – what factors and circumstances are important in private enforcement of a successful standalone case.

Finally, included in the current YARS volume are also conference reports. They cover: (i) '2nd International Conference on the Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective' (Supraśl, 29–30 June 2017), (ii) 'Conference on EU Competition Law and the New Private Enforcement Regime: First Experiences from its Implementation' (Uppsala, 13–14 June 2017), (iii) 'Workshop – Reform of Regulation 1/2003: Effectiveness of the NCAs and Beyond' (Warsaw, 28 April 2017), (iv) '6th International PhD Students' Conference on Competition Law' (Białystok, 27 April 2017).

The aim of this volume is to provide its readers with information needed to revisit the legal frameworks of CEE countries in this context; this goal will be fulfilled to our satisfaction if the readers will find it useful. We end this brief editorial note with expressions of deep gratitude. We wish to first thank the

members of the Conference Organising Committee, in particular Professor Tadeusz Skoczny, for all their support. We also offer thanks to the authors and various anonymous reviewers who willingly gave their time and expertise to contribute to the current volume.

Białystok, 2nd October 2017

***Anna Piszcz***
***Paulina Korycińska-Rządca***
***Magdalena Knapp***
University of Białystok
– YARS Volume Editors

# List of acronyms

**INSTITUTIONS**

CFI – Court of First Instance
CJ – Court of Justice
CJEU – Court of Justice of the European Union
DG – Directorate General
EC – European Commission
ECJ – European Court of Justice
GC – General Court
NCA – National Competition Authority
NRA – National Regulatory Authority
SA – Appellate Court of Warsaw, *Sąd Apelacyjny w Warszawie* (Poland)
SN – Supreme Court, *Sąd Najwyższy* (Poland)
SOKiK – Court of Competition and Consumers Protection, *Sąd Ochrony Konkurencji i Konsumentów* (Poland)
UOKiK – Office for Competition and Consumers Protection, *Urząd Ochrony Konkurencji i Konsumentów* (Poland)

**LEGAL ACTS**

ACCP – Polish Competition and Consumer Protection Act
TEC – Treaty establishing the European Community
TEU – Treaty on European Union
TFEU – Treaty on the Functioning of the European Union

**OTHER ACRONYMS**

BGN – Bulgarian lev
CEE – Central and Eastern Europe(an)

CZK – Czech koruna
ECR – European Court Reports
EU – European Union
EUR – Euro
HRK – Croatian kuna
HUF – Hungarian forint
iKAR – *internetowy Kwartalnik Antymonopolowy i Regulacyjny* (Poland)
OJ – Official Journal
YARS – Yearbook of Antitrust and Regulatory Studies

# A R T I C L E S

# The Scope of the Implementation of the Damages Directive in CEE States

by

Michal Petr*

**CONTENTS**



## *Abstract*

The Damages Directive has a rather limited scope, focusing only on damages claims stemming from anticompetitive agreements or abuse of a dominant position, provided such conduct was able to affect trade between EU Member States. However, Member States are not limited by this scope and so they may decide, when implementing the Directive, to enhance not only claims for damages, but the overall private enforcement of competition law. In this article, we shall explore the

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scope of the implementing legislation of selected Central and Eastern European Countries, namely in Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia.

***Résumé***

La Directive Dommages a un champ d'application plutôt limité qui se concentre uniquement sur les actions en dommages causés par des accords anticoncurrentiels ou des abus de position dominante, susceptibles d'affecter le commerce entre États membres. Toutefois, les États membres ne sont pas limités par ce champ d'application et peuvent donc décider, lors de la mise en œuvre de la Directive, de renforcer non seulement les actions en dommages, mais aussi l'ensemble de l'application privée du droit de la concurrence. Dans cet article, nous explorerons le champ d'application de la législation de mise en œuvre dans les certains pays d'Europe centrale et orientale, à savoir la Bulgarie, la Croatie, la République tchèque, l'Estonie, la Hongrie, la Lettonie, la Lituanie, la Pologne, la Roumanie, la Slovaquie et la Slovénie.

**Key words:** competition law; Damages Directive; private antitrust enforcement; undertaking.

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## I. Introduction

In its landmark *Courage* judgment of 2001,[1] the Court of Justice of the European Union (hereinafter referred to as 'CJEU') declared that 'a party to a contract liable to restrict or distort competition within the meaning of [Article 101 TFEU] can rely on the breach of that article to **obtain relief from the other contracting party**';[2] thus, even though the case was concerned with claims for damages,[3] the court ruled on the possibility to **obtain relief**,[4] which is arguably a significantly broader category (Piszcz, 2015, p. 84).

[1] CJEU judgment of 20.09.2001, Case C-453/99 *Courage and Crehan*, ECLI:EU:C:2001:465.

[2] Ibid, para. 36. All emphases added by the author.

[3] And the CJEU indeed declared in para. 26 that 'The full effectiveness of [Art. 101 TFEU] and, in particular, the practical effect of the prohibition laid down in [Art. 101 (1) TFEU] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition'.

[4] Apart from the right to compensation, the CJEU also specifically discussed the issue of nullity in para. 22: 'That principle of automatic nullity can be relied on by anyone, and the courts are bound by it once the conditions for the application of [Art. 101(1) TFEU] are met and so long as the agreement concerned does not justify the grant of an exemption under

When the Damages Directive[5] was finally adopted in 2014, its scope was limited only to **compensatory relief** of claims stemming from anticompetitive agreements and abuse of dominance in cases capable of significantly affecting trade between EU Member States,[6] that is, cases with EU dimension.[7] The aim of the Damages Directive is thus not to stimulate private enforcement as such, but only one part of it – a specific category of damages claims.

While implementing the Damages Directive, Member States are, however, not bound by its limited scope, and they may decide to go beyond it. To assess how did the states of Central and Eastern Europe tackle this issue, we will analyse the legislation adopted (or being adopted) in Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia.

In this article, we first discuss the **potential** scope of private enforcement of competition law (Chapter II) and contrast it with the **actual** scope of the Damages Directive (Chapter III). In Chapter IV, we shall analyse the implementing legislation in CEE countries.

In addition, we shall briefly explore the specific topic of the **personal** scope of the implementation; according to the Damages Directive, the infringer is 'an undertaking or an association of undertakings',[8] that is, a single economic entity,[9] potentially composed of several persons where parent companies may be liable for the conduct of their subsidiaries.[10] In Chapter V, we shall analyse

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[Art. 101(3) TFEU] (…) Since the nullity referred to in [Art. 101(2) TFEU] is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties (…) Moreover, it is capable of having a bearing on all the effects, either past or future, of the agreement or decision concerned (…)'.

[5] Directive 2014/104/EU of the European Parliament and of the Council of 26.11.2014 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, OJ L 349, 05.12.2014.

[6] Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101, 27.04.2004, p. 81.

[7] The Damages Directive itself is a part of a broader package of measures intended to foster private enforcement, including the Commission's Communication and Practical Guide on quantifying antitrust harm in damages actions. It is, however, important to notice that this package contains also the Commission's Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, which addresses not only antitrust claims, but rights stemming from EU law in general, and not only damages claims, but injunctive relief as well; this arguably suggests that the scope of the Damages Directive might also have been wider, as will be discussed below.

[8] Damages Directive, Art. 2(2).

[9] See e.g. CJEU judgment of 23.04.1991, Case C-41/90 *Höfner*, ECLI:EU:C:1991:161.

[10] See e.g. CJEU judgment of 10.09.2009, Case C-97/08 *Akzo Nobel NV*, ECLI:EU:C:2009:536.

to what extent was the concept of a single economic unit implemented into national legislation.

## II. Private enforcement of competition law

### 1. The notion of private enforcement

Before discussing the scope of the implementation of the Damages Directive, it is first necessary to briefly outline the notion of 'private enforcement' and 'competition law'.

It is not our aim to discuss here in detail the topic of private enforcement, we only want to recall that its scope is much broader than damages claims, which has become the focus of attention following the Commission's activities subsequent to the *Courage* judgment.[11] The term is amply summarised by Komninos according to whom, private enforcement is:

> 'a litigation, in which private parties advance independent civil claims or counter-claims based on the EC competition [law] provision' (Komninos, 2003, p. xxiv).

Private enforcement thus provides different forms of relief to those negatively affected by anticompetitive conduct. **Compensatory relief**, that is, the right to claim damages, is probably the most common remedy, which will be discussed in the following chapters. The compensation is generally monetary in nature, even though restitution in kind remains a (theoretical) possibility in a few countries (Müller-Graff, 2016, p. 119). In some countries, including the Czech Republic, it is also possible to claim **satisfaction** in order to compensate immaterial injuries.[12] Satisfaction has, as a matter of principle,

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[11] The Commission was clearly aware of this fact, as is evident from its Green Paper *Damages Actions for Breach of the EC Antitrust Rules* (2005), p. 3: 'Private enforcement in this context means application of antitrust law in civil disputes before national courts. Such application can take different forms. Article 81(2) of the Treaty states that agreements or decisions prohibited by Article 81 are void. The Treaty rules can also be used in actions for injunctive relief. Also, damages awards can be awarded to those who have suffered a loss caused by an infringement of the antitrust rules'. Conversely, it might be argued that the Commission later identified the private enforcement only with the right to compensation, as might be deduced from the Damages Directive, recital 5: 'Actions for damages are only one element of an effective system of private enforcement of infringements of competition law and are complemented by alternative avenues of redress, such as consensual dispute resolution and public enforcement decisions that give parties an incentive to provide compensation'.

[12] See e.g. judgment of the Supreme Court of the Czech Republic of 05.05.2006, Ref. No. 32 Odo 511/2006; this judgment was delivered in an unfair competition case, it is however

a non-pecuniary form, as long as it constitutes a real and sufficiently effective compensation; only in other cases is pecuniary satisfaction admissible.[13] As a specific form of satisfaction, the publication of the court judgment has been sought in the Czech Republic in the past.

As an independent claim, **forfeiture of profits** (or restitution of unjust enrichment) may be sought in some countries (Müller-Graff, 2016, p. 119).

**Injunctive relief**, that is pleas asking the defendant to bring their anticompetitive conduct to an end, is also available in most of the countries, including claims for **interim measures** (Müller-Graff, 2016, p. 119).

Finally, **nullity of contracts** is a civil-law consequence of anticompetitive conduct and aggrieved parties may seek **declaratory relief**, that is ask the court to declare a specific contract (or a part of it) null and void (Müller-Graff, 2016, p. 119); seeking a declaration of nullity will typically be employed in cases based on contractual law (that it is no longer necessary to observe the contract due to its nullity), but may also serve as a basis to claim restitution of unjust enrichment.

In addition, there are also some **other remedies** which are not specific to private antitrust enforcement, but constitute a general part of civil law of the respective Member States such as, for example, the publication of a judgment, as indicted above, was claimed in several private antitrust enforcement cases in the Czech Republic (Petr and Zorková, 2016, p. II).

Without going into details, it is important to keep in mind that different claims are often 'bundled' in a single court claim; as we have observed in the Czech Republic, the plaintiffs rarely seek only compensatory relief, but they commonly also ask for an injunction or other forms of relief (Petr and Zorková, 2016, p. II).

## 2. The notion of competition law

So far, we have discussed different forms of private enforcement of competition law; the notion of **competition law** itself is, nonetheless, difficult to define. Indisputably, anticompetitive agreements (Article 101 TFEU) and abuse of a dominant position (Article 102 TFEU), as well as their national-law equivalents, are covered by this term.

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applicable to private enforcement of competition law as well. Satisfaction can also be employed to remedy injuries which have material consequences, but cannot be financially quantified, because if they were quantifiable, it would be appropriate to seek damages (judgment of the Supreme Court of the Czech Republic of 14.11.2008, Ref. No. 32 Cdo 1664/2008).

[13] Czech Civil Code, Section 2951(2).

From then on, clear answers are more difficult to find. Regulation 1/2003 itself enables Member States to apply provisions on **abusive behaviour toward economically dependent undertakings** as part of their competition laws;[14] therefore, such regulation should presumably be included in the notion of competition law.

Control of concentrations is generally perceived as a part of competition law (Whish and Bailey, 2015, p. 3). If a merger was implemented before being cleared by a competent competition authority, competition law was breached and so it should be possible to rely on private enforcement remedies; the same applies to cases when the merger was cleared on condition the commitments of the merging parties will be fulfilled, but they were in fact breached. We put forward that under such circumstances, injured parties could (and should) be able to rely on the same rules to claim damages as in cartel and antitrust cases, including the limitation periods, quantification of harm etc.

In addition to that, there are other specific rules that pursue similar objectives as competition law, in particular those on state aid,[15] but also on public procurement. Although these can probably not be properly classified as competition law, the system in which they are regulated is similar. It might thus be argued that also private enforcement in these legal areas should follow the same principles as in the area of competition law, especially if the same competition authorities are responsible for the enforcement of these rules, as is often the case in CEE countries.

Last but not least, there are the rules on unfair competition, which clearly pursue different objectives than rules on agreements and abuses of dominance. However, it may often be the case that an anticompetitive conduct (agreement or abuse of dominance) falls, at the same time, also within the definition of unfair competition. Indeed, in the Czech Republic, a significant proportion of private enforcement claims are based simultaneously on the breach of competition as well as unfair competition law (Petr and Zorková, 2016, p. III). In many EU Member States, competition authorities are also responsible for the enforcement of unfair competition (or consumer protection) legislation. It may thus be argued that for the sake of coherence of civil law, the same rules on private enforcement shall be available for competition as well as unfair competition claims.

[14] Regulation 1/2003, recital 8.

[15] Private enforcement of state aid law is addressed by the Commission notice on the enforcement of State aid law by national courts, OJ C 85, 09.04.2009, p. 1; this notice is, however, more concerned with the – general – role of national courts in enforcement of state aid law than with specific private enforcement rules.

## III. The Damages Directive

As has already been noted above, the Damages Directive only applies to damages claims stemming from anticompetitive agreements and abuse of dominance in cases capable of significantly affecting trade between EU Member States, that is, breaches of Articles 101 and 102 TFEU. In this chapter, we will discuss what this scope actually means, and argue that it might have been significantly broader.

The aim of the Damages Directive is to secure **full compensation** to anyone harmed by an infringement of competition law.[16] Clearly, as is also evident from its title, the Damages Directive is only concerned with damages claims,[17] not private enforcement in its broader meaning. Full compensation shall place a person who has suffered harm in the position in which that person would have been if the infringement of competition law had not been committed.[18] It therefore needs to cover 'compensation for actual loss and for loss of profit, plus the payment of interest'.[19] The Damages Directive thus arguably covers only the monetary compensation of the harm, not restitution or satisfaction; unjust enrichment claims also seem not to be covered by it (Strand, 2014, p. 378 *et seq.*).

The Damages Directive applies to harm caused by infringements of **competition law**, which is understood in its narrowest sense as anticompetitive agreements (Article 101 TFEU) and abuse of dominance (Article 102 TFEU). It does not apply to breaches of the law on concentrations. Similarly, distortions of competition by States are not covered, as is the case with other rules which pursue similar objectives to competition law or the application of which is in some Member States entrusted to competition authorities. These include, for example, the rules on state aid, public procurement, unfair competition or the protection of consumers, superior bargaining position etc.

At the same time, the Damages Directive only applies to agreements and abusive conduct capable of affecting trade between Member States, that is, to infringements with 'EU dimension', and falls on corresponding national competition law provisions only inasmuch as it is applied in parallel with the EU one.[20]

The scope of the Damages Directive is thus very limited. Member States have, nonetheless, an opportunity to implement it more broadly, that is,

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[16] Damages Directive, Art. 1(1).

[17] In the Damages Directive, Art. 2(5), 'claim for damages' is defined as 'a claim for compensation for harm caused by an infringement of competition law'.

[18] This requirement is in essence the reiteration of the Roman *restitutio in integrum*.

[19] Damages Directive, Art. 3(2).

[20] Damages Directive, Art. 2(3).

to apply their implementing provisions to other situations than claims for damages for breaches of competition law with EU dimension. Indeed, even though the majority of the provisions of the Damages Directive are applicable only to antitrust damages claims, some may be employed in a more broadly conceived private enforcement.

One of the most novel aspects of the Damages Directive are the rules on disclosure of evidence.[21] In principle, there is no material reason why such rules should not be applicable to private enforcement in its broader meaning, as described above, or in areas of law other than the strictly defined competition law. Conversely, we put forward that keeping these rules applicable only to strictly defined damages claims may result in serious complications for the more broadly conceived private enforcement. For example, if claimants would come to a court with a claim for damages and for injunctive relief, they might be able to use the evidence gathered by means of the disclosure for the purposes of the damages claim, but not for the injunction. Similarly, if the claim was built on a double legal basis, for example, competition and unfair competition law, the evidence thus collected would arguably be permissible only in the competition law limb of the claim. Without a broader implementation of the Damages Directive, such paradoxes cannot be reconciled. The same applies to other important provisions of the Damages Directive, in particular the binding effect of decisions of national competition authorities.[22]

Similar problems may be caused by the specific rules on limitation periods,[23] which – among other goals – attempt to reinforce follow-on claims by stating that the limitation period cannot elapse sooner than the infringement decision of a national competition authority becomes final.[24] It is difficult to argue why there is a legitimate aim in securing compensatory relief thank to specific limitation periods allowing follow-on claims, but at the same time limiting (or indeed precluding) declaratory or injunctive relief based on the same anticompetitive conduct, because the limitation periods for different forms of remedies are construed in an incoherent way.

Even the rules peculiar to damages claims, for example, the rules on the right to full compensation,[25] the quantification of harm[26] or the rules on joint and several liability[27] and the passing-on of overcharges,[28] may be used for

[21] Damages Directive, Chapter II.
[22] Damages Directive, Art. 9.
[23] Damages Directive, Art. 10.
[24] Damages Directive, Art. 10(4).
[25] Damages Directive, Art. 3.
[26] Damages Directive, Art. 17.
[27] Damages Directive, Art. 11.
[28] Damages Directive, Chapter IV.

other claims than those based on the narrowly defined concept of competition law; for example, we cannot think of any arguments for calculating the damages for breaches of competition law differently in the case of a breach of Article 102 TFEU than in the case of a breach of superior bargaining position regulation.[29]

Thus, there is a very strong argument for implementing the Damages Directive more broadly than its actual scope suggests.

## IV. National legislation

### 1. Introductory remarks

Even before the implementation of the Damages Directive, private enforcement of competition law was possible in EU Member States (Martinez Lage and Allesandesalazar, 2010, p. 2), either only on the basis of general provisions of tort law, or due to specific provisions applicable only to competition law (Müller-Graff, 2016, p. 118).[30]

The history of private enforcement in the Czech Republic may be illustrative in this regard. When the first modern competition law was enacted in 1991, the competition act contained a specific provision on private enforcement,[31] enlisting all possible remedies, including injunction, restitution, satisfaction, damages and disgorgement of unjustified enrichment. In 2001, when the current Competition Act was adopted,[32] it was decided by the legislator that such a provision is no longer necessary, as the claimant may rely directly on general tort law. Interestingly, the Czech Competition Authority attempted to enact certain specific provisions on private enforcement in 2008, but these were rejected by the Government as superfluous (Kreiselová, 2008, p. 4). At present, the new Civil Code,[33] in force since 2014, provides for specific rules on private enforcement of unfair competition law,[34] and it adds that the same remedies are available to those who have been aggrieved by breaches

[29] In the Czech Republic, that is the Act No. 395/2005 Coll., on superior bargaining position by sale of agricultural products and on its abuse, as amended. Similar regulation is, however, also in place in other CEE countries, including Bulgaria, Hungary Lithuania, Slovakia and Slovenia (Bejček, 2016, p. 281 *et seq*).

[30] Concerning specifically EU law, the right to claim damages has been guaranteed at least since the *Courage* judgment of the CJEU.

[31] Act No. 63/1991 Coll., on the protection of competition, Sec. 17.

[32] Act No. 143/2001 Coll., on the protection of competition, as amended.

[33] Act No. 89/2012 Coll., Civil Code, as amended.

[34] Czech Civil Code, Sec. 2988.

of competition law;[35] coincidently, the term 'competition law' is not defined in the Civil Code and there is currently a discussion about what regulation should be covered by these provisions, along the lines outlined in Chapter II.

In several countries, specific rules enhancing private enforcement were adopted even before the Damages Directive, sometimes going beyond its scope. Hungary may serve as an example in this regard; already in 2009, it enacted a rebuttable presumption that cartels increase prices by 10% (Bodnár, 2017, p. 130).

Despite these 'pre-existing' rules on private enforcement, some level of implementation of the Damages Directive was necessary in all CEE countries. This was done (or is currently in the state of being finalised) mostly by a specific 'self-standing' new act, dedicated exclusively to the implementation of the Damages Directive,[36] or by amending the respective competition acts.[37] In some CEE countries however, the Damages Directive was transposed directly into civil law 'codes', in particular the civil code and the civil procedure code.[38]

We will not discuss 'pre-existing' legislation, but concentrate only on the implementation of the Damages Directive. As this article is concerned specifically with the scope of the implementation, we shall strive to answer the following questions:

(1) does the implementation apply only to conduct with EU dimension?
(2) does the implementation apply only to (strictly defined) competition law?
(3) does the implementation apply only to claims for damages?

## 2. The 'EU dimension'

Due to the principles of subsidiarity and proportionality of EU legislation, the Damages Directive only applies to breaches of EU competition law; since corresponding provisions of national law may nonetheless be applied in parallel with it,[39] these national provisions are also covered, because otherwise, it would 'adversely affect the position of claimants in the same case'.[40]

[35] Czech Civil Code, Sec. 2990.

[36] That was the case in Croatia, Czech Republic, Poland and Slovakia.

[37] That was the case in Bulgaria, Hungary, Lithuania and Slovenia.

[38] That was the case in Estonia, Latvia and Romania.

[39] Regulation 1/2003, Art. 3.

[40] Damages Directive, recital 10, which stipulates that: 'In the interest of the proper functioning of the internal market and with view to a greater legal certainty and a more level playing field for undertakings and consumers, it is appropriate that the scope of this Directive extend to actions for damages based on infringement of national competition law where it is applied pursuant to Article 3(1) of Regulation (EC) No. 1/2003. Applying differing rules on civil

Breaches of provisions of purely national competition law, in other words, anticompetitive conduct without EU dimension (in its strict meaning, that is the rules on agreements and abuse of dominance), are not covered by the Damages Directive. The same argument for the inclusion of national law if applied in parallel with EU rules applies, however, also in the case of the application of national law on its own. In our opinion, there is no compelling reason why claims for damages based on the breach of Articles 101 and 102 TFEU should follow different rules than damages claims based on the breach their national equivalents.[41] This is especially important in countries where most claims are bases only on national law.[42]

This view was shared by all CEE states and so the rules implementing the Damages Directive thus cover also situations in which only national competition law was breached, as is evident from Table 1.[43]

**Table 1. Is anticompetitive conduct without EU dimension covered by the implementation?**

| BG | HR | CZ | EST | H | LV | LT | PL | RO | SR | SLO |
|---|---|---|---|---|---|---|---|---|---|---|
| YES | YES | YES | YES | YES | YES | YES | YES | YES | YES | YES |

In addition, the question might also be asked whether domestic implementing provisions also apply, in cases without EU dimension, to breaches of the national competition laws of other countries, on condition the rules of international private law allow such a scenario. This question is usually not discussed by the respective implementing legislations;[44] Czech law may thus be unique in stating explicitly that it applies also to breaches of national competition laws of other EU Member States.[45]

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liability in respect of infringements of Article 101 or 102 TFEU and in respect of infringements of rules of national competition law which must be applied in the same case in parallel to Union competition law would otherwise adversely affect the position of claimants in the same case and the scope of their claims, and would constitute an obstacle to the proper functioning of the internal market'.

[41] This issue could not have been addressed by the Damages Directive itself, as it applies only to EU law.

[42] E.g., in the Czech Republic over the last 15 years, there was only one private enforcement case where the court directly referred to EU competition law (Petr and Zorková, 2016, p. III).

[43] Tables 1 to 3 were prepared by the author of this article, using the information derived from national reports published in Piszcz (ed.), 2017.

[44] E.g., in the Hungarian report, it is only mentioned that this issue is 'ambiguous' (Bodnár, 2017, p. 136).

[45] Draft act implementing the Damages Directive, Sec. 1.

## 3. The 'competition law'

The Damages Directive only applies to anticompetitive agreements and the abuse of a dominant position, as defined by Articles 101 and 102 TFEU; other legislation, which may also be called 'competition law', that pursues similar objectives to these Articles or is enforced by the same competition authority, is, however, not covered by the Damages Directive.

Does the implementation of the Damages Directive in CEE states go beyond anticompetitive agreements and abuses? Although pure logic would point to the affirmative, the situation is in fact varied in this regard, with the vast majority of CEE countries choosing the opposite approach. Thus in eight out of the eleven CEE countries, only agreements and abuses are covered (Croatia, Czech Republic, Estonia, Lithuania, Poland, Romania, Slovakia, Slovenia); broader implementation was adopted only in Bulgaria, Hungary and Latvia, as is evident from Table 2.

**Table 2. Does the implementation cover other practices than agreements and abuses?**

| BG | HR | CZ | EST | H | LV | LT | PL | RO | SR | SLO |
|---|---|---|---|---|---|---|---|---|---|---|
| YES | NO | NO | NO | YES | YES | NO | NO | NO | NO | NO |

The methodology used by these countries seems to be the same – extending the implementing provisions to legislation administered by the competition authority. In Hungry, where the implementing provisions were included into the competition act, most of the implementing provisions apply only to Articles 101 and 102 TFEU and their national equivalents,[46] some of them[47] also cover the prohibition of unfair manipulation of business decisions[48] (Bodnár, 2017, p. 135). A similar approach was taken in Bulgaria,[49] where most of the implementing provisions apply only to Articles 101 and 102 TFEU and their national equivalents, while only the provision on the right to full compensation applies to all the infringements of the Bulgarian Competition Act, including merger control, unfair competition and abuse of superior bargaining position (Petrov, 2017, p. 29). Only in Latvia, where the Damages Directive is to be transposed into numerous legal acts[50] (in particular the Civil

[46] Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (hereinafter referred to as 'Hungarian Competition Act'), Chapter XIV/A.

[47] Hungarian Competition Act, Chapter XIV/B.

[48] Hungarian Competition Act, Chapter III.

[49] The law was still a draft in August 2017.

[50] The law was still a draft in August 2017.

Procedure Code), the implementing provisions cover breaches of competition law in general, thus including also rules on mergers and unfair competition (Jerneva and Druviete, 2017, p. 159).

### 4. The 'private enforcement'

The situation is even less versatile concerning the different forms of remedies covered by the implementing legislation. In all but one CEE state, the implementation of the Damages Directive only deals with claims for damages; as is evident from Table 3, the only exception is Hungary, where all 'private law remedies' are covered (Bodnár, 2017, p. 134).

**Table 3. Does the implementation cover other remedies than damages claims?**

| BG | HR | CZ | EST | H | LV | LT | PL | RO | SR | SLO |
|---|---|---|---|---|---|---|---|---|---|---|
| NO | NO | NO | NO | YES | NO | NO | NO | NO | NO | NO |

In this regard, we should not overlook that in Slovenia, where the legislator intended to implement the Damages Directive in a broader way, covering private enforcement as such (and especially unjustified enrichment claims). The European Commission insisted, however, that the implementation was to be limited only to damages claims, which materialised in the law finally adopted (Vlahek and Podobnik, 2017, p. 271); similar interference has however not been reported in other CEE countries.

## V. The notion of an undertaking

So far, we have been discussing the **material** scope of the implementation of the Damages Directive. Concerning its personal scope, the directive is very clear in providing that '**anyone** who has suffered harm caused by an infringement of competition law (…) can effectively exercise the right to claim full compensation';[51] in that regard, the States have no room to choose the extent of the implementation.

Those harmed may seek redress from infringers, who are to be understood as undertakings (or associations of undertakings) that have committed the infringement;[52] again, there seems to be no room for manoeuvre for the

[51] Damages Directive, Art. 1(1), emphasis added.
[52] Damages Directive, Art. 2(2).

implementation. However, it needs to be observed that civil law generally works with a single **legal**, as opposed to **economic** entity. Arguably, it is therefore not self-evident that the civil courts will approach the notion of an undertaking in the same way as competition authorities do.[53]

Such a problem has already materialised in the Czech Republic, where the term 'undertaking' was interpreted in several civil court judgments as a 'competitor', which led to the dismissal of a private enforcement claim (Petr and Zorková, 2016, p. V and VI); this situation has not improved with the implementation of the Damages Directive, as the Czech implementing act does not use the term 'undertaking', but a 'person'. Apparently, the civil case-law in Bulgaria encountered similar problems with an economic entity broader than the legal one (Petrov, 2017, p. 37).

Some countries, for example Croatia, attempted to overcome this problem by using the term 'undertaking' as defined by competition law, for the purposes of damages claims; it is nonetheless still not clear whether civil courts will follow this concept in full (Malnar, 2017, p. 61). In other CEE countries, for example Hungary (Bodnár, 2017, p. 136) or Lithuania (Mikelénas and Zaščiurinskaité, 2017, p. 192), there are civil-law provisions governing liability of the parent company, even though they cannot arguably cover the complex doctrine of a single economic unit.

Conversely, it seems to be the case that in Slovenia, thanks to the case-law of its courts, the concept of as single economic entity does not cause any problems (Vlahek and Podobnik, 2017, p. 270).

It is thus evident that the usage of the notion of an undertaking as a single economic entity is very diverse in the civil laws of CEE countries; in addition, the civil case-law is, at best, ambiguous, which leads us to the conclusion that this rather overlooked issue deserves more attention in the future.

## VI. Conclusions

The scope of the Damages Directive is quiet narrow, limited to damages claims stemming from anticompetitive agreements and the abuse of dominance in cases capable of significantly affecting trade between EU Member States. This is in line with the general principles of subsidiarity and proportionality, even though arguably, the scope of EU legislation might have been broader,

[53] It has been observed that '[m]any Member States, however, do not extend the single economic unit doctrine to private enforcement cases (in which the notion of an "economic unit" (…) may collide with the traditional rules on causality and the responsibility of a legal entity)' (Müller-Graff, 2016, p. 136).

as is evident from the Commission's initiative in the area of class actions. The decisive element is, nonetheless, that Member States were in the position to implement the Damages Directive more broadly.

We put forward that in order to ascertain effective private enforcement of competition law, the implementation of the Damages Directive should indeed be significantly broader. First, national implementing legislation should cover not only conduct with 'EU dimension', but also breaches of national competition law, without a parallel application of EU law. The coherence of Member States' legal systems would be disrupted if damages claims based on a breach of EU law were directed by one set of rules (the Damages Directive and its implementation), while damages claims based on a materially same conduct, but contrary 'only' to national law, would follow other (purely national) rules. There seems to be a universal agreement on this among the surveyed CEE countries and all of them thus implemented the Damages Directive to cover also the infringements of purely national competition law.

At the same time, we have argued that in order to secure effective private enforcement of competition law, it is not possible to concentrate solely on damages claims, but that other kinds of relief need to be addressed as well. Even though most of the provisions of the Damages Directive are relevant only to damages claims, many may be employed in cases of nullity claims, injunctions etc. We contend that the same argument concerning the coherence of legal systems, outlined above, applies in this case as well. Conversely, to employ different claims stemming from identical material facts, but following different rules, is in our opinion difficult to justify, especially if the claims are 'bundled' in a single legal action. Surprisingly, this opinion was not shared among CEE countries – only in Hungary do the implementing rules cover private enforcement as such.

Finally, we claim that for the sake of the coherence of national legal systems, a broader category of practices distorting competition (than only anticompetitive agreements and the abuse of dominance) ought to be covered by the implementing legislation. Such practices, covered by rules on merger control or superior bargaining position, or in a broader sense unfair competition or state aid, are often prohibited by the same competition act and applied by the same competition authority. From the point of view of a person harmed by distorted competition, it is in our opinion difficult to argue that private enforcement of some of these rules (Articles 101 and 102 TFEU) should be made easier, while others should not. Nonetheless, and rather surprisingly, most of the CEE countries were satisfied with a limited implementation. Only in Bulgaria and Hungary, some aspects of the implementation can be relied upon while enforcing other provisions of their competition acts. Moreover,

solely in Latvia are all anticompetitive practices enshrined in its competition act covered by the implementing legislation.

We have also observed that the notion of an 'undertaking' as an **economic** entity might not be easily applicable in civil law cases in many CEE states, potentially endangering the effectiveness of private enforcement, as private and public enforcement might construe their addressees in an incompatible way. Practical experience with this issue has, however, been very limited in CEE countries and their case-law is rather rudimentary; under such circumstances, some more specific guidance, even in the form of legislation, might in our opinion be beneficial for civil courts.

We thus conclude that in order to truly strengthen the legal position of those harmed by anticompetitive conduct, the implementing legislation, even though only recently adopted (or still in the process of adoption) should be revisited and the scope of the implementation of the Damages Directive should be broadened, as suggested above.

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# Institutional Challenges for Private Enforcement of Competition Law in Central and Eastern European Member States of the EU

by

Ondrej Blažo*

**CONTENTS**



## *Abstract*

The paper will focus on requirements and thresholds set for the judiciary by the Damages Directive. Answered will also be questions on the specialization of courts and its application in Central and Eastern European (CEE) Member States of the EU, as well as on the involvement of national competition authorities (NCAs) in court proceedings. The paper provides also general thoughts regarding the specialization of courts and confronts them with the judiciary structure in CEE Member States in the context of private enforcement of competition law. While there is no uniform model of a judicial system, the paper provides a critical analysis of the centralization, specialization and decentralization of private enforcement models, taking into account also the importance of the training of judges. The

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relationship between NCAs and courts will be discussed whereby the role of NCAs in private enforcement defines the responsibility of the given public authority in private enforcement as a country's policymaker.

***Résumé***

L'article se concentre sur les exigences et les seuils fixés par la Directive Dommages pour le pouvoir judiciaire. Les réponses vont se focaliser également sur la spécialisation des tribunaux et son application dans les États membres d'Europe centrale et orientale (PECO) de l'UE, ainsi que sur la participation des autorités nationales de concurrence (ANC) aux procédures judiciaires. L'article fournit également des réflexions générales sur la spécialisation des tribunaux et les confronte à la structure judiciaire des États membres de l'Europe centrale et orientale dans le cadre de l'application privée du droit de la concurrence. Bien qu'il n'existe pas de modèle uniforme de système judiciaire, l'article fournit une analyse critique de la centralisation, de la spécialisation et de la décentralisation des modèles d'application privée du droit de la concurrence, en tenant également compte de l'importance de la formation des juges. La relation entre les ANC et les tribunaux sera examinée dans le contexte ou le rôle des ANC dans l'application privée du droit de la concurrence définit la responsabilité d'autorité publique comme un décideur politique national.

**Key words:** judicial system; judicial specialization; competition law; damages; harmonization; EU law.

**JEL:** K40; K21

## I. Introduction

In the European Union, specific judicial systems are subject to their national regulation and Member States employ different models in this context. EU law usually gives only general guidelines to secure the rule of law and to empower courts with a specific authority to enforce common EU policies required by respective legislation.

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[1] (hereinafter, 'Damages Directive') introduces a set of powers to be granted to 'national courts', for example,

[1] OJ L 349, 05.12.2014.

rules on disclosure of evidence, power to impose penalties, cooperation with national competition authorities (hereinafter, 'NCAs'). However, the Damages Directive does not bind Member States regarding the detailed structure and types of the courts or tribunals responsible for dealing with damages claims.

The paper will focus on (1) requirements and thresholds set for the judiciary by the Damages Directive, (2) questions of the specialization of courts and (3) its application in CEE Member States as well as (4) the role of NCAs in court proceedings.

## II. Requirements for national judicial systems described in the Damages Directive

The scope of the Damages Directive regarding bodies empowered to handle private enforcement cases is quite limited. The Damages Directive covers procedural powers of 'national courts' with respect to private enforcement, while referring to the meaning of the term 'court or tribunal' provided under Article 267 TFEU.[2] [3] While describing its own scope as coordination of 'the enforcement of the competition rules by competition authorities and the enforcement of those rules in damages actions before national courts',[4] the Damages Directive remains silent on the powers of other bodies and tribunals that can be involved in private enforcement (for example, ADR, administrative bodies). As it is obvious from the spirit of the Damages Directive (as well as its limited scope), the Damages Directive represent a 'minimum standard' form of harmonization, and so it does not offset national regulations that provide more rights, enhance safeguards and provide more effective enforcement. The Damages Directive thus does not prevent Member States from empowering bodies and tribunals other than 'national courts' with rights similar to those of 'national courts' described in the Damages Directive. On the other hand, this enhancement of powers cannot undermine effective public enforcement. However, neither the Damages Directive nor its preparatory documents answer

[2] Damages Directive, Art. 2(9).

[3] There is a lot of literature and discussions as well as developed case-law dealing with the concept of 'court' or 'tribunal' and for the purposes of this paper it is not necessary to analyse this concept, (for instance Ježová, 2013, p. 35–38; Stehlík, 2006, p. 30; Stehlík, 2005, Steiner and Woods, 2009, p. 229; Judgment of 30.06.1966, Case C-61/65 *Vaassen-Goebbels v. Beambtenfonds voor het Mijnbedrijf*, ECLI:EU:C:1966:39; Judgment of 11.06.1987, Case C-14/86 *Pretore di Salò v. Persons unknown*, ECLI:EU:C:1987:275; Judgment of 17.09.1997, Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*, ECLI:EU:C:1997:413; Judgment of 6.07.2000, Case C-407/98, *Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist*, ECLI:EU:C:2000:367.

[4] Damages Directive, Art. 1(2).

clearly whether other enforcement bodies can be granted powers that might clash with public enforcement (taking into account the EU paradigm that there is no effective private enforcement without effective public enforcement).[5] Furthermore, there is a crucial requirement that this non-judicial system must be more effective that the judicial one and that judicial remedies must be provided. If that was not the case, such system can be considered contrary to the Damages Directive due to its ineffectiveness (failure of a Member State to provide an effective system for damages claims) and due to the lack of judicial protection, including an involvement of the Court of Justice of the European Union as the authority of last resort regarding the interpretation of EU law.

The Damages Directive does not require a specific structure or mode of operation of 'national courts'; that could be, in fact, contrary to the principles of subsidiarity or respect to the national identities of EU Member States. The only requirements given as far as national judiciaries are concerned can be seen in general principles of effectiveness and equivalence. The principle of effectiveness of enforcement is repeated several times in the Preamble of the Damages Directive. There are four aspects of effectiveness in this context:

(1) effective judicial enforcement in order to provide compensation to a harmed party: for example, Recital 4 demands '(…) to have procedural rules ensuring the effective exercise of that right, Rec. 6 recalls that the aim of the Damages Directive is to '(…) ensure effective private enforcement actions under civil law (…)';
(2) effective system of private enforcement as a whole (Recital 5: 'Actions for damages are only one element of an effective system of private enforcement (…)');
(3) the right to effective judicial protection (Recital 4: 'The need for effective procedural remedies also follows from the right to effective judicial protection as laid down in the second subparagraph of Article 19(1) of the Treaty on European Union (TEU) and in the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union. Member States should ensure effective legal protection in the fields covered by Union law');
(4) effective national enforcement of EU law (Article 4).

It must be noted that, in their literal meaning, the provisions of Article 4 of the Damages Directive require a rather low threshold of effectiveness of private enforcement of EU competition law: '(…)all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an

[5] See for instance Opinion of AG Mazák in Case C-360/09 *Pfleiderer AG v. Bundeskartellamt*, ECLI:EU:C:2010:782.

infringement of competition law'. A contrario, every situation which is at least a little better than 'practically impossible or excessively difficult' possibility for compensation of the harm can be considered to fulfil the harmonization requirement. Indeed, the Damages Directive recalls case-law and requires the right for full compensation of harm suffered from competition infringements. The effectiveness of private enforcement can be seen from two standpoints: substantive, that is, subjective right for compensation, and procedural, that is, an actual possibility to acquire such compensation. While 'substantive' effectiveness is easy to describe (definition of the extent of damages), 'procedural' effectiveness was described only by the lowest possible threshold. However, the threshold 'practically impossible or excessively difficult' is not absolute, and other requirements of the rule of law and right to a fair trial must be added, for example, it must be possible to execute the right to damages in reasonable time.

The principle of equivalence can be easily fulfilled by national legislation in this context too. The Damages Directive (Article 4) requires that '(…) national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 TFEU shall not be less favourable to the alleged injured parties than those governing similar actions for damages resulting from infringements of national law'. It seems that a Member State can violate this provision by restricting private claims to cases of a breach of national competition law only, because it is hard to imagine that a reasonable legislator will develop a separate set of rules for the enforcement of national competition law and a separate set for EU competition law. If the Member State decides to develop rules for the enforcement of EU competition law only, the requirement of equivalence is fulfilled too. A situation where a Member State excludes EU law from private enforcement rules was not observed.

In the context of 'effectiveness' and 'equivalence', there is a question whether a Member State can design private enforcement rules for follow-on actions only. This problem arose in Bulgaria where the Supreme Court of Cassation stated that civil courts should refuse to hear a case for damages unless it was already examined by the NCA and the latter had found that a violation of competition law had been committed.[6] Although this rule is not part of Bulgaria's statutory law, lower courts shall obey it (Petrov, 2017, p. 32–33). Regulation No. 1/2003 refers to the power of national courts to rule on violations of Article 101 and 102 TFEU, yet it does not stipulate in which phase this can be done. Therefore, if domestic law asks for prior investigation by a NCA, before the issuance of a final decision of the court on damages, this does mean a violation of the principles of effectiveness and equivalence

[6] Ruling No. 520 of 28.07.2014 in case No. 4004/2013 of the Supreme Court of Cassation, Commercial Division, 2nd Chamber.

per se.[7] Furthermore, the Damages Directive itself requires that the relevant decision of the NCA shall be binding or constitute evidence of the violation, so why would the court rule before the NCA, risking that the NCA decides otherwise?

## III. Specialization of courts – general observations

When implementing the Damages Directive, the question of creating (or assigning) special courts dealing with competition cases became part of legislative proposals in several CEE EU countries. When analysing the specialization of courts, two situations must be distinguished: (1) a specialized court or panels of the court or group of them that hold exclusive powers (specialization) to deal with certain types of cases, (2) specialized judges, that is, judges that are experts in a specific field of law, notwithstanding specialized powers of the court itself. There are different models of specialization of courts in Europe:

(1) concentration of cases, that is, the mechanism through which one or more courts in specific territories, on the basis of legal provisions or through agreements between courts, are allocated the exclusive competence to deal with certain categories of cases;
(2) allocation of specialized judges to different courts in the State's territory;
(3) cooperation between courts, for example, by transferring groups of pending cases from one court to another (Mak, 2008, p. 2).

Generally, arguments on efficiency, expertise and uniformity of specialized courts are given in favour of court specialization. However, an efficient and expert judge sitting at a specialized court does not imply an effective judicial system (Ginsburg and Wright, 2013, p. 793–795), because a small court with very few cases and few judgments can be considered less effective compared to a 'generalist' court dealing with the bulk of cases. Hence, balancing between specialization and a general scope of courts is crucial. Another point of view takes into account the supply-demand relationships of public policies. Under this approach, specialized courts reflect a special demand of the public, which is

[7] 'Per se' must be stressed in this context. Because in fact this approach can entail into massive violation of rights of harmed party. If there is a legal requirement of previous decision of a NCA, the NCA must be obliged to investigate and decide every case in which damages claims have been brought forward. On the other hand, the NCA can claim that this requirement can undermine its independence and it shall follow the public interest only. Nevertheless, there is a close relationship between effective private enforcement and public interest, as will be discussed later on.

then answered by special attention of public authorities that create specialized courts filled by judges with expert training in specific legal areas (such as family courts, labour courts) (Barendrecht, Kamminga, and Verdonschot, 2008, p. 13).

Specialization and centralization of specialized courts shall be balanced with territorial diffusion of courts, because one of the understandings of the principle of access to justice can be read as the requirement for timely decision-making in a geographically nearby court. Therefore, balancing of territoriality and specialization takes into account two factors:

(1) the nature of cases: territorial and generalized courts can handle simple cases, while centralized and specialized courts can focus on more complex cases;
(2) the frequency of cases: frequently occurring types of cases can be dealt with most efficiently through territorial jurisdiction, since there are multiple courts dealing simultaneously with cases occurred in diverse regions; infrequent cases can be effectively handled by centralized/specialized court.

When combining these factors, Mak (Mak, 2008, p. 2) formulates the following combinations of territorial distribution and functional specialization of courts:

(1) simple and often occurring cases, for instance general contract disputes and simple criminal cases, are dealt with by general and territorially distributed courts (courts of first instance);
(2) complex and often occurring cases, for instance labour law cases and commercial law cases, are dealt with by specialized but territorially distributed courts;
(3) simple and sporadically occurring cases, for instance 'mass collective actions' and big criminal law cases are dealt with by a specific court with general jurisdiction;
(4) complex and sporadically occurring cases, for instance business law cases and intellectual property law cases, are dealt with by a small number of specialized courts.

Although Mak analysed the judiciary systems of Germany, France and the Netherlands, that is, countries territorially larger and more populous than the majority of CEE EU Member States, general observations can be applicable. Competition cases can be considered more complex and their occurrence is quite low.

Therefore, territorial-functional balancing can point to a small number of specialized courts. Several other factors can be found that speak in favour of assigning specialized/ centralized courts, for instance the probability of advice of specialized lawyers (often concentrated 'around' a particular court),

possibility of collective actions (if available in a particular country), problematic territorial allocation and forum shopping (due to diversity of infringers and/or harmed parties), hard to estimate overall damage (in case the powers of the court are defined by value of the case).

This specialization can be acquired either by creating a 'specialized' court or by the specialization of one or more existing courts. Due to different models of judiciary systems, competition cases can be dealt with, in the first instance, by:

(1) general courts – all cases are dealt with by a lower court in the first instance;
(2) general courts, but more complex cases are dealt with by a higher court in the first instance;
(3) specialized courts, for instance commercial, competition or consumer courts;
(4) every possible combination of the aforementioned models.

The specialization of courts can bring also certain disadvantages. Their first group constitutes a counterpart to the aforementioned advantages: effectiveness of specialized courts *vs* unbalanced effectiveness of the judiciary; uniformity and stability *vs* conservatism; expertise *vs* less expertise in other areas. A different level of effectiveness of specialized courts, as compared to general courts, can represent an imbalanced judicial system as a whole. Uniformity of case-law and procedures can overtake incentives for new approaches and positive 'deviations'. Finally, high expertise of judges can make them loose perspective, when they become too focused on a particular area of law without taking into account the development and dynamics of the legal system as a whole (Cf. Ginsburg and Wright, 2013, 802–806). The selection of judges for the court, as well as for a particular case can be problematic too. A judicial appointment to a specialized court does not make a judge an expert in the field of the specialization of the court. Hence, only experts can be selected for specialized courts, or relevant training must be provided to judges after their appointment. Indeed, an appointment to a specialized court cannot be considered punishment or a form of sanction (there is a notorious case in Slovakia when the, at that time, chairman of the Supreme Court, Štefan Harabin, harassed his opponents, moved a long-serving criminal judge to an administrative panel as a form of revenge and made very derogatory speeches regarding administrative judges).[8] If a specialized court has a rather low number of judges, random selection of the judge for a particular case, from that rather narrow pool of judges, can develop into more of a regular

[8] For instance '(…) he can do pensions, there he cannot cause damage (…), since he is and engineer, he can work in boiler room (…)' [online] http://www.sudcovia.sk/sk/dokumenty/externe/115-gavalec-reakcia (12.07.2017).

pattern than random selection, and thus the impartiality and neutrality of the court can be undermined.

## IV. Specialization, centralization and generalized approach in CEE Member States

According to the current state of legislation, following models and approaches can be observed in CEE Member States regarding first-instance courts competent to deal with private enforcement cases:

(1) single specialized court – in Lithuania, Romania, Slovakia and, via the draft law, in Latvia;
(2) 'higher' courts competent in the first instance – Czech Republic, Poland and Slovenia;
(3) specialized commercial courts – Croatia;
(4) jurisdiction is split between 'lower' and 'higher' courts depending on the amount of the claim – Bulgaria and Hungary;
(5) no further specialization – Estonia.

None of the CEE Member States created a special court empowered to handle competition cases. Although a specialised competition court exists in Poland (*Sąd Ochrony Konkurencji i Konsumentów,* hereinafter SOKiK), dealing with appeals to administrative decisions issued by the Polish competition authority (*Prezes Urzędu Ochrony Konkurencji i Konsumentów*), the Polish legislator did not choose to grant SOKiK the power to deal with private enforcement claims (Piszcz and Wolski, 2017, p. 216).

In Slovakia, the District Court Bratislava II has had the exclusive power to deal with all competition law disputes even before the transposition of the Damages Directive. By mere coincidence, the new Civil Disputes Code[9] came into force in July 2017 and this assignation was confirmed. The District Court Bratislava II (*Okresný súd Bratislava II*) cannot be considered an expert court in business matters, or other types of more complex cases that require also an economic point of view or, at least, the capacity to understand them. This court is a generalist court and competition matters are its only possible specialisation (for details see Blažo, 2017, p. 251). Other 'specialisations' similar to competition matters (for instance, patents and intellectual property rights, abstract revision of consumer contracts) are entrusted to other specific courts. Hence, none of these courts can benefit from synergies arising from the accumulation of experiences in complex business-consumer questions

[9] Act No. 216/2016 Coll. Civil Disputes Code is one of the outcomes of the long-lasting reform of Slovak civil law; it replaced Act No. 99/1963 Coll. Civil Court Proceeding Code.

involving economic issues. Such synergies cannot be achieved at the second instance either. Decisions of district courts are reviewed by regional courts, so competition cases are to be reviewed by the Regional court in Bratislava. However, what seems to be another coincidence, this regional court reviews also the decisions of the Slovak competition authority in the capacity as an administrative court. Administrative, civil, commercial and penal judges and panels are separated within the courts and so private law competition cases will be handled by other judges (that is, not civil law judges) who can have some experience from administrative competition cases. Either way, the quality of judicial review in competition matters and the approaches and expertise showed by administrative judges (that also handle all types of administrative revision cases) is currently dubious in Slovakia because the reasoning presented by judges is not very persuasive and in some cases, Slovakian judgments in administrative cases are contrary to settled case-law in European competition law (Cf. Kalesná, 2016; Fodorová, Šabová and Lukáčová, 2013; Šabová, 2016; Blažo, 2013). Hence, the specialisation of courts for competition matters in Slovakia can avoid problems with territorial jurisdiction and enable more focused training for judges. However, it does not facilitate synergies arising from experience of judges dealing with complex business and consumer cases. It must also be noted that due to the usual career steps taken by judges, the majority of judges in district courts are at the beginning of their careers, judges who do not have the capacity to take the next step in their career or for other reasons decide not to pursue their professional career. It was decided in Romania and Lithuania to assign exclusive powers to deal with competition matters to one of their higher courts, the Bucharest Tribunal Court of Appeal (*Curtea de Apel Bucureşti*)[10] and the Vilnius Regional Court (*Vilniaus Apygardos Teismai*)[11] respectively. Both of these courts were selected because of the greater experience of their judges (Micrea, 2017, p. 238–239, Mikelėnas and Zaščiurinskaitė, 2017, p. 184). Moreover, synergies from experiences gathered in dealing with other complex cases can occur. In particular, the Vilnius Regional Court has also exclusive competences in certain other complex and specific legal fields, for instance patents and trademarks regulation (Mikelėnas and Zaščiurinskaitė, 2017, p. 184). A similar approach was suggested in Latvia where its draft legislation designates the City of Riga Latgale District Court (*Rīgas pilsētas Latgales priekšpilsētas tiesa*) as the only court dealing with competition cases. However, judges of this court are not currently trained in competition law, and their training is only expected in future (Jerneva and Druviete, 2017, p. 160).

[10] Exclusive competence created by the transposition of the Damages Directive.
[11] Already from 2004.

Granting exclusive powers to deal with competition cases to one court has also its opponents. In territorially larger and more populous countries, particularly Poland and Romania, limited access to justice due to large distances to the competent court can constitute a ground for objections (for this discussion for Poland see Piszcz and Wolski, 2017, p. 215; and for Romania see Mircea, 2017, p. 239). On the other hand, it is unlikely for harmed parties to claim damages without legal assistance from a specialized lawyer, and this type of claim does not require the personal presence of the parties before the court (comparing to, for instance, family matters, small civil claims). Therefore, centralization in competition matters does not seem to be a serious hurdle for effective private enforcement.

Entrusting 'higher' courts, that is courts that are normally appellate but still generalist courts, is a compromise between specialization and a generalist approach. It can be expected that judges sitting at such courts have certain judicial experience and also certain expertise in complex matters involving also questions of economic effectiveness, quantification of harm etc. This approach was taken in Poland (regional court – *sąd okręgowy*) and Hungary (regional courts – *törvényszék*) and is under consideration in the Czech Republic (regional courts – *krajské soudy*) (Petr, 2017, p. 88). In Slovenia, district courts (*okrožna sodišča*), which are responsible for competition cases, are 'higher' than local courts (*okrajna sodišča*), albeit they are not appellate courts. When selecting a 'group' of courts that shall deal with competition cases, specialization of commercial courts seems to be a reasonable option. Such courts fulfil, on one hand, the request for territorial proximity but, on the other hand, they are still specialized and can benefit from synergies produced by experience of their judges accumulated in other complex business matters. This approach was taken in Croatia where commercial courts[12] deal with a wide range of business matters, including business disputes, maritime disputes, bankruptcy matters, intellectual property cases or registration of companies (Butorac Malnar, 2017, p. 61).

Regarding the training of judges in competition law it must be noted that 11 district courts in Slovenia, 8 regional courts and the Metropolitan court in Prague (*Městský soud v. Praze*) in the Czech Republic and 7 commercial courts in Croatia allow certain targeted training and education. However, in the case of the 19 regional courts and the Budapest-Capital Regional Court (*Budapest Környéki Törvényszék*) in Hungary as well as more than 40 regional courts in Poland, this training will be more challenging and the benefit deriving from the concentration of experiences can be lost.

[12] Commercial courts are organized in two instances: in the 1st instance, 7 commercial courts; in the 2nd instance, the High Commercial Court of the Republic of Croatia (*Visoki trgovački sud Republike Hrvatske*).

In Estonia and Bulgaria the transposition of the Damages Directive did not affect the judicial system and no special court or group of courts was chosen to deal with competition cases. Furthermore, the situation is more complex in Bulgaria because of the split of competences between different levels of the courts depending on the amount of the claim: claim value up to BGN 25,000 (approx. EUR 12,500) should be reviewed by a district court (*районен съд*), whereas a provincial court (*окръжен съд*) should examine claims above this threshold. Article 365(5) of Code on Civil Procedure stipulates that provincial courts should follow the procedure for commercial disputes when deciding cases related to cartel agreements, decisions and concerted practices, concentrations, unfair competition, and the abuse of a monopolistic or dominant position. However, this cannot be read as exclusive competence of provincial courts in competition matters,[13] but merely as the setting of procedural rules if the case is handled by a regional court (for details see Petrov, 2017, p. 34–35). Apart from different procedural rules at district courts and provincial courts, the complexity of the system itself can be confusing for prospective claimants (and practical questions of choosing applicable procedural court rules, that is, civil or commercial), especially in the situation when the court is allowed to estimate the amount of damages. This structure does not, therefore, seem to be suitable for effective competition claims and can theoretically (and maybe later also practically) lead to chaotic situations when claims of different claimants will be handled not only by different courts from the territorial point of view, but also of a different level under different procedural rules.

## V. Relationship between courts and NCAs

The European Commission can intervene in both types of court proceedings – judicial revision of administrative decision issued by NCAs and in civil claims procedures. Moreover, it can act as *amicus curiae* in criminal cases if European competition rules are applied. The main purpose of the power of the European Commission as *amicus curiae* is to maintain uniform application of EU law. Although the Commission has broad discretion whether to be, or not to be involved in a court proceeding, it can be discussed whether it has a duty to act if uniform application of EU competition law is in question and whether it is possible to file an action against the Commission's failure to act.

[13] Ruling No. 3103/2016 of the Sofia Court of Appeals (*Софийски апелативен съд*) on civil case No. 4102/2016.

Another motive of the Commission can be seen in cases where it already acted as a competition authority.

Similar motives can be seen in establishing the power of NCAs to act as *amicus curiae* in purely national cases, that is, cases outside the reach of Regulation No. 1/2003. In this context, a NCA can act as *amicus curiae* in general (provide its options and explanations to every possible aspect of the case), or its powers are restricted to questions of the quantification of harm. Hungarian and Slovak law explicitly introduce the NCA as 'general' *amicus curiae*. It must be, however, distinguished from a court's power to ask, or to order the cooperation of other subjects of law, including state authorities. Furthermore, it shall be distinguished from the position of a 'third party' or intervenient, that is, a party that shall show its legal interest in a particular case.

Both Hungarian and Slovak rules on *amicus curiae* are shaped under the model of the European Commission, which is more focused on information rights of the competition authority and notification duties of a court and the authority's right to be heard before a court, than on the responsibilities of the competition authority in this context. In the Hungarian model, the court is obliged to interrupt its proceeding while the authority takes 'surveillance action'. In Slovakia, the law is silent on this question, although a decision of the competition authority can serve as a decision in a preliminary question, and so it can give grounds for an interruption of the court's proceeding. The Act on protection of economic competition stipulated very carefully that the Slovak competition authority has discretion whether or not to provide guidance to the court regarding the quantification of harm, however this power of the competition authority is described in a separate provision of the Slovak competition act[14] (Article 22(1)(n)).

Slovenian legislation went even further and introduced 'international' cooperation between courts and competition authorities (Article 62k ZPOmK-1). In other words, a court may ask NCAs of other Member States for their opinions and the Slovenian competition Agency may provide assistance to national courts of other Member States (Vlahek and Podobnik, 2017, p. 272). However, this form of 'on demand' cooperation is not *amicus curiae stricto sensu*.

According to the wording of respective laws, *amicus curiae* is always defined as a power of a competition authority, with a corresponding duty of the court to allow the authority to present its opinion. It seems, therefore, that the competition authority has no duty to act as *amicus curiae*. However, general duties or responsibilities of the competition authority, that is, to protect competition,

[14] Act No. 136/2001 Coll. on Protection of Economic Competition and Amending Act of the Slovak National Council No. 347/1990 Coll. on Organization of Ministries and Other Central Bodies of State Administration of the Slovak Republic as Amended as amended.

to enforce competition law or to provide competition advocacy, can suggest otherwise.[15] Competition authorities usually enjoy certain discretion whether to launch an investigation or proceeding on the basis of their prioritisation policies, and this principle is applicable to *amicus curiae* also. Prioritisation and discretion of a competition authority cannot be replaced by arbitrariness – the authority cannot overlook a manifest and harmful violation of competition law due to principles of the rule of law, good administration of public affairs, equality and justice. An 'inaction' of a competition authority in such cases can be deemed illegal, and a harmed party can claim damages from the State stemming from such failure to act. Similar principles seem to be applicable to *amicus curiae*. The decision of a competition authority whether to intervene in a given civil proceeding must be based on objective criteria, rather than on a subjective assessment. The competition authority shall take into account criteria such as relevance of the dispute for competition law enforcement as a whole, relevance of the opinion of the authority due to, for instance, facts and legal opinions represented by the parties, necessity of public enforcement in the case, etc. Moreover, with respect to stand-alone actions, private disputes can serve as a source of information for public law enforcement. These principles and responsibilities of NCAs can appear to work well on paper and in theory, but a real action for damages caused by inaction of a NCA, including refusal to act as *amicus curiae*, is quite a long shot. This responsibility is, thus, more of a political one, as accountability for the condition of competition enforcement in a particular country, which is a topic for possible further research.

## VI. Conclusions

The Damages Directive does not require a specific judicial structure to apply for damages claims for competition law infringements, and so Member States have full discretion in shaping their judicial structure, including the

[15] For instance, in the Czech Republic, according to Act No. 273/1996 Coll. on the Scope of Competence of the Office for the Protection of Competition as amended, the Office for the Protection of Competition is a central administrative body, its purpose is to maintain and protect competition against its prohibited restriction (§ 1(1)) and the Office creates conditions for maintenance and protection of competition (§ 2a)); in Latvia according to Cabinet Regulation No. 795 adopted 29 September 2008 (By-law of the Competition Council as amended), the Competition Council, (…), shall implement State policy in the matters of development and protection of competition (para. 2); in Hungary under Act No. LVII of 1996 Art. 33 (1) the Hungarian Competition Authority (…) is responsible for competition supervision (…); in Slovakia, the Antimonopoly Office is under Act No. 136/2001 Coll. on protection of economic competition, a central body of state administration for protection and promotion of competition (§ 14(2)).

specialization or not of their courts or judges. Due to the specific character of private competition law enforcement claims and their rarity, it seems that for the proper performance of justice and access to justice, expertise and preparedness of courts is more relevant than their territorial proximity (to the victim). The necessity to educate judges has been stressed also by the Supreme Court of the Slovak Republic in the so-called 'Highway cartel' case,[16] where the court itself questioned the ability of Slovak courts to properly decide on competition cases.[17]

Specialisation of courts, particularly in smaller economies, cannot be a process of random selection of a given court without assessing that its ability to deal with such cases is equivalent to a generalist court. Accumulating complex cases, which also involve an economic assessment or context, in the hands of one or a small number of courts seems to be a more suitable compromise promoting specialisation and limiting its disadvantages – hence the concept of commercial courts (Croatia) or choosing only one court that is already dealing with similar complex cases (Lithuania, Romania). However, every specialisation of courts requires the solution of a potential conflict of competences in 'mixed' cases, that is, in cases where the application of competition law is only a preliminary or partial issue (for instance, business or consumer disputes where a competition law violation is used as a defence invoking the nullity of a contract, on which a claim for payment is based).

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[16] 1Sžhpu/1/2009, 30.12.2013.

[17] '(…) the panel of the supreme court must note (…) that the case in issue falls into particularly specialized agenda that is quite new for the judges and that is due its character factually and legally substantially compacted and almost always connected to international element, legislatively stemming from communitarian regulation (primary and secondary one) that requires high level of knowledge of not only foreign-language scientific literature as well as decision-making activity of the Commission and of the CJ EU, which decisions are accessible in Slovak language for the judges of the Supreme Court of the Slovak republic only in limited extent. Regarding aforementioned, one must note particular character of competition law which is exceptional not only by connecting objective law with economic theory, but also by implanting economic notions into legal order which then become legal rules by long-term legal practice, while only few legal areas use economic institutes in such depth such as competition law (…) This character of agenda, showing also rising level of variability and flexibility of anti-competitive practices, undoubtedly requires high specialization of judges with rising accent on decision-making tier, necessity of their systematic and permanent education as well as professional capacity of judicial personal in this area, which is unfortunately still permanently missing in the conditions of the Slovak Republic. Without deep and firm experience of judges, in this particular agenda, it is not possible due to Art. 101 to 106 TFEU secure fulfilment of union competition rules by issuing broadly acceptable and authoritative judicial decisions. Therefore the panel agrees with complaints of the Commission that the Slovak judicial system does not show stability of panels trying competition agenda, and not even on a such high level as the Supreme Court of the Slovak Republic, it is still not able unity of its decision-making activity in this area (…) what undoubtedly endangers competition on Slovak market'.

Cooperation between courts and NCAs in private enforcement issues (*amicus curiae* or quantification of harm) is more a question of policy of a given competition authority, its activism and responsibility for the competition environment in its country as a whole. Therefore, even though NCAs enjoy discretion and procedural autonomy, these must be understood as features of their independence. Moreover, these actions must follow a straightforward policy pattern. Thus NCAs shall be prepared to be policy makers also in private enforcement of competition law.

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# Consensual Dispute Resolution in the Damage Directive. Implementation in CEE Countries

by

Małgorzata Modzelewska de Raad*

**CONTENTS**



## *Abstract*

This paper discusses the use of consensual dispute resolution for the purpose of antitrust damage claims as introduced by the Directive. It presents these type of claims in a broader context of arbitration (or ADR), in comparison with traditional claim settling before a state court. Particular focus is on selected CEE countries and their implementation of the Directive, serving as an example of the transposition

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of the Directive's rules (Article 18 and 19) into national systems in the area of consensual dispute resolution. Specific institutions intended to encourage consensual resolution included in the Directive (and transposed into national systems) are being commented on as well. Lastly, the paper briefs on the advantages of ADR in general, and concludes that even post-Directive, ADR remains attractive as a complimentary instrument to public enforcement and state judiciary enforcement.

***Résumé***

Cet article discute de l'utilisation du règlement consensuel des litiges dans le cadre des actions en dommages pour les infractions aux dispositions du droit de la concurrence introduites par la Directive. Il présente ce type des demandes dans un contexte plus large d'arbitrage (ou modes alternatifs de résolution des conflits «MARC»), en comparaison avec des demandes traditionnelles devant les tribunaux nationaux. Un accent particulier est mis sur certains pays d'Europe centrale et orientale et leur mise en œuvre de la Directive, qui donnent l'exemple de la mise en œuvre des règles de la Directive (articles 18 et 19) dans les systèmes nationaux de règlement consensuel des différends. Des institutions spécifiques destinées à encourager la résolution consensuelle incluses dans la directive (et transposées dans les systèmes nationaux) sont également commentées. Enfin, l'article décrit les avantages du MARC en général et conclut que même après la mise en œuvre de la Directive, le MARC reste attractif en tant qu'instrument complémentaire à l'application publique et à l'application judiciaire du droit par les États.

**Kew words:** private antitrust enforcement; arbitration; competition law arbitration; Damages Directive.

**JEL:** K21; K42

## I. Introduction

In principle, any damage caused in connection with a commercial activity could be settled either within a framework of institutional dispute resolution, such as arbitration or mediation, or simply through either bilateral, or multilateral negotiation(s) and settlement(s) between the interested parties. Damages caused by infringements of competition law are no exception. Moreover, there are several reasons to believe that consensual resolution could be extremely suitable for effective damage claims which resulted from infringements of competition law. This belief was obviously shared by the drafters of Directive 2014/104/EU[1]

[1] Directive 2014/104/EU of the European Parliament and of the Council of 26.11.2014 on certain rules governing actions for damages under national law for infringements of the

who created several instruments to encourage the settlement of the claims in question in alternative ways. Those instruments have been already transposed in a number of Member States into their national systems,[2] including Estonia, Hungary, Poland, Romania, Slovakia, and Slovenia; in the remaining CEE jurisdiction, the said instruments are awaiting implementation.

This paper discusses first: the legal background of claims with a competition law element in ADR (and in particular – in arbitration); second: advantages of this type of dispute resolution, third: institutions in the Directive that relate to consensual dispute resolution, and fourth: transposition of the Directive's institutions in selected CEE countries. Lastly, the paper addresses impact of the 'facilitations' introduced in national systems (as a result of the Directive's transposition) on the attractiveness of consensual dispute resolution for this type of claims.

## II. Consensual dispute resolution – definition

There are a number of possible definitions of 'consensual dispute resolution'. Often, the term is regarded as equivalent to the popular term 'alternative dispute resolution' ('ADR'), which is used for any form of claim settlement outside the state judiciary. However, these terms are not synonyms. Apparently, ADR is meant for any form of out-of-court resolution when the parties decide to resolve their dispute with a help of a third person (expert, mediator, arbitrator); meanwhile, 'consensual dispute resolution' shall be understood broader, including dispute resolution with, or without any institution or person supporting the resolution of a given dispute (Idot, 2010, p. 51–52). Equally, the Directive's drafters intended to cover **all** forms of formal or informal processes that lead to the settlement of claims. The Directive's definition (point 21) explains that 'consensual dispute resolution' means any mechanism enabling parties to reach the out-of-court resolution of a dispute concerning a claim for damages'.

Thus, the term used in the Directive, and to be implemented into national legal systems, shall be understood broadly. As recital 48 of the Directive further explains, it shall cover **'arbitration, mediation or conciliation'**; the same term shall be used for an agreement made in the course of ordinary

competition law provisions of the Member States and of the European Union, OJ L 349, 05.12.2014.

[2] As of 14 June 2017, 20 countries reported to the Commission their implementation of the Directive, see: ec.europa.eu/competition/antitrust/actionsdamages/index.html (retrieved 14.07.2017).

court proceedings and brought before the court in order to be provided with enforceability under state enforcement measures. It may also invoke an ordinary negotiation between the parties covered in a simple agreement that will never be the subject of any state enforceability mechanisms.

Qualifying parties' conduct as 'consensual dispute resolution' makes them benefit from the attractive solutions set out in the Directive, such as suspension of limitation period or reduction of the total claim amount (discussed below in more detail). The practical problem the parties shall take care of – so that they do not lose the benefits in question – is to sufficiently record their 'consensual dispute resolution', if the process is outside any formalised proceedings or institutions and has a totally 'private' nature. It may become necessary to evidence that the parties indeed 'engaged in consensual dispute resolution' (see recital 50) as well as the time when they have effectively done so.

Obviously, if the parties get involved in arbitration or mediation and follow certain procedure, the process is by its very nature recorded beyond any doubt.

Lastly, despite the fact that in many jurisdictions arbitration has the benefit of state enforceability (through recognition or enforceability procedures), arbitration is by no means deprived of its 'consensual' nature, and definitely falls under the notion of 'consensual dispute resolution'.

## III. Application of competition law in arbitration – overview

Arbitration is the most popular way to settle the dispute outside the state judicial framework. Its role has been noted in both: commercial disputes with a competition element, as well as in damage actions,[3] despite lack of engagement of EU institutions or recognition in the relevant statute on the EU level (Szpunar, 2010, p. 615).

Notably, an arbitration tribunal is not recognised as a 'court' under the TFEU,[4] which may impair effective and equivalent application of EU competition law by those tribunals, as they are deprived of the privilege to turn to the Court of Justice with a preliminary question on the interpretation of European law.

The issue of the application of competition law has been answered in the Court of Justice's ruling in *Eco Swiss*.[5] In this preliminary ruling, the Court of

[3] OECD report (2010), *Arbitration and Competition*, http://www.oecd.org/competition/abuse/49294392.pdf (retrieved 14.07.2017).

[4] See: judgment of 23.03.1982, Case C- 102/81 *Nordsee v. Reederei Mond*, ECLI:EU:C:1982:107.

[5] Judgment of 1.06.1999, Case C-126/97 *Eco Swiss China Time Ltd. v. Benetton International NV*, ECLI:EU:C:1999:269.

Justice held that competition law forms part of public policy of any Member States and the EU. There are two important conclusions stemming from such a qualification: first, whenever the law applicable to the dispute is the national law of an EU Member State, competition law applies, and second, whenever the law applicable in recognition or enforcement of arbitration award proceedings is the national law of an EU Member State, competition rules (domestic or European) will also apply. Importantly, the challenge of the arbitration award takes place in the country of the place of arbitration, which means that if the *lex fori* is EU Member's law, naturally the award shall take account of these rules.

Since the article's focus is not to discuss the application of competition law in general (all the interesting issues of the application of competition law before the judiciary and in arbitration are discussed specifically by Derains, 2001, p. 323 et seq), it is sufficient to conclude that the arbitrators, even if they would be ruling under fairness rules, may not disregard competition law since they should anticipate post-arbitral proceedings and take care of thefull enforceability of their judgment. This is exactly what was also confirmed by CJEU in *Almelo*.[6]

In short, competition law is a mandatory public policy regulation, which shall be applicable in arbitration proceedings.[7] In any case, arbitral tribunals need to foresee proceedings for the setting aside of the award (or for making it enforceable by state institutions), and equally take account of these regulations when deciding a case with a competition law component. Further, national courts, when engaged in aforementioned proceedings, are under the duty to apply EU law (or any relevant Member State's law) in order to give effect to the principles of equivalence and effectiveness[8] under Article 19(1) TFEU. National courts may also make use of the instruments provided under Regulation 1/2003 in order to ensure uniform application of EU competition law.

Up-to-date practice indicates that also the cooperation between arbitration tribunals and the European Commission is permitted and practically possible, in view of effective and equivalent application of EU competition law.[9] It

[6] Judgment of 27.04.1994, Case C-393/92 *Almelo*, ECLI:EU:C:1994:171.

[7] The question remains whether it should be taken into account *ex officio* or if it should be always called by either party; to follow on this discussion, please see Derains, 2001, p. 323 et seq; according to Tomáš Pavelka, the courts apply competition law *ex officio*, see: Pavelka, 2012, p. 10.

[8] Please see the detailed comparison of the application of the principles *vs* national procedural autonomy (to be duly noted when discussing the principles of equivalence and effectiveness) by Petit, 2014.

[9] See the Commission's interventions in: 1) Ioan Micula, Viorel Micula and others v. Romania, ICSID Case No. ARB/05/20; 2) AES Summit Generation Limited and AES-Tisza

is also highly advisable for National Competition Authorities (hereinafter, 'NCAs') to work out ways to invite an arbitration tribunal to ensure that once a competition law infringement becomes the key for a given arbitral ruling, they may consult a NCA or the European Commission.

Now, since the arbitrability of competition law is established, there is no doubt that cases involving damages caused by competition law infringements can also be settled in arbitration.

There could be two grounds to refer such a case to arbitration. One is when a party to a contract infringes competition law, and the claim indicates sufficient liaison with the contract to rely on the arbitration clause, or – two – when the parties, in view of the existing claim, agree to settle the case before an arbitral tribunal (arbitration agreement). While the latter is rather undisputable, there is a vivid discussion about to what an extent parties may rely on the arbitration clause in antitrust damage cases. The discussion is well nourished by various jurisprudence on this issue. On one hand, it seems that Dutch and Finish courts find that broadly worded arbitration clauses do not cover damage claims,[10] on the other hand, an English court has recently accepted, in the *Microsoft v. Sony Europe* case,[11] the applicability of the arbitration clause. In the dispute, Microsoft claimed damages against Sony Europe as jointly and severally liable for a damage caused by an alleged cartel involving Sony, Samsung and LG. To give effect to the arbitration clause, the High Court decided to stay the proceedings. Interestingly, the English High Court built upon the CJEU's views in *CDC Hydrogen Peroxide SA v. Akzo Nobel NV et al.*,[12] that actually left the issue of arbitrability of antitrust damages' claims undecided, by stating: 'The effectiveness of broadly worded agreements to arbitrate in relation to follow-on damages claims (…) subject to uncertainty in Europe'. According to the English High Court, 'I can see nothing in the decision of the Court to require me to displace the effect of the arbitration clause as something inimical to EU law'.[13]

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Erömü Kft. v. Republic of Hungary, ICSID Case No. ARB/07/22; as well as the ICC cases listed in: Kolber, 2012, p. 67–81.

[10] Judgment of the District Court of Amsterdam of 04.06.2014, *CDC Project 13 SA v. Akzo Nobel NV* et al., Case No. C/13/500953/HAZA 11-2560 (upheld by the Amsterdam Court of Appeals); judgment of the District Court of Central Netherlands of 27.11.2013, *East West Trading BV v. United Technologies Corp. and Others*; judgment of the District Court in Helsinki of 04.07.2013, *CDC Hydrogen Peroxide SA v. Kemira Oyj*. All the jurisprudence listed herein is cited by: Živković, 2017.

[11] Judgment of the English High Court of 28.02.2017, *Microsoft Mobile OY (Ltd) v. Sony Europe Limited et al.*, No. EWHC 374 (Ch).

[12] Judgment of 21.05.2015, Case C-352/13 *CDC Hydrogen Peroxide SA v. Akzo Nobel NV et al.*, ECLI:EU:C:2015:335.

[13] Judgment of the English High Court of 28.02.2017, *Microsoft Mobile OY (Ltd) v. Sony Europe Limited et al.*, No. EWHC 374 (Ch), para 81.

Definitely the issue requires in-depth analysis. For the purpose of this paper, one shall conclude that European jurisprudence (in various EU jurisdictions) is not uniform on the effectiveness of arbitration clauses in antitrust damage disputes. Those who concur with the view that broadly drafted arbitration clauses shall apply (see also Aren Goldsmith's argument that overpayment for goods resulting from a cartel could be qualified as failure to perform the contract in Goldsmith, 2015) to disputes arising out of a damage caused by an antitrust violation, call the US example[14] as well as well-establishes continental doctrine on the arbitrability of various tortious claims.[15] The Directive's drafters' belief in arbitration (seen as a key method of consensual dispute resolution) expressed in a few of its articles, gives hope for a (more) friendly approach to arbitrating antitrust damage claims in the future.

## IV. Consensual settlement of claims resulting from infringements of competition law – advantages

Claiming damages resulting from a competition law infringement is a hazardous business. First, the opposing parties may still hold a commercial relationship, and for obvious reasons, it may turn extremely difficult to file a law suit against an existing supplier. Second, even if the parties do not trade any longer, the infringer would usually get hostile against the claimant since most likely he had already 'paid his bill' to a NCA or the European Commission. In such circumstances, what brings the parties to conciliatory resolution are (still) tangible mutual benefits making the parties willing to settle the case amicably, instead of arguing it before a state court.

The first advantage a prospective defendant may see is the confidentiality of arbitration. Compared to a public hearing and easily accessible information

[14] *JLM Industries, Inc. v. Stolt-Nielsen SA*, 387 F.3d 163 (2d Cir. 2004).

[15] 'German Federal Supreme Court, judgment of 24 November 1964 – VI ZR 187/63. Similarly, the Greek Supreme Court held that where the same facts simultaneously amount to a breach of contract and a tortious act, the latter fall within the scope of an arbitration clause that refers to '[a]ll differences arising in relation to the present contract' (Greek Supreme Court judgment no 506/2010*).* Regarding an arbitration agreement referencing 'all disputes arising out of a contract', the Austrian Supreme Court deemed the agreement applicable'as long as the (concretely) damaging behaviour and a breach of contract are, in the narrowest sense, one event' *(*cf. Austrian Supreme Court – 4 Ob80/08f, 26 August 2008*).* The English High Court deemed an arbitration clause for 'all disputes from time to time arising out of this contract' to encompass claims in tort (*cf. Aggeliki Charis Compania Maritima SA v. Pagnan SpA (The Angelic Grace*) [1994] 1 Lloyd's Rep. 168, 174 (QB)), cf. also *X Ltd v. Y Ltd* [2005] EWHC 769 (TCC)' – the jurisprudence and laws cited by Bellinghausen and Grothaus 2015.

on the case decided before a state court, the defendant may wish to keep his arguments and agreed amount of damage secret (at least for some time). Thus, in cases where a defendant anticipates many possible claims, his pressure on amicable settlement may raise.

Second, both parties may seek this way to settle in order to resolve an uneasy situation quicker. Usually, arbitration or mediation tends to lead to receiving an award much faster than it is usually done before a state court.

Third, the parties may simply feel much more comfortable with a set of authorities of their choice deciding their case. The usual fear that difficult issues of competition law or damage liability may lead to unexpected results before state courts shall disappear in arbitration. Each party may chose at least one arbitrator and may have impact on the selection of a presiding arbitrator. In mediation, both parties usually agree on one mediator. If they discuss the matter informally, they may bring experts (including economic experts) of their choice who may put forward their calculations and come to a reasonable figure, to the satisfaction of both parties. The advantage of having greater control over how the proceedings progresses is a valuable asset of consensual dispute resolution as well.

Fourth, a defendant coming to settle amicably has a genuine intention to compensate. There are a number of beneficiaries of this feature apart from the claimant – they include also public enforcers, who do not need to get involved at any stage to satisfy their objectives of compensation and deterrence. The same is not always achieved within a state enforcement system. Infringers often try to avoid final payments in all possible ways. There is no doubt that if the parties come to the table voluntarily, they also (usually) follow the final ruling/decision/agreement, which is not the case after the proceedings before a state court. Therefore, consensual dispute resolution shall be – by all means – the preferred path.

Finally, some practitioners point at the lower cost argument. Unfortunately, this is not always the case. It may appear that arbitration needs less resources, but it may also turn out that the total cost will be higher compared with the cost of the 'state machinery'. This argument may also encourage the disputants to turn to a mediator, or to use completely informal negotiations, where the parties hold total control over their spending.

There are also disadvantages of arbitration used for the purpose of damage compensation. As the OECD rightly points out in its report (see Key Findings by Secretariat in OECD, 2010), some entrepreneurs may find arbitration: less transparent, less predictable (as there are scarce precedents available to the public), less effective in terms of investigation instruments available, and (sometimes) not enforceable.

Although ADR may not be suitable for all cases, these methods of dispute resolution may often serve the parties far better compared to traditional litigation.[16]

## V. Directive's 'carrots' to enhance consensual resolution

The Directive leaves no doubt that consensual resolution is a suitable instrument to settle discussed claims. In recital 48, it reads: 'Achieving a 'once-and-for-all' settlement for defendants is desirable in order to reduce uncertainty for infringers and injured parties' and 'the provisions in this Directive on consensual dispute resolution are therefore meant to facilitate the use of such mechanisms and increase their effectiveness'.

The Directive encompasses several instruments to encourage consensual settlement.

First, national laws should make sure that the statutory limitation is suspended during the time of consensual resolution. Second, the parties should have sufficient time if they decide to go for consensual resolution during the ordinary court proceedings. Third, an infringer who settles amicably should be 'protected' from further claims both: from the injured party or from its co-infringers.

### 1. Suspension of the statutory limitation

The drafters of the Directive were aware that time runs against potential claimants, and that the issue of time flow should be somehow reconciled with the desire to settle. Obviously, not all national proceedings recognised the same threshold for the suspension. In Polish substantive law, for instance, only arbitration or mediation would have an effect on the time-barring. Additionally, some of the legal systems would produce a different effect: for instance, engaging in some forms of ADR could result in stopping the clock (instead of suspending it).

The purpose of the Directive was to make every genuine effort to settle amicably, resulting in the suspension of the statutory limitation. This is being expressed under Article 18(1) of the Directive:

[16] See: https://www.carteldamageclaims.com/compensation/settlements/ where the CDC specializing in claiming damages indicate 'multiple out-of-court' settlements in the cases in question (retrieved 23.07.2017).

> 'Member States shall ensure that the limitation period for bringing an action for damages is suspended for the duration of any consensual dispute resolution process. The suspension of the limitation period shall apply only with regard to those parties that are or that were involved or represented in the consensual dispute resolution'

The only practical issue that remains is to take care that the informal negotiations are sufficiently recorded, in order to be able to argue for the discussed suspension (as discussed earlier in this paper).

## 2. Suspension during the court proceedings

Usually, continental procedures indicate a preference for consensual resolution and contain various encouragements to settle out-of-court. In some systems, parties shall prove that before filing a claim with the court, they took reasonable efforts to resolve the dispute amicably. In others, the court has the duty to make sure that the dispute could not be resolved amicably, or to encourage the parties to negotiate. There are also various instruments the court may use: from fixing the time limit for coming up with an amicable solution to soft measures, such as signalising problems that could be better resolved between the parties themselves.

The Directive takes care that once the parties engage in negotiations during the court proceedings, the litigation will be effectively suspended for a time sufficient to settle outside the court. The Directive under Article 18(2) specifies that national legal systems should foresee up to a two years suspension during the court proceedings, if the parties indicate the wish to settle in an alternative manner.

## 3. Modification of the settling infringer's liability in multi-party cases

First of all, the Directive under Article 19 stipulates that the total amount of the damage will be effectively reduced by the relative part due from every infringer, despite actual compensation paid by the settling infringer. In other words, the settling infringer closes its case with the settling claimant, even if the settled amount is lower (which will be usually the case) than his relative share in the total damage amount.

Furthermore, under Article 19(2), the Directive protects the settling infringer against bringing the claim against him in another post-settlement proceeding. As it was rightly pointed out '[i]f a settling infringer were to continue to be fully jointly and severally liable for the harm caused, even after a consensual settlement was reached, it would be placed in a worse

position compared to its co-infringers than it would otherwise be without the consensual settlement' (Wijckmans, Visser, Jacques and Noel, 2016, p. 780). However, when it comes to the principle of a full compensation, the Directive favours the interest of the party seeking compensation for damages.[17] Namely, if this party may not – for any reason – recover the remaining part of the compensation from other (not-settling) infringers, it may still turn to the infringers with whom it settled its relative part(s). This rule may be excluded under the provision of the settlement itself. Thus, the settling party is fully protected only if the settlement itself provides for such full protection; otherwise, the settling party may still be challenged by the same claimant if the recovery of the remaining compensation proves ineffective. The question remains how the latter may be exercised. Most likely, the claimant will have to go through the entire proceeding, including execution proceedings, so that to evidence the ineffectiveness of the execution against other infringers. Thus, even without contractual protection, the settling party (defendant) may enjoy relative freedom from being too easily asked to pay additionally under the joint and several liability rule.

Moreover, the Directive protects the settling party (defendant) against reproach from other infringers (Article 19(2) of the Directive). In the ordinary course of business, if damage is paid by one defendant (under joint and several liability rule), such party may reproach other infringers and recover relative parts of the damage accordingly. The rule expressed under Article 19(2) of the Directive protects the settling party from being called to pay any additional compensation by co-infringers who did not settle with an injured party earlier.

The Directive under 19(4) protects a settling party with respect to compensating the damage to another injured entity. In essence, it requires national legislation to assure that the settling infringer (who may have voluntarily paid some part of the damage) will not pay in excess of its relative part when sharing the payment of the compensation with co-infringers vis-à-vis another injured entity with whom it did not settle amicably.

## 4. Compensation as a fine mitigating factor

Under Article 18(3) of the Directive 'A competition authority may consider compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor'.

[17] Under Art. 19(3) of the Directive: 'By way of derogation from paragraph 2, Member States shall ensure that where the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party, the settling injured party may exercise the remaining claim against the settling co-infringer'.

Public and private enforcement may come into conflict here. On one hand, NCAs desire to enhance deterrence through high fines. On the other hand, the fine shall be reduced due to the compensation paid by an infringer.

However, the contradiction seems rather artificial Effective damage claims have undoubtedly also a deterrent effect if potential infringers would – as a consequence of their breach of competition law – anticipate not only paying a fine but also compensating all the injured entities. Thus, the conflict does not exist, and both ways of enforcing competition law shall work in combination as deterring factors. The purpose of Article 18(3) is thus to establish another encouragement to settle and to make the fine paid as a result of the infringement, fair and proportional.

The fining policies of various Member States may vary on this issue, and therefore it is highly desirable to work out a common strategy within the EU. The example could actually come from the Commission that frequently inspired Member States to introduce certain legislation in different enforcement areas (leniency can serve as a success story).[18] In the meantime, the Commission 2006 Fining Guidelines[19] remain silent on the impact of compensation on a fine reduction. Although the Commission seems to encourage the payment of compensation either through an effective lowering of the fines (such as in *General Motors,*[20] *Pre-insulated Gas cartel*[21] *or Nintendo*[22]) or closing the proceedings in an alternative way. The examples for the latter are: *Macron*, where the Commission closed the file after Angus Fire paid a compensation to the complainant Macron, and *Sony*/*Philips* (both cases are discussed by Ezrahi and Ioannidou, 2012, p. 541), where the Commission accepted commitments after Philips' payment of due amounts to its licensees; *Deutsche Bahn*[23] is also a telling example here, where the Commission proposed commitments involving compensations to be paid to customers. The new proposal on empowering competition authorities with effective tools to enforce EU and

[18] ECN Model Leniency Programme: 2012 revision, http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf (retrieved 14.07.2017).

[19] Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No. 1/2003, OJ C210/49.

[20] Commission Decision of 19.12.1974, Case No. IV/28.851 *General Motors Continental*, OJ L29/14.

[21] Commission Decision of 21.10.1999, Case No. IV/35.691/E-4 *Pre-Insulated Pipe Cartel,* OJ L24/1.

[22] Commission Decision of 30.10.2002, COMP/35.587, 35.706, 36.321 *Nintendo*, OJ L255/33.

[23] Press release*:* 'Antitrust: Commission market tests commitments proposed by Deutsche Bahn concerning pricing system for traction current in Germany', 15.08.2013, IP/13/780, the case ended with a commitment decision (Commission Decision of 18.12.2013, COMP/AT.39678, 39731 *Deutsche Bahn I*/*II*, OJ C86/4) in December 2013, see: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39678/39678_2514_15.pdf (retrieved 14.07.2017).

national competition laws[24] is also silent on the impact of compensation on the amount of the fine.

It is interesting to note that in jurisdictions where private enforcement has developed so far (Kuijpers, Tiunenga, Wisking, Dietzel, Campbell, Fritzsche, 2015, p. 129–142), namely: UK, the Netherlands and Germany, public enforcers actively use their instruments to encourage compensations to injured parties. The OFT, for instance, reduced the fines imposed on independent schools who participated in a fee-setting cartel upon an *ex gratia* payment to an educational trust which 'benefited those who attended the schools in the relevant period'.[25] Moreover, the German Bundeskartellamt closed its proceedings concerning two abuses of dominance due to compensations paid by the alleged abusers to their customers (OFT Decision No. CA98/05/2006 discussed by Ezrahi and Ioannidou, 2012, p. 540).

The described examples from the mentioned jurisdictions clearly indicate that public policy instruments used by NCAs can strongly encourage consensual settlement, and contribute to private compensation greatly. Those instruments are not limited to fine reductions. Obviously, in the given cases, the above NCAs resigned from imposing fines at all, favouring commitments or closing the file subject to compensating injured parties.

Another question that remains is whether compensation paid after a public enforcement decision could serve as an argument for a court to reduce the fine during the judicial review process of the decision issued by a NCA.

It seems that making it possible to raise such argument at the judicial review stage would be in line with the policy to encourage (as much as possible) voluntary compensation in general. This reasoning has actually driven the appellant in *Nintendo*[26] to seek a further reduction of the fine imposed by the Commission in its decision against Nintendo.[27] A further reduction by the Court was however denied on this ground (the Court did lower the fine on different grounds though) since the appellant was relying on the 'legitimate expectation' rule to argue for an even greater reduction than that actually granted by the Commission in its fining decision.

The Nintendo case reveals another problem: although it may be apparent for competition authorities to take into account compensation paid voluntarily

[24] Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, 22.03.2017, COM(2017) 142 final, http://ec.europa.eu/competition/antitrust/proposed_directive_en.pdf (retrieved 14.07.2017).

[25] Others give also another example from the UK practice: the Rover case where the OFT reduced the fine on Rover upon compensation paid to consumers and funds being contributed to the Consumer Association.

[26] Judgment of 30.04.2009, T-13/03 *Nintendo*, ECLI:EU:T:2009:131.

[27] Commission Decision of 30.10.2002, COMP/35.587, 35.706, 36.321 *Nintendo*, OJ L255/33.

to the injured party, the extent of this reduction lies within the discretion of the competition authority. This uncertainty may work against voluntary compensations. In *Nintendo* for instance, the compensation paid by the infringer amounted to EUR 375,000 while the reduction granted to Nintendo equalled EUR 300,000. The appellant's complaint was that the fine reduction should be equal to the compensation paid; it further argued that Nintendo's representatives were given assurance to this effect by the Commission. The Court did not confirm the reasoning and kept the reduction (under this argument) at the level of EUR 300,000. The court in any case seemed receptive to the argument, since it did not deny raising the plea at the judicial review stage.

## VI. Implementation of the Directive in the area of consensual resolution in CEE countries

Many of the Member States have already implemented the Directive.[28] The Polish act implementing the Directive came into force 27 June 2017.[29] Legislative works are still in progress in a number of Member States.

Based on the detailed reports from a number of CEE countries (the publications covers: Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia, see Piszcz, 2017), the implementation of Article 18 and Article 19 of the Directive, including the definition of 'consensual dispute resolution', was smooth. However, there are a few exceptions. The Czech Republic's implementation failed to introduce a suspension of the limitation during any consensual dispute resolution process (Petr, 2017, p. 106). There in another interesting variation in Slovakia. The Slovak law implementing the Directive with respect to the impact of settling a part of the damage by one co-infringer provides for the reduction by the amount actually paid, instead of a reduction by the relative part irrespective of the part actually paid, as envisaged in the Directive (Blažo, 2017, p. 261).

The greatest diversity can be found in relation to the implementation of the Article 18(3) of the Directive, which requires the consideration, as a mitigating factor, of compensation paid as a result of a consensual settlement. In some CEE countries (Poland, Estonia, Slovenia), such provisions have already existed in the relevant national competition acts. In some others (Bulgaria,

[28] As of 14 June 2017, 20 Member States reported their implementation of the Directive.

[29] Legislation is available in Polish at: http://isap.sejm.gov.pl/DetailsServlet?id=WDU20170001132 (retrieved 14.07.2017).

Hungary, Lithuania, Slovakia and Romania), the relevant inclusions were made in order to implement the Directive. Croatia has made the choice not to regulate the matter explicitly, leaving it entirely to the competition authority's discretion or future regulation in the national competition act (Butorac Malnar, 2017, p. 81).

A summary of the implementation status in CEE countries is presented in the chart below:[30]

| | **Suspension of limitation period during ADR** | **Staying the court proceedings during ADR** | **Effect on fine** | **Limitation of joint and several liability** |
|---|---|---|---|---|
| Bulgaria | V | V | V | V |
| Croatia | V | V | X | V |
| Czech Rep. | X | V | IN | V |
| Poland | V | V | IN | V |
| Estonia | IN | V | IN | V |
| Hungary | V | V | V | V |
| Latvia | V | V | ? | V |
| Lithuania | V | V | V | V |
| Slovakia | V | V | V | V* |
| Romania | V | V | V | V |

For symbols' explanation, please see footnote 30.

## VII. Claiming damages resulting from an infringement of competition law in a consensual way vs state court – post-Directive

One may wonder whether consensual dispute resolution remains attractive once the Member States modify their procedures and substantive regulations in order to implement the Directive effectively. The answer is: in many instances, the disputing parties may still have a strong preference for an amicable and confidential resolution, since the facilitations introduced as a result of the Directive could be also partially or entirely achieved in arbitration.

[30] Symbols indicate the following: V – implementation; x – no implementation; IN – existence of a given rule under national law; ? – means difficulty in establishing the actual status at the moment of closing of the article; and the situation in Slovakia marked as V* has been explained in the body of the text.

First, all substantive provisions covered in the Directive (and implemented in national laws) shall apply, provided this is the Member State's law which is applicable to a dispute at hand. Consequently, any tribunal or conciliator proceeding on the basis of the law of any Member State (that implemented the Directive) will need to apply the rules on joint and several liability as well as, on the passing-on and on indirect purchasers. The statutory limitation remains part of this set of rules as well.

The rules on the burden of proof are, however, problematic since they are regarded as substantive **or** procedural.

Second, although procedural facilitations will only be applicable before a state court, it seems that the outcome designed in the Directive (in the procedural dimension) could be reached by other means available in ADR. The best example is found in the disclosure of evidence (compare different view by Moisejevas, 2015, p. 190), which is key for successful claim settling.

In order to resolve asymmetry in access to documents, the IBA Rules on Taking Evidence in International Arbitration[31] (frequently applied in international arbitration) address the issue and foresee under Article 3 a 'request to produce' necessary evidence. As a result of the application of those rules, the party refusing to produce certain documents could suffer adverse inferences to be drawn by the tribunal against the refusing party. Furthermore, although popular rules applied in arbitral proceedings, such as the UNCITRAL Arbitration Rules (as revised in 2010)[32] or ICC Rules of Arbitration (current as of 1 March 2017),[33] are silent about similar 'discovery' procedures, nothing shall preclude the claimant from bringing the issue before the tribunal, which may order the other party to produce the relevant documents. In any case, the parties themselves may consensually decide to introduce regulations similar to those covered under Article 3 of IBA Rules or similar to those included in the Directive.

Another important facilitation is the binding force of the decisions issued by NCAs. In this case, it seems that arbitral tribunals will have a strong inclination to treat such decisions as *prima faciae* evidence and above all, will avoid discrepancy in view of their duty to respect public policy.[34] The same reason may cause an arbitral tribunal to refuse reviewing a leniency

[31] IBA, *Rules on the Taking of Evidence in International Arbitration (2010)*, www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (retrieved 17.07.2017).

[32] UNCITRAL, *Arbitration Rules as revised in 2010*, https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (retrieved 17.07.2017).

[33] ICC, *Rules of Arbitration*, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration (retrieved 17.07.2017).

[34] As explained in the paper, competition law qualifies as public policy regulation; a violation of public policy rules may cause an award to be set aside or to be refused enforceability; it is a basic duty of every arbitrator to secure validity and enforceability of the award.

application or to accept the refusal to submit such an application without drawing adverse inference from it, in line with the prohibition covered in the Directive (Nazzini, 2017).

Furthermore, a party in arbitration is not precluded from using the Commission's guidelines on quantification of harm.[35] What is even more important, once a party (or its expert) decides to follow the methodology contained therein, it would be rather difficult to challenge that methodology; thus, the use of the guidelines could be a natural choice in the strategy of a prospect claimant.

Finally, even if the procedural or substantive facilitations are achieved only partially, the advantages of arbitration in general counterbalance the listed facilitations still.

## VIII. Conclusion

Consensual dispute resolution may be regarded as the third pillar of competition law enforcement, next to public enforcement and claim settlement before a state court. In order to develop this method of achieving compensation, many stakeholders shall combine their competences and measures to facilitate ADR, or other ways to resolve competition claims amicably. An example could be found in the organised and thoughtful manner in which ADR is promoted within the UK,[36] which is obviously bringing about the desired outcome of increasing the number of compensations paid to injured parties (Hodges, 2014, p. 268–269 and 284). Based on the UK example, it is apparent that for many reasons (many of them being listed in this paper) consensual dispute resolution of the claims in question will always be desirable from the perspective of the injured parties.

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[35] Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, 2013/C 167/07 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:167:0019:0021:EN:PDF (retrieved 14.07.2017); Practical Guide Quantifying Harm In Actions For Damages Based On Breaches Of Article 101 or 102 Of The Treaty On The Functioning of the European Union, http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf (retrieved 14.07.2017).

[36] See: UK government Department for Business, Innovation and Skills, *Private actions in competition law: a consultation on options for reform*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31528/12-742-private-actions-in-competition-law-consultation.pdf (retrieved 14.07.2017).

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# The Type of Liability in Private Enforcement in Selected CEE Countries Relating to the Implementation of the Damages Directive

by

Dominik Wolski*

**CONTENTS**



## *Abstract*

The article is devoted to the type of liability in selected CEE countries, namely those covered by the national reports drafted for the 2nd International Conference on Harmonization of Private Antitrust Enforcement: Central and Eastern European

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Perspective. The paper starts with preliminary remarks concerning the role of the type of liability in private enforcement of competition law and the Damages Directive. In the following sections of the article, the author discusses the manner of adopting the aforementioned element as a result of the implementation process in CEE Member States. The article is mainly based on the content of the relevant national reports, with a few references to issues beyond their scope. In the summary, the author formulates brief conclusions with respect to the implementation manner of the type of liability as well as provides general remarks concerning the role of the type of liability in competition-based private enforcement cases.

***Résumé***

L'article est consacré au type de responsabilité dans certains pays d'Europe centrale et orientale, c'est-à-dire dans les pays couverts par les rapports nationaux rédigés pour la Deuxième Conférence Internationale sur l'Harmonisation de l'Application Privée du Droit de la Concurrence : la perspective d'Europe centrale et orientale. Le document commence par des remarques préliminaires concernant le rôle du type de responsabilité dans l'application privée du droit de la concurrence, ainsi que dans la Directive Dommages. Dans les sections suivantes de l'article, l'auteur parle de la manière dont laquelle l'élément susmentionné a été adopté dans les pays d'Europe centrale et orientale suite au processus de la mise en œuvre de la Directive. L'article est principalement basé sur le contenu des rapports nationaux pertinents, avec quelques références aux problèmes dépassant leur cadre. Dans le résumé, l'auteur formule de brèves conclusions sur la manière de la mise en œuvre du type de responsabilité et fournit des remarques générales sur le rôle du type de responsabilité dans les actions privées en droit de la concurrence.

**Key words:** private antitrust enforcement; type of liability; CEE states; implementation; Damages Directive.

**JEL:** K15; K21; K42

## I. Introductory issues

Long before the Damages Directive[1] was adopted, or even any works on said document started, it was quite obvious for many lawyers and academics that any person who suffered a damage resulting from an infringement of competition law has the right to compensation. This is because, in the vast

[1] Directive 2014/104/EU of the European Parliament and of the Council of 26.11.2014 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, OJ L 349, 05.12.2014.

majority of European countries, the general rule of non-contractual civil liability stipulates that if a breach of law results in a damage to any person, that person should have the right to legal redress (see application of this rule in selected European states Wolski, 2016, p. 69–95). The legal systems of EU Member States differ in their particular solutions, but the aforementioned principle of civil liability does not seem to be questioned.

Liability for damages has been added to the field of private antitrust enforcement. As a consequence, in spite of doubts and ambiguities relating to the legal ground of competition-based claims, eventually the European Union and the national courts of its Member States came to the same conclusion. Any person suffering damage caused by an infringement of competition law must have the right to redress it (see Polish case Jurkowska, 2008, p. 59–79). Once the main rule of liability for a competition law infringement was decided, the injured parties have started seeking compensation based on the civil liability regime of a given Member State. This process was taking place even if a particular EU country did not have specific liability addressed directly to an infringement of competition law at that time. This was true mainly, or even exclusively for so-called Western European states (such as the UK, the Netherlands and Germany) because in most CEE countries private enforcement of competition law did not, in effect, exist. Recently, the situation changed somewhat, but a difference in the development of private antitrust enforcement between the aforementioned parts of Europe is still significant.

In spite of relatively similar perceptions of liability for damages resulting from a competition law infringement, there are still several differences between the civil liability regimes among the Member States (see Wolski, 2016, p. 69–95, see also Lithuanian and Slovak examples Stanikunas and Burinskas, 2015, p. 239–240, and Blažo, 2015, p. 261–262 and p. 271–272 respectively). Apart from less significant variations, one of the main differences rests in the type of liability applicable to private enforcement cases. Such notion (type of liability) usually includes the principle of liability – strict or based on fault referring to negligence or lack of due care – as well as several presumptions. The latter is sometimes omitted, but has great significance. Those presumptions decide if the burden of proof that the infringer is at fault is placed on the plaintiff or on the defendant. Therefore, it substantially affects the course of the proceedings and sometimes its final result too.

Having this in mind, the main aim of this paper is to go through the implementation process of the Damages Directive in CEE Member States in order to find out how the Damages Directive might affect the type of liability in those countries applicable to private antitrust enforcement cases. This is also to learn whether, in a given Member State, its type of liability will change, or not as a result of the implementation process. The paper mainly covers the

principle of liability in competition-based damages cases and presumptions therein. Wherever possible, due to the content of the national reports mentioned below, the paper presents the current state of play against the legal background existing before the transposition of the Damages Directive.

The content of the paper is based on national reports prepared for the 2nd International Conference on Harmonization of Private Antitrust Enforcement: Central and Eastern European Perspective.[2] Therefore, its scope is limited to information included in these reports. However, while these may not always have to be comprehensive, this is not to say that some of the reports did not include information relating to the type of liability. For this reason, there was a need to ask some post-report questions to the authors of these reports in order to complete the missing information. This has been done and the current version of this paper contains relatively comprehensive information about the type of liability in the CEE countries covered by the national reports.

## II. The Damages Directive and the type of liability

The Damages Directive, in particular in its Preamble, generally aims to encourage and facilitate the effectiveness of private antitrust enforcement as the second pillar of the enforcement of competition law. For those reasons, the Damages Directive mentions the notion of 'effectiveness' multiple times.[3] However, in relation to rules of civil liability applicable to private antitrust enforcement in Members States, recital No. 11 of the Damages Directive clearly stipulates that 'Where Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive'. Therefore, there is no need to amend these rules, except those expressly mentioned in the Damages Directive,[4] under the condition that those rules fulfil the principles of effectiveness and equivalence. As a consequence, the Damages Directive does not say too much about types of liability, except the aforementioned principles and presumptions. The

[2] The conference was held in Supraśl, 29–30 June 2017; it was organized by the Faculty of Law, the University of Białystok and Centre for Antitrust and Regulatory Studies, University of Warsaw. The reports are included in Piszcz, 2017. For the reason that each particular national report includes relevant list of literature used by its author when drafting the report, that literature has not been repeated in this article.

[3] See for example recital No. 4, 5, 8 or 11.

[4] For example, presumption of damage caused by a cartel infringement.

presumption of damage caused in the case of a cartel can play an important role in practice, once the transposition process has been completed.[5] This means that Member States could, in turn, decide to change or to stay within their existing legal frameworks relating to the type of liability. As we can see from the following parts of this paper, Member States used such opportunities in various ways; some of them altered or adjusted the type of liability applicable in their countries, some did not. If the aforementioned goals of the Damages Directive are fulfilled, the way a given State implements the Directive should not be questioned.

## III. CEE member states and types of liability in private antitrust enforcement[6]

### 1. Bulgaria[7]

In Bulgaria, the Damages Directive is to be implemented via amendments to the Protection of Competition Act[8] ('PCA'),[9] namely a bill for amendment to the PCA.

The first section of the new PCA chapter on 'Liability for Damages' contains general rules confirming the right of any party that has suffered damages, as a result of violations committed under the PCA, to seek indemnification from the tortfeasor, irrespective of the nature of the infringement. The second section of this chapter includes detailed rules on liability for damages caused by antitrust violations. The main innovation of the Directive is the presumption that cartel infringements cause harm,[10] which shifts the burden of proof in favour of the claimant. This presumption is rebuttable under Bulgarian law.

Regarding the types of liability in competition-based damages cases, from a theoretical point of view – as in practice it almost does not exist – liability is based on a variation of standard tort liability. Fault is presumed in both tort and contractual regime. Consequently, the injured party needs to prove only that a tortfeaser disregarded the requirements of due diligence. Thus, the concept of tort under Bulgarian civil law does not contain any elements

[5] As stated in Art. 17(2) of the Damages Directive.

[6] In the following parts of the paper the type of liability in selected CEE States is presented in an alphabetical order.

[7] This section of the article is based on the Bulgarian national report, Petrov, 2017.

[8] Protection of Competition Act (State Gazette No. 102 of 28.11.2008, in force as of 2.12.2008).

[9] CPC Annual Report for 2015, adopted by decision no. 366 of 26.05.2015, p. 53.

[10] Art. 17(2) of the Directive, reflected in the proposal for a new Art. 113(1) PCA.

of subjective intention, unlike in other fault-based jurisdictions. While it thus seems to fall within the strict liability type – in Bulgaria it is defined as fault-based liability. This enables defendants to prove that they have taken all reasonable steps to prevent third party damage or that the injured party did not act prudently and did not take adequate steps to mitigate damages. The rules outlined above have been already applied by courts to cases which arose out of the infringement of competition law, namely the PCA.

## 2. Croatia[11]

Croatian lawmakers assumed that a separate act implementing the Damages Directive is the most suitable manner for the achievement of legal clarity, certainty and transparency, namely the Act on actions for damages arising out of antitrust infringements (hereinafter, the Act on antitrust damages). The Act on antitrust damages is a *lex specialis* in relation to the general provisions of the Civil Procedure Act[12] (hereinafter, CPA) and the Obligations Act[13] (hereinafter, OA). This means, in turn, that any issue not regulated by the Act on antitrust damages falls under the general rules of civil procedure and civil law.[14]

As mentioned in the second chapter of this paper, the Damages Directive does not prescribe what type of liability is to be applicable in cases of antitrust damages. However, the Damages Directive expresses clearly the principles of effectiveness and equivalence of private antitrust enforcement. In spite of this, the Croatian Act on antitrust damages opts for strict liability, while the general tort rule of liability is based on presumed fault. This is an extraordinary solution, due to the fact that under Croatian general tort law, strict liability is an exception to the general rule of presumed fault. According to the general rule of Article 1045 OA, a person who has caused damage is liable for it, unless he has proved that the damage has not occurred as a result of his fault (lack of duty of care). Strict liability is, in turn, limited to situations relating to the specific nature of the harm and the protected right, such as acts that may substantially affect the health of people or cause a substantial amount of loss. Harm caused by a cartel can be recognized, in particular cases, as the latter, due to the substantial amount of loss involved. However, other types

[11] Remarks included in this part are based on the Croatian national report, Butorac Malnar, 2017.

[12] Civil Procedure Act, Official Gazette – Narodne novine 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08, 57/11, 148/11, 25/13, 89/14.

[13] Official Gazette – Narodne novine 35/05, 41/08, 125/11, 78/15.

[14] Art. 4 of the Act on antitrust damages.

of antitrust infringements and strict liability therein are very questionable for both legal and economic types of reasons (for more see Croatian national report Butorac Malnar, 2017, p. 62–63). In spite of the many arguments in favour of fault-based liability, the group working on draft of the Act on antitrust damages decided to apply strict liability with no exonerating reasons. The aforementioned working group referred to the spirit of the Damages Directive as a decisive argument favouring strict liability. The Croatian Act on actions for damages arising out of antitrust infringements was finally enacted by the Croatian parliament on 30 June 2017.[15]

## 3. The Czech Republic[16]

In the Czech Republic, the Damages Directive is to be transposed via the Act on Compensating Damages in the Area of Competition Law (hereafter, 'Damages Act').[17] The draft of the Damages Act was adopted by the Government and submitted to the Parliament in December 2016. The Ministry of Justice opposed amending the new Civil Code and as a result of a compromise a new, self-standing act shall be adopted for the purposes of implementing the Damages Directive, amending, if necessary, the Competition Act.[18] Therefore, the type of liability applicable to private antitrust enforcement remains unchanged – it is generally fault-based with a presumption of negligence. Consequently, the plaintiff does not have to provide evidence of the defendant's fault. On the contrary, the defendant is found liable unless he proved that he was not at fault (he did exercise due diligence).

## 4. Estonia[19]

Estonian lawmakers decided to implement the Damages Directive via amendments to the Competition Act[20] (hereinafter, CA), the Code of Civil

[15] See Narodne novine 69/2017, http://narodne-novine.nn.hr/clanci/sluzbeni/2017_07_69_1607.html.

[16] This part of the article is based on the Czech Republic national report, Petr, 2017.

[17] Proposal of the Damages Act is accessible in Czech at: http://www.psp.cz/sqw/text/tiskt.sqw?O=7&CT=991&CT1=0 (13.03.2017).

[18] Act. No. 143/2001 Coll., on the protection of competition, as amended.

[19] Remarks relating to Estonia are based on the Estonian national report, Parn-Lee, 2017.

[20] In Estonian: Konkurentsiseadus, passed on 5.06.2001, entry into force on 1.10.2001. English version available at: https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/519012015013/consolide (4.03.2017).

Procedure[21] (hereinafter, COCP) and the Code of Criminal Procedure[22] (hereinafter, CCP). Therefore, no separate legal act is to be adopted. With respect to the type of liability, the Estonian Law of Obligations Act[23] (hereinafter, LOA) has to be taken into consideration first. According to this law, liability is fault-based. This means that to be liable the defendant must be at fault in a particular case, competition law infringements included. However, similarly to many of the aforementioned jurisdictions, fault of the defendant is presumed if the claimant proved the damage, the illegal action of the defendant and the causal link. As a result, the law does not require the plaintiff to prove the defendant's fault. Having said that, the presumption is rebuttable and the defendant can prove that he was in fact not at fault.

## 5. Hungary[24]

Not surprisingly, private enforcement of competition law was theoretically possible in Hungary from the moment when the Hungarian Competition Act came into force; since then anticompetitive agreements and the abuse of a dominant position were prohibited. This possibility was based on Hungarian Private Law and the right for compensatory damages as a general right under that law. According to the Hungarian Civil Code 'Anyone causing damages to another person by infringement of law shall compensate therefor. They are exempted from liability if they prove that they behaved as it is generally expected in the given situation' (section 6:579 of the Civil Code). This section establishes the general rule of liability in non-contractual damages. Obviously, proving culpability is a crucial part of the litigation. However, in the case of Hungary, the burden of proof is not on the plaintiff, but on the party having caused the damage. The defendant has the possibility to prove that he or she has not failed to meet the standards of behaviour that would generally be expected in a given situation.

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[21] In Estonian: Tsiviilkohtumenetluse seadustik, passed on 20.04.2005, entry into force on 1.01.2006. English version available at: https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/504072016003/consolide (4.03.2017).

[22] In Estonian: Kriminaalmenetluse seadustik, passed on 12.02.2003, entry into force on 1.07.2004. English version available at: https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/531052016002/consolide (4.03.2017).

[23] In Estonian: Võlaõigusseadus, passed on 26.09.2001, entry into force on 1.07.2002. English version available here: https://www.riigiteataja.ee/en/eli/524012017002/consolide (4.03.2017).

[24] This section is based on the Hungarian national report, Miskolczi Bodnár, 2017.

The current model of liability in competition-based damages cases is still governed by the Civil Code. As stated in Article 88/C (1) of the Hungarian Competition Act, the norms of the Hungarian Civil Code must be used. Those are the general rules of delictual damages based on fault. Fault is presumed and the defendant may rebut that presumption.

## 6. Latvia[25]

In Latvia the rules applicable to competition-based damages claims are set forth in the Latvian Competition Law and Latvian Civil Procedure Law[26] (hereinafter, CPL). Therefore, the draft implementing the Damages Directive contains amendments to the Competition Law,[27] as well as amendments to the CPL[28] (hereinafter, Draft CPL and collectively referred to as the Amendments). The Amendments drafted by the Ministry of Economics were not, however, submitted to the Latvian Parliament.

With respect to the type of liability applicable to competition-based damages claims in Latvia, it is generally based on fault.

## 7. Lithuania[29]

Lithuanian private enforcement of competition law has been governed by the Law on Competition of Lithuania ('Law on Competition'), the Civil Code of Lithuania ('Civil Code') and the Code of Civil Procedure of Lithuania ('Code of Civil Procedure'), even before the country joined the European Union in 2004.

The Law on Competition, adopted in 1999, has established a general right for injured persons to bring damages compensation claims before national courts. However, before Lithuania's entry into the European Union, this right was limited only to harm caused by competition law infringements. Furthermore, since 1 July 2001, the Civil Code established the principle of general delict (Article 6.263 of the Civil Code) including four cumulative elements of civil liability: (i) unlawfulness (infringement of competition law); (ii) damage; (iii) causal link between the infringement and the damage, and (iv) fault. The

[25] This part of the article refers to the Latvian national report, Jerneva and Druviete, 2017.

[26] In Latvian: *Civilprocesa likums.*

[27] Draft law No. VSS-441, approved by the Meeting of State Secretaries on 8.09.2016.

[28] Draft law No. VSS-866, approved by the Meeting of State Secretaries on 8.09.2016.

[29] This section of the article is based on the Lithuanian national report, Mikelenas and Zasciurinskaite, 2017.

latter is presumed, but the presumption is rebuttable (Articles 6.246–6.248 of the Civil Code).

Following the Code of Civil Procedure applicable in competition-based damages cases, the burden of proof of civil liability for the infringement of competition law rests on the claimant, but as mentioned above, fault is presumed. It is also generally accepted that a claim is proved if there are no reasonable doubts as to whether the available evidence is substantial, relevant or admissible.

In the course of the implementation process a general decision was taken not to make any amendments to either the Civil Code or the Code of Civil Procedure. Instead, all the amendments and supplements, both substantive and procedural, were to be made only in the Law on Competition. The new Law came into force on 1 February 2017. It shall be regarded as *lex specialis* with respect to the Civil Code and the Code of Civil Procedure as well as to other laws.

With respect to the type of liability, fault as a cumulative element for the application of civil liability has been presumed under Article 6.248 (1) of the Civil Code. As a result, the claimant shall be relieved of both the duty to prove fault and the fact that he has suffered damages due to a cartel. However, this presumption concerns only cartel infringement. It is rebuttable and the defendant has a right to prove that no damages have in fact been caused because of the cartel. This shall not be applicable to damages suffered due to other restrictive agreements and the abuse of a dominant position.

## 8. Poland[30]

In Poland, it was decided to implement the Damages Directive via a self-standing Act on Claims for Damages for Infringements of Competition Law as of 21 April 2017 (hereinafter, 'the Act'). The new law came into force on 27 June 2017. It contains necessary amendments to the Polish Act on Competition and Consumers Protection, the Civil Code (hereinafter, 'CC') and the Code of Civil Proceedings (hereinafter, 'CCP') respectively, in particular those required by the Damages Directive.

With respect to the type of liability in competition-based damages claims, tort-based liability has not been questioned, even before the Damages Directive was adopted. These claims belong in the Polish legal system to tort liability based on fault. For this reason, Article 415 of the Civil Code was

[30] This chapter refers mainly to the Polish national report, Piszcz and Wolski, 2017.

indicated as the main legal ground of private enforcement of competition law in Poland. In order to disperse any doubts, in particular in relation to claims of indirect purchaser, but also to create liability based on a presumption of fault, the Polish lawmakers decided to create a separate basis of liability addressed directly to the aforementioned claims. Article 415 of the Civil Code, laying down the main principle of tort-based liability, stipulates that 'the person who has inflicted damage to another person by her/his own fault shall be obliged to redress it'. This wording creates ambiguity with respect to claims being brought by indirect purchasers. This is because Polish doctrine is rather firm on the fact that bringing a damages claim by an indirectly injured party is not allowed based on Article 415 of the Civil Code. This could mean, in turn, that bringing a competition-based damages claim by indirect purchaser would not be possible, contrary to Article 14 of the Damages Directive. As a result, Article 3 of the Act stipulates clearly that the infringer is obliged to redress damage caused by the infringement of competition law to anybody, unless he is not at fault. This directly expresses the liability of the infringer to any person who suffered damages resulting from the infringement of competition law. As a consequence, the relevant rules of the Damages Directive have been properly transposed. The principle of liability, namely fault, remains unchanged.

Article 3 of the Act includes a presumption of fault which does not exist under Article 415 of the Civil Code. As a result, according to the Act, the infringer shall bear the burden of proof that her/his fault did not exist in a particular case. This is another difference worth noting when comparing tort-based liability arising from Article 415 of the Civil Code and that created in Article 3 of the Act applicable to private enforcement of competition law.

Article 7 of the Act contains a presumption of damage caused by an infringement of competition law which goes further than that stipulated in Article 17(2) of the Damages Directive. According to the aforementioned provision of the Act, it is presumed that any types of infringements of competition law causes damage; according to the relevant provision of the Damages Directive this presumption concerns only cartels. As stated in the reasoning of draft Explanatory Notes accompanying the Act, the Damages Directive does not oppose the solution employed in Poland. Additionally, according to the aforementioned draft Explanatory Notes, there is a need to help injured parties (to bring competition-based damages claims) with relation to the premises of liability of the infringer in the case of other, than cartels, infringements of competition law too. It is worth mentioning that both of the aforementioned presumptions are rebuttable according to Article 234 CCP.

## 9. Romania[31]

The first Romanian competition law (Law 21/1996) included a specific provision underlining the right of victims of competition law infringements to obtain compensation for the damages they incurred. As stated in the Law 21/1996, 'Apart from the sanctions applied in accordance with this law, the right of the physical and legal persons to obtain full compensation for the damages produced through an anticompetitive act prohibited by this law remains reserved'. This principle was supplemented in 2010 and 2011 with several specific provisions, meant to create a specific framework for the private enforcement of competition rules.

The rules implementing the Damages Directive were adopted through a Government Ordinance. This includes provisions with respect to the quantification of the damage, presumption that anticompetitive agreements and concerted practices cause damage and the possibility of the Romanian Competition Council to assist the court in such matters as *amicus curiae*. As a result, liability in competition-based damages claims is based on fault and the rebuttable presumption that an infringement of competition rules caused damage.

## 10. Slovakia[32]

Slovak lawmakers decided to transpose the Damages Directive into the text of a brand new act dealing with private enforcement, namely Act No. 350/2016 Coll. on Some of the Rules of Enforcement of Claims for Damages Arising from Violation of the Law of Economic Competition and Amending and Changing Act No. 136/2001 Coll. on Protection of Economic Competition and Amending Act of the Slovak National Council No. 347/1990 Coll. on Organization of Ministries and Other Central Bodies of State Administration of the Slovak Republic as Amended as Amended (hereafter, 'the Act 350/2016').

According to § 21 of the Act 350/2016, other rules for competition damages claims are to be referred to the Commercial Code[33] and to Civil Disputes Code (*Civilný sporový poriadok*).[34] However, any provisions of the Commercial Code and the Civil Disputes Code that are contrary to Act 350/2016 are not applicable in the case of competition law enforcement.

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[31] This part is mainly based on the Romanian national report, Mircea, 2017.

[32] This part of the article refers to the Slovak national report, Blažo, 2017.

[33] Act No. 513/1991 Coll. Commercial Code as amended.

[34] Act No. 160/2015 Coll.

Notwithstanding the above, in Slovakia damages resulting from competition law infringements are covered by the rules of the Commercial Code since the Act 350/2016 is a *lex specialis* regulation in relation to the Commercial Code. Liability for damages under the Commercial Code is based on principles of strict liability. The transposition of the Damages Directive does not change substantial civil or commercial law.

## 11. Slovenia[35]

In Slovenia, the Damages Directive is to be implemented via the law amending the existent Prevention of Restriction of Competition Act (Sl. *Zakon o preprečevanju omejevanja konkurence*, *ZPOmK-1*) of 2008.[36] This will be the eighth amendment to ZPOmK-1 (for a historical background of Slovenian competition law and the substance of the amendments to ZPOmK-1 see Fatur, Podobnik and Vlahek, 2016, p. 27–32) and it will take the form of a new Act Amending and Supplementing the Prevention of Restriction of Competition Act (Sl. *Zakon o spremembah in dopolnitvah Zakona o preprečevanju omejevanja konkurence (ZPOmK-1G)*). An important element of the amending act is the new Part VI entitled 'Certain rules of private enforcement of breaches of competition law' encompassing Articles 62 and 62a–62o. The latter paragraphs are inserted into ZPOmK-1 replacing the existent Part VI titled 'Court Proceedings' and its Article 62.

Apart from the specific regime governing damages claims set out in ZPOmK-1, more fundamental substantive and procedural rules (that is, the Code of Obligations (Sl. *Obligacijski zakonik (OZ)*)[37] and the Civil Procedure Act (Sl. *Zakon o pravdnem postopku (ZPP)*)[38] are relevant in competition damages claims. General provisions of the OZ and the ZPP apply to all those issues of antitrust damages actions which are not covered by EU law and/or by Article 62 of ZPOmK-1.

With respect to the type of liability, according to general rules of Slovenian law of obligations (Article 131(1) of OZ), fault of the defendant is presumed. As a consequence, in order to escape liability, the defendant must prove that the damage would have existed even without his/her fault (he/she was not

[35] This chapter is mainly based on the Slovenian national report, Vlahek and Podobnik, 2017.

[36] Official Gazette RS, Nos. 36/08, 40/09, 26/11, 87/11, 57/12, 39/13 (Constitutional Court's decision), 63/13, 33/14 and 76/15. ZPOmK-1 entered into force on 26.04.2008.

[37] Official Gazette RS, No. 83/01, with further amendments.

[38] Official Gazette RS, No. 26/99, with further amendments. For further details as to the act, see Galič, 2014.

at fault). As regards the defendant's fault, case-law sometimes limits it to negligence only. The aforementioned rule applies to competition damages claims too, according to the renewed Article 62(1) of ZPOmK-1. However it is worth noting that the same rule existed prior to the implementation of the Damages Directive and prior to the insertion of Article 62 into the ZPOmK-1 of 2008.

## IV. Conclusions

As mentioned in the previous parts of this paper, recital No. 11 of the Damages Directive stipulates that where Member States provide conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and the Damages Directive. This means, in turn, that Member States are not expressly obliged under the Damages Directive to significantly change their existing model of liability, even if it is based on fault. However, there are many arguments, based on both European Commission documents and jurisprudence, which suggest that it is really difficult to prove that the infringer was not at fault in competition-based claims. This particularly regards cartel cases.

Having in mind the types of liability applicable in CEE Member States, as outlined in the relevant national reports, we can come to the conclusion that the implementation process did not affect significantly pre-existing models. Member States usually kept their existent type of liability, adjusting them somewhat, in particular according to the requirements of the Damages Directive. These adjustments usually concerned presumptions, such as the presumed harm resulting from a cartel infringement.

As a result, the vast majority of the CEE States covered by the aforementioned national reports opted for a fault-based model of liability, but some of them decided to apply a presumption of fault. Two countries stand out from the overall group, namely Croatia and Slovakia, which applied strict liability to competition-based damages cases. The Bulgarian example is quite interesting too. Theoretically, it is based on fault, but arguments exist which suggest that the Bulgarian model is an example of strict liability.

As the final conclusion, it is worth remembering that the type of liability, the principle of liability included, does not seem to be crucial for the effectiveness of private enforcement of competition law. In particular in cases like cartels, abuse of a dominant position or other types of hard-core restrictions, it is very

difficult for the infringer to prove that such violations have not been committed intentionally. As a result, it seems that the specific type of liability adopted by a particular Member State as part of the Damages Directive implementation process – fault-based or strict – will not significantly affect the final result of the implementation.

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# Joint and Several Liability of Competition Law Infringers in the Legislation of Central and Eastern European Member States

by

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## CONTENTS



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## *Abstract*

The study reviews the provisions of the Directive by, first, presenting its general rule – joint and several liability – and then its two exceptions, pointing out that albeit they contain similar solutions, these have different reasons in the case of leniency applicants obtained immunity from fines and small and medium-sized enterprises. The study examines whether the 11 CEE Member States prescribe joint and several liability, in principle, to cases where multiple persons cause harm jointly by an infringement of competition law. The study also analyses the position of an immunity recipient in national laws. During the examination, the study separates the position of the immunity recipient and the injured parties, as well as the position of the immunity recipient and other co-infringers, as is the case in the Directive. The study summarizes also national experiences with the implementation of the Damages Directive. It is a fact that the norms of the Directive have been implemented, and there is no deviation to jeopardize either the enforcement of claims for damages or the integrity of the internal market.
Nevertheless, having established two separate exceptions, it would have been duly justified for the Commission to explain them in detail, considering their rules differ from each other. Noticeably, some CEE countries considered the difference unjustified and uniformly provided an opportunity for the co-infringer who compensated the harm of an injured party to submit a reimbursement claim against the immunity recipient and SMEs. Other CEE countries considered that they did not have the authority to do so.

It would be worth reviewing the implementation of the exceptions to joint and several liabilities after a year, in conjunction with the issue of alternative dispute resolution.
The study makes a proposal for an amendment of the Directive. Doctrinal views related to the SMEs exemption from joint and several liability draw attention to the fact that it is unfortunate if solutions designed in a relatively late stage of the legislative procedure do, in fact, later become a part of that directive.
It would seem practical, for example, to declare that this exception shall be applied also to micro enterprises in relation to the compensation of harms caused by infringements of competition law. The Damages Directive requires, however, the implementation of this exception only with regard to small and medium-sized enterprises.


## *Résumé*

L'étude examine les dispositions de la Directive en présentant tout d'abord la règle générale - la responsabilité solidaire - puis ses deux exceptions, en soulignant que même si elles contiennent des solutions similaires, elles ont des raisons différentes dans le cas des demandeurs de clémence qui ont reçu une immunité et des petites et moyennes entreprises.
L'étude analyse si les onze États Membres d'Europe centrale et orientale prévoient, en principe, la responsabilité solidaire dans les cas où plusieurs personnes causent un dommage conjointement par une infraction au droit de la concurrence. L'étude analyse également la position d'un bénéficiaire de l'immunité dans les lois nationales. Pendant l'évaluation, l'étude sépare la position du bénéficiaire de l'immunité et des personnes lésées, ainsi que la position du bénéficiaire de l'immunité et des autres contrevenants, comme c'est le cas dans la Directive.
L'étude résume également les expériences nationales avec la mise en œuvre de la Directive Dommages. Il est vrai que les normes de la Directive ont été mises en œuvre et qu'il n'y a pas d'écart qui pourrait mettre en péril les actions en dommages ou l'intégrité du marché intérieur.
Néanmoins, après avoir établi deux exceptions distinctes, il aurait été dûment justifié que la Commission explique ces exceptions en détail, en prenant en compte qu'ils se diffèrent les uns des autres.
Il faut noter que certains pays d'Europe centrale et orientale ont considéré que la différence était injustifiée et ont prévu de manière uniforme que le contrevenant qui compensait le préjudice d'une personne lésée pouvait présenter une demande de remboursement contre le bénéficiaire de l'immunité et les PME. D'autres pays d'Europe centrale et orientale ont estimé qu'ils n'avaient pas le pouvoir de le faire.
Il serait intéressant d'examiner la mise en œuvre des exceptions à la responsabilité solidaire après un an, en combinaison avec la question du règlement extrajudiciaire des différends.
L'étude propose une modification de la Directive. Les opinions doctrinales concernant l'exonération de la responsabilité solidaire des PME soulignent qu'il est

regrettable que des solutions conçues au stade relativement avancé de la procédure législative fassent ultérieurement une partie de cette directive.
Il semblerait pratique, par exemple, de déclarer que cette exception s'appliquera également aux micros entreprises en ce qui concerne la réparation des préjudices causés par des infractions au droit de la concurrence. Cependant, la Directive Dommages n'exige la mise en œuvre de cette exception que pour les petites et moyennes entreprises.

**Key words:** joint and several liability; maximum degree of liability; micro, small and medium-sized enterprises; full compensation, proportional reimbursement; direct or indirect purchasers and suppliers; ceilings of the liability of immunity recipients.

**JEL:** K12; K13; K15; K21

## I. Introduction

A cartel inevitably has multiple members. By contrast, it is usual for only one entity to be in a dominant position, thus multiple perpetrations take place only exceptionally in the case of abuses of a dominant position. Nonetheless, legislation shall pay attention to those infringements of competition law which are committed by multiple persons. In the case of harm caused by such competition law breaches, the legal relationship between infringers and injured parties is of a specific nature. This study examines the liability of infringers towards injured parties (external relationship) on the one hand, and, on the other hand, analyses the rules on the relationship between multiple infringers (internal relationship).

Civil laws traditionally create special rules on harm caused by multiple entities. Infringers are typically jointly and severally liable towards injured person(s). Based on joint and several liability, the injured party may claim even full compensation of its harm from any of the infringers. Alternatively, the injured party may claim compensation from multiple infringers in a proportion considered appropriate. Joint and several liability of the infringers is beneficial to the injured party from several points of view.

First, it facilitates actions against infringers, a fact of importance mainly if the group of infringers includes foreign nationals or undertakings with residences unknown to the injured entity. Second, the fact that the injured party does not have to hunt for each infringer is likely to result in a faster recovery of its harm. Third, joint and several liability considerably reduces the risk that the injured party fails to receive full compensation as a result of the insolvency of any of the infringers. In comparison with shared responsibility,

joint and several liability places the risk on all infringers that any of them (part of them) becomes insolvent and thus unable to pay its share of the harm caused. Finally, it is also an advantage of joint and several liability that legal disputes on the share of the liability between infringers do not cause a delay in providing compensation since the co-infringers do not have to decide on what share of the harm are individual infringers liable for. Such a separate lawsuit may still be necessary, but it occurs between co-infringers already after the injured party had received its compensation.

In case of infringements of competition law,[1] 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 (hereinafter, 'Damages Directive') considers the application of joint and several liability appropriate in principle, while laying down exemptions to that rule.

## II. Joint and several liability under the Damages Directive

### 1. Disciplines in the Damages Directive

The Directive lays down certain principles – it declares the right to full compensation (Article 3(1)), and places a duty on the Member States to have national legislation that makes possible the actual enforcement of the compensation (Article 3(2)). Moreover, Member States shall also ensure the equivalent assessment of harms caused by an infringement of national and European competition law (Article 4)(Peyer, 2016, p. 91).

In case of harm caused by multiple persons, the Damages Directive expects from the Member States, in principle, the application of joint and several liability of the co-infringers. Joint and several liability of co-infringers means – in external relations – that all injured parties may claim damages for their harms from any of the infringers until the harm has been fully compensated.[2] The internal relations of co-infringers are governed by the first sentence of Article 11(5) of the Damages Directive. In the relationship between

[1] Infringements of competition law: violation of Art. 101 and 102 of TFEU or national competition law – Art. 2(1) of the Directive 2014/104/EU of the European Parliament and of the Council of 26.11.2014 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, OJ L 349, 05.12.2014.

[2] Damages Directive, Art. 11(1).

co-infringers, the Damages Directive mentions only the right to 'recover a contribution from any other infringer'. It leaves the determination of the amount to be claimed to the Member States, because it mentions only 'the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement of competition law'. According to our understanding, the infringer that has actually paid a bigger amount of compensation than its own share of the claims of the injured parties under national law may request the difference from other co-infringers, and if they fail to provide their contribution voluntarily, the paying infringer may bring an action against them as well.

The European Commission considers certain exceptions to the general rule of joint and several liability appropriate.

## 2. Liability of immunity recipients

Detection of typically secret cartel agreements, and bringing cartels to an end, is greatly facilitated by rules that promise immunity from fines for that cartel member which provides the relevant competition authority with appropriate evidence on the cartel. Such leniency policies significantly contribute to the detection of cartels. However, the usage to leniency is minimized by the fact that cartel members revealing a cartel are exempted only from fines levied by competition authorities, but not from the payment of compensation. Until the payment of compensation constituted only a danger in theory (very unlikely in practice), immunity from administrative fines created sufficient incentives for leniency to work. However, the Damages Directive envisages that in the future, cartelists face a real risk of having to pay compensation. This will hinder detection based on leniency submissions of current and future cartels but, at the same time, hopefully dissuading many others from entering cartels in the first place. In order for the risk of compensation not to deter cartel members from stopping their cartel behaviours, and to provide evidence on the cartel, the European Commission wants to ensure a more favourable position to those infringers that cooperate with the authorities. This preferential treatment relates to the liability sphere, and affects both the external relations between infringers and injured parties, as well as internal relations among co-infringers.

Pursuant to the Damages Directive, leniency applicants exempted from the fine imposed in competition law proceedings (hereinafter, 'immunity recipients') shall be separated from other infringers in the realm of national law; national legislators shall prescribe less stringent liability rules for immunity recipients. Two groups of injured parties shall be distinguished. The immunity recipient shall pay compensation only for harm suffered by its own direct or

indirect purchasers and providers.[3] In other words, immunity recipients are exempted from the burden that other injured parties (other than its own direct or indirect purchasers and providers) may claim damages directly from them. They are liable to other injured parties only if the latter cannot receive full compensation from other co-infringers.[4]

In their internal relations, infringers may, in principle, claim between each other an amount based on their own portion of the responsibility for the harm caused. Immunity recipients are thus placed in a more favourable position, than that granted by the general rule, also in the internal relations with their co-infringers. The amount of the 'contribution' to be paid by an immunity recipient shall not exceed the sum of the harm caused to its own direct or indirect providers and purchasers. If another co-infringer actually compensates the harm, the immunity recipient is also in a favourable position with regard to the paying co-infringer's claim against the immunity recipient, because its reimbursement obligation shall not exceed the total sum of the harm caused to the immunity recipient's own direct or indirect providers and purchasers.[5]

## 3. Responsibility of small and medium-sized enterprises

Similarly to the general rule concerning immunity recipients, small and medium-sized enterprises (hereinafter, SMEs) shall not bear responsibility against all those injured by the cartel. Small and medium-sized enterprises shall only compensate harm suffered by their own direct or indirect purchasers. However, this rule is subject to conditions, and the exceptions specified in the Directive shall also be taken into account.[6] The Damages Directive does not contain a rule (unlike with respect to the immunity recipient) whereby a SME would be obliged to compensate the harm of injured parties other than its own direct or indirect providers or purchasers, if they fail to get compensation from other co-infringers. The phrase used in the Directive, whereby the aforementioned rule is applied without prejudice to the right to full compensation, may serve as a basis to reason for the existence of vicarious liability. On the other hand, if the requirements provided for in the Directive

[3] Pursuant to Art. 2(23) 'direct purchaser' means a natural or legal person who acquired, directly from an infringer, products or services that were the object of an infringement of competition law; 'indirect purchaser' means a natural or legal person who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser, products or services that were the object of an infringement of competition law, or products or services containing them or derived therefrom. The direct or indirect providers are not defined in Art. 2.

[4] Damages Directive, Art. 11(4).

[5] Ibidem, Art. 11(5).

[6] Ibidem, Art. 11(2)–(3).

are satisfied (that is, the SME is failing), a SME has hardly the assets to cover a claim submitted by another co-infringer.

## 4. Underlying reasons

Out of the two aforementioned cases, the interest of the injured party is easy to be recognized behind the first. The European Commission protects the best interests of all injured parties by giving preferential treatment to those infringers that facilitate the effectiveness of competition enforcement procedures, thus exempts the infringer from joint and several liability in a certain sphere. Without mitigating joint and several liability of immunity recipients, evidence necessary to determine an infringement of competition law would not become available, thus all injured parties would be in a far worse situation.

The second case mentioned above is specific because the Damages Directive tries here to deviate from its own joint and several liability of co-infringers rule, not favouring the injured party by any means. The European Commission makes at this point an exception only to save SMEs. This solution is contrary to the aim set out in the Damages Directive, namely the protection of injured parties; however, it fully corresponds with European measures favouring SMEs. Having regard to the fact that SMEs are not entitled to favourable treatment if they lead the infringement in question or have committed an infringement of competition law before, this responsibility norm while favourable to SMEs, nevertheless facilitates deterrence from future infringements.

## 5. Issues

### 5.1. Norm drafting

It is unfortunate that the Damages Directive separates the rules concerning the external and the internal relations of co-infringers. The right of injured parties to submit a claim against any of the co-infringers is laid down in Article 11(1). The provision concerning the internal relations of the co-infringers is included in the first sentence of Article 11(5), which was placed among rules concerning immunity recipients.

### 5.2. Interpretation of joint and several liability

On the one hand, Article 11(4) of the Damages Directive refers to the liability of an immunity recipient towards its direct and indirect purchasers and

providers. On the other hand, it refers to the liability of an immunity recipient towards other injured parties as joint and several. It does so despite the fact that it lays down the responsibility against these two groups of injured parties according to non-identical rules. In our opinion, the liability of an immunity recipient towards injured parties other than its own direct and indirect purchasers and providers is, in fact, a form of vicarious liability. Against such injured parties, immunity recipients are, in principle, exempted from joint and several liability of co-infringers, since compensation shall be paid in this context only if all other co-infringers prove unable to cover the damage caused.

### 5.3. Ceilings of the liability of immunity recipients to other co-infringers

The second sentence of Article 11(5) of the Damages Directive fixes the maximum liability level of immunity recipients – an immunity recipient shall not pay more than this maximum amount to those co-infringers who have actually paid the compensation. According to our standpoint, this provision determines the maximum amount to be paid by an immunity recipient in terms that are too vague.

Surely, a given immunity recipient may not be aware of the identity of all its direct and indirect purchasers and providers, as it may not be familiar with these undertakings. First, an immunity recipient might not know to whom its 'direct purchasers' sell products distributed by that immunity recipient or pass on services provided by that immunity recipient (the first group of 'indirect purchasers'). Second, it is even more difficult to know to whom these 'indirect purchasers' passed on these products and services (the second group of 'indirect purchasers'). Third, a similar difficulty might lie in knowing those natural and legal persons, who produce goods or services derived from the goods and services distributed by that immunity recipient (the third group of 'indirect purchasers'). Fourth, the immunity recipient might not be able to identify those indirect providers that provide components, semi-finished goods and services for direct providers that are in contact with the immunity recipient, as buying cartels affect negatively not only those in direct contact with the cartel members but also indirect providers. Because of the low price paid to direct providers being in contact with the immunity recipient, the direct provider is able to pay only a smaller price to its own providers.

The identity of a significant part of the indirect purchasers and providers becomes known to an immunity recipient only after they file a claim for damages and, in this context, after they provide evidence concerning the contested transactions.

On the other hand, an immunity recipient does not know, for a long time, the amount of the harm suffered by its direct or indirect purchasers and providers.

If that amount is contested, the degree of the harm caused by the immunity recipient to its own direct or indirect purchasers and providers becomes clear only after the court decision settling the legal dispute becomes final. Until this moment, the immunity recipient may not know the ceiling of its responsibility towards other co-infringers. Immunity recipients find themselves in difficulty when facing a claim for damages, as it is the immunity recipient itself who should prove the maximum rate of their responsibility, but at least for a while, it will not be able to do so.

We shall differentiate among four situations, depending on who makes the claim against an immunity recipient and for what kind of compensation of harms.

(1) If an injured party belonging to the group of 'own direct and indirect purchasers and providers of the immunity recipients' submits a compensation claim for damages from an immunity recipients, the latter may not evade it. After paying such compensation, the immunity recipient may claim a contribution towards the paid compensation from other co-infringers. The issue of the maximum amount of harms does not play a role here. When the immunity recipient compensates the harm of an injured party belonging to its own direct and indirect purchasers and providers, it will not exceed the amount of harm caused to injured parties belonging to its own direct and indirect purchasers and providers, because the damages claimed from him are part of that overall amount.

(2) If a person other than 'own direct and indirect purchasers and providers of the immunity recipient' submits a compensation claim for its harm from the immunity recipient, the position of the latter depends on the behaviour of its other co-infringers. If there is a chance for other co-infringers to compensate the harm, the immunity recipient may reject the payment of such compensation. The issue of the maximum level of liability of an immunity recipient comes into focus here, however, if the injured party proves that its damages claims towards other co-infringers were unsuccessful or that a part of its harm has not been recovered. In this case, if the immunity recipient can prove that it compensated the harm suffered by its direct and indirect purchasers and providers, it may be exempted from the compensation of the harm of an injured person other than its own direct and indirect purchasers and providers. As a matter of digression, it may occur, in principle, that the immunity recipient exceeds the maximum degree of its liability by paying compensating in full the harm suffered by injured parties other than its own direct and indirect purchasers and providers. In this case, compensation should only be paid up to the extent of that cap.

However, due to the aforementioned evidentiary difficulties, until the last direct or indirect purchaser or provider makes its claim, or, if the amount of harm is disputed, until the amount of compensation to be paid is not set by a final judgment of the court, the immunity recipient may not take advantage of the limitation of the maximum degree of liability the Directive provides for.

(3) If an immunity recipient faces a claim made by a co-infringer, which has already covered the harm suffered by an injured party, for the payment of a contribution towards the already paid damages, one has to examine whose harm was covered by the co-infringer that submits such contribution claim. If the claimant covered the harm of an injured party other than 'own direct and indirect purchasers and providers of the immunity recipient', the immunity recipient may reject the claim for a contribution from the paying co-infringer. In this case, the immunity recipient does not take part in the distribution of the already paid compensation (as a situation where the harm of the injured party has not been covered does not exist). Thus, in this case, it is not necessary to refer to the maximum degree of the liability of the immunity recipient, the latter may reject the claim for a contribution upon the applicable rule of special joint and several liability (in fact, secondary liability).

(4) If a co-infringer compensated the harm of an injured party belonging to 'own direct and indirect purchasers and providers of the immunity recipient', the immunity recipient shall take part in the distribution of the paid compensation. The payment of compensation could not have been refused if such an injured party had made the claim against the immunity recipient directly. The maximum degree of liability has no relevance in this case either, because if the immunity recipient covers its share of the harm of an injured party belonging to its own direct and indirect purchasers and providers, this compensation cannot exceed the overall amount of harm which was caused to all injured parties belonging to this group, because the individual compensation claimed from the immunity recipient is only a part of the overall liability amount.

The European Commission was likely focusing on a situation when the immunity recipient compensates the harm caused to its own direct and indirect purchasers and providers, but refuses claims submitted by other injured parties. After covering the harm caused to its own direct and indirect purchasers and providers, the immunity recipient may invoke the limited nature of its own liability against an injured party who does not belong to that group but has not received compensation from other co-infringers. The defence of the immunity recipient may be successful from the point when it has indeed covered the harm caused to its own direct and indirect purchasers and providers and reached the

maximum degree of its own liability. This assumption seems logical, but it does not take into account the possibility that it might turn out, in a relatively short period of time, that an injured party not belonging to the aforementioned group does not receive compensation from other co-infringers, and so it will claim compensation from the immunity recipient. The latter may thus become a defendant in an action for damages before it manages to compensate all of the harm caused to its own direct and indirect purchasers and providers (which constitutes the fact that determines the maximum degree of its liability). Therefore, notwithstanding the rule protecting immunity recipients, the latter will more than likely be forced to cover the harm of some injured parties not belonging to their own direct or indirect purchasers and providers, because at the time of the claim, the degree of compensation paid by a given immunity recipient has not yet reached the maximum degree of its own liability or, if its amount cannot be proved. In these cases, it would be advisable to suspend the seizing of the action for damages against such immunity recipient.

### 5.4. Responsibility of SMEs

While the Damages Directive refers to Commission Recommendation 2003/361/EC in connection with SMEs, the definition of SMEs is, in fact, laid down in Commission Regulation (EU) No. 651/2014 of 17 June 2014.

The exemption from joint and several liability is subject to arguments when it comes to SMEs – it seems that joint and several liability is not only applied as a general rule, but its total exclusion is considered justified in Brussels. This exception rule may, in certain cases, hinder injured parties from getting full compensation. Thus the special provision on SMEs jeopardizes the achievement of the fundamental goal of the Damages Directive.

The Damages Directive describes the liability of SMEs as an exception to joint and several liability of co-infringers ('By way of derogation from paragraph 1'). Upon the strict literal interpretation of the rules provided for in the Damages Directive, the liability of SMEs for harm caused to their direct and indirect purchasers may not be considered joint and several liability either. We believe that other co-infringers are jointly and severally liable together with the SMEs for these harms as well. It is likely that the Damages Directive intended to exempt joint and several liability only for those harms which were suffered by injured parties other than 'own direct and indirect purchasers of the SMEs'.

## III. Joint and several liability of co-infringers in CEE countries

### 1. Joint and several liability of co-infringers as a general rule in the 11 CEE Member States

The 11 Central and Eastern European Member States (CEE countries) prescribe, in principle, joint and several liability if multiple persons jointly cause harm by their behaviour that infringes competition law (Piszcz, 2017a, p. 302). CEE countries get this result (set out in the Damages Directive as an aim) thanks to two kinds of solutions.

One group of CEE countries did not need to make any harmonization efforts because their respective Civil Codes (or maybe separate Acts on Contract Law[7]) consider joint and several liability as applicable in the case of co-infringements. Their legislation contains also exceptions, or makes it possible for courts to waive joint and several liability under certain circumstances.[8] Civil Codes do not typically mention harm caused by competition law infringements separately, but joint and several liability (as a general legal consequence) is applicable to harm caused by infringements of competition law also.[9] This group of CEE countries had the task of determining which of its laws must not be applied in case of co-infringements of competition law.[10]

Concerning the other group of CEE countries,[11] their new legislations expressively declare that co-infringers which breach competition law are, in principle, held liable jointly and severally. Incidentally, it does not emerge from the national reports why, in general, these Member States deem this step necessary during the implementation of the Directive. For instance, the reports were not clear whether the respective rule of the Civil Code is applicable to infringements of competition law, or whether the Civil Code contains any rules at all on joint and several liability.

Joint and several liability means the same in both groups, namely that the injured party may claim damages from one of the co-infringers. Consistently also, the infringer that compensated the damages of an injured party may claim its proportional reimbursement from other infringers.

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[7] For example: Estonia, Slovenia.

[8] Bulgaria, Czech Republic, Estonia, Lithuania, Hungary, Poland, Slovenia.

[9] 'As a rule, CEE countries do not need to introduce the principle [of joint and several civil liability of competition law infringers], as the national reports assert – they already have it in their laws with regard to competition law infringements,' (Piszcz, 2017a, p. 302).

[10] For example: in Hungary during the amendment of the act on competition it was declared that other than in the Civil Code, the court may not ignore joint and several liability in case of infringements of competition law.

[11] Croatia, Latvia, Romania, Slovakia.

## 2. Exception rules to joint and several liability of co-infringers in CEE countries

What the legislations of CEE countries had in common, before the adoption of the Damages Directive, is that their contract laws had not contained any exception rules, which would have exempted a group of co-infringers from joint and several liability based on their individual characteristics (e.g. financial situation of a co-infringers) or special behaviour of a co-infringer which behaviour should be independent of the action which has led to the harm (e.g. fact-finding activity of the immunity recipients during the competition law procedure). The Damages Directive caused the legislatures of all of the examined countries to adopt new rules on immunity recipients and SMEs. They all implemented these rules; there is only a difference in the date of their implementation.

In Hungary and in Slovakia, immunity recipients were exempted from joint and several liability already according to the White Paper, hence even before the adoption of the Damages Directive (Miskolczi Bodnár, 2017, p. 129 and Blažo, 2017, p. 253). These regulations were later amended in light of the actual Directive. Other countries awaited the adoption of the Damages Directive and introduced relevant national rules (draft rules) with content appropriate to the Directive that is, containing the special exceptions (Piszcz, 2017, p. 19).

## 3. Assessment of the justification of exceptions to joint and several liability of co-infringers

Generally, the rapporteurs do not query the exemption given to immunity recipients from joint and several liability, as evidence provided by immunity recipients is of considerable aid to the determination of a competition law infringement. It is possible that because of the exception rules concerning immunity recipients, a minor part of competition-based harms will not be recovered, but it is quite possible that without the fact-finding activity of immunity recipients, injured parties would not receive any compensation at all, as they could not prove the unlawfulness of the conduct. Only the national report from Lithuania[12] expressed doubts about both exceptions, that is, not only in connection to SMEs but immunity recipients as well (Mikelėnas and Zaščiurinskaitė, 2017, p. 193). At this point, the question arises whether there

[12] It might be debatable whether those exemptions are necessary and can be justified based on the principles of justice, reasonableness and good faith. (National report of Lithuania).

is a need for exceptions, on the one hand, and, on the other hand, whether the existence of exceptions from joint and several liability is in compliance with the principle of justice, reasonableness and good faith.

The SMEs' exemption from joint and several liability gives food for thought based on the national report from Hungary. In this case, the Directive favours a given group of entities (SMEs) who do not improve the position of the injured parties (Miskolczi Bodnár, 2017, p. 129 and 140).

The SMEs exemption from joint and several liability is based only on reasons other than the right to compensation (such as preservation of employment, social aspects). In practice, it is not expected that the position of the injured parties will substantially deteriorate due to the SMEs exemption, as only those SMEs are exempted from joint and several liability pursuant to the Directive, from who injured parties cannot expect considerable damages anyway. However, it is dogmatically difficult to explain why the Directive exempts some infringers to the detriment of injured parties, while it was adopted in order to facilitate full compensation. The Polish national report (Piszcz and Wolski, 2017, p. 220) draws attention to the realisation that the financial position of a SME is difficult to assess; that is, whether its financial standing is consistent with point 2b of Article 11 of the Damages Directive ('the application of the normal rules of joint and several liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value'). Therefore, it is doubtful whether the SMEs exemption from joint and several liability is feasible in light of the provisions of the Damages Directive.

## IV. Position of immunity recipients in national laws

When it comes to the exceptions to joint and several liability, national reports generally state that domestic rules have been harmonized accordingly. We are forced to note that the 11 national reports do not discuss the rules on joint and several liability with the same level of detail (some national reports contain only one page on the problem of the joint and several liability and the exceptions to joint and several liability). As a consequence, it may not be excluded with certainty that there are discrepancies between the Directive and the provisions of national laws concerning immunity recipients.

During the examination, we separate the position of immunity recipients and the injured parties, on the one hand, and the position of immunity recipients and other co-infringers, on the other hand.

## 1. Relationship of the immunity recipient and the injured parties

CEE countries implemented (plan to implement) the rules of the Damages Directive regarding the varying level of liability of immunity recipients, which differs depending on who the injured party is. Immunity recipients are jointly and severally liable with other co-infringers for the harm suffered by their own direct and indirect purchasers and providers. Immunity recipients are in a better position regarding harm suffered by injured entities that are not their own direct and indirect purchasers and providers, because these harms shall only be compensated by an immunity recipient in the event that such injured parties have not received sufficient compensation from other co-infringers.

After the adoption of the Damages Directive, the majority of CCE countries transposed these provisions as new rules. However, Hungary and Slovakia had introduced an exception regarding immunity recipients into their national laws earlier in light of the White Paper (Miskolczi Bodnár, 2017, p. 129 and Blažo, 2017, p. 253). These rules were more beneficial to the immunity recipients than the relevant norms of the Damages Directive. These rules were applicable for a relatively short period of time only in these two countries. Norms on legal position of the immunity recipients were adjusted to the norms of the Damages Directive in December 2016.

Only the Romanian national report informs us that immunity recipients shall not bear joint and several liability, but only joint liability towards their own direct and indirect purchasers (Mircea, 2017, p. 240). The Romanian national report does not mention injured 'providers'; in the Damages Directive, the rules on liability towards providers are the same as on harm caused to own direct and indirect purchasers of the immunity recipient.

## 2. Relationship of the immunity recipient and other co-infringers

In light of those national reports that also considered this question,[13] the legislation of CEE countries transposed the rule of the Damages Directive regarding claims for the payment of a contribution to damages already covered submitted by the co-infringer that had actually compensated the harm.

We highlight three of the issues related to claims for the payment of a contribution towards damages already covered.

[13] Croatia, Czech Republic, Estonia

### 2.1. Starting date of the payment obligation of the immunity recipient

The national report of Croatia points out that the starting date of the payment obligation of the immunity recipients is not clarified in the Damages Directive. 'It is very unclear what is the determining moment when the claim against other co-infringers shall be deemed unsuccessful, consequentially triggering the right of such victims to request compensation from the immunity recipient.' (Butorac Malnar, 2017, p. 65).

According to the Croatian national report, the date when the decision is taken on the irrecoverable nature of compensation from other co-infringers may be considered as the date when the position of the immunity recipient changes. Nevertheless, the date when pubic enforcement proceedings are to be considered finally unsuccessful is uncertain. This uncertainty jeopardizes the full compensation of injured parties (Butorac Malnar, 2017, p. 65).

Issues connected to the claim for contribution.

### 2.2. Factors determining the internal share of the responsibility among co-infringers

Some of the national rapporteurs expressed their disappointment about the shortcomings of the legislation.

The national report from Latvia[14] wished for more precise guidance concerning the share of responsibility among the persons liable jointly and severally (Jerneva and Druviete, 2017, p. 162). The Latvian national report noted that it would be necessary to settle this issue before concrete legal disputes ensue, facilitating the work of the parties and the court.

The Croatian draft legislation indicates some factors to be taken into account during the determination of internal responsibility allocations (like the circumstances of the case, the market share, the turnover and the role in the competition infringements of the infringers, regardless of whose purchaser or provider the injured party is). This list partially follows the rules detailed in recital 37 of the Damages Directive (Butorac Malnar, 2017, p. 65).

In the other group of CEE countries, national reports did not raise any complaints about shortcomings regarding rules on joint and several liability, presumably because their civil law norms regulate this question and the respective Member States found these general rules appropriate also for harm caused jointly by multiple competition law infringements.

[14] It remains to be seen how the identification of the relative share of responsibility will take place in practice. The Amendments are silent on this matter, while it would be practical to try to resolve these issues beforehand and include, for example, a rebuttable presumption of equal share of liability, or give general guidelines which would assist the parties to the dispute as well as the judge.

The Estonian act on contract law prescribes the taking into account of all essential circumstances for each person (including, but not limited to, the gravity of non-performance, the unlawful nature of the conduct and the degree of arising risk) during the determination of the share of co-infringers. The Estonian national report does not refer to the fact that the authors of the report considered the supplementing necessary in case of harms jointly caused by competition law infringements (Pärn-Lee, 2017, p. 113).

The Hungarian national report cites the rules set out in the Civil Code[15] as well, and assumes that those circumstances govern the relationship of co-infringers in the case of harm caused by competition infringement as well (Miskolczi Bodnár, 2017, p. 129).

### 2.3. Maximum degree of liability of the immunity recipient

The Croatian and the Latvian national reports (Butorac Malnar, 2017, p. 65 and Jerneva and Druviete, 2017, p. 162) point out that based on the Damages Directive, the maximum degree of the liability of an immunity recipient is different, depending on whether the injured party is

(1) a person, who is not 'own direct or indirect purchaser or provider of the immunity recipient', but the direct or indirect purchaser or provider of any of the other co-infringers, as well as,
(2) a person, who is not in a relationship as 'own direct or indirect purchaser or provider' with either the immunity recipient or any of the co-infringers (so-called umbrella customer or competitor).

The maximum degree of liability set out in Article 11(5) of the Damages Directive governs the first case; in the second case however, the liability of the immunity recipient adjusts to the share of liability without a special maximum limit.

## V. Exemption of SMEs from joint and several liability in national laws

### 1. Scope ratione personae of the special liability rule

The national report of Slovenia draws attention to the realisation that the Damages Directive contains only provisions concerning small and medium-sized enterprises, even though it refers to Commission Recommendation

[15] Hungarian Civil code uses a three steps system. The first step is the degree of the tortfeasors culpability. The second step – if the culpability cannot be determined – in proportion to tortfeasors respective involvements. If the degree of involvement cannot be verified, tortfeasors shall cover the damages equally.

2003/361/EC the very title of which speaks of micro, small and medium-sized enterprises. Therefore, rules of the Directive that must be implemented by the member States only with regard to small and medium-sized enterprises shall be applied in Slovenian law also to micro enterprises, in connection with the compensation of harms caused by infringements of competition law (Vlahek and Podobnik, 2017, p. 279).

The national report of Slovakia, similarly to Slovenia, mentions that Commission Recommendation 2003/361/EC is also applicable to micro enterprises as well as mentions that Commission Regulation (EU) No. 651/2014 of 17 June 2014 is also applicable to micro enterprises (Blažo, 2017, p. 253).

The national report of Slovakia draws the attention to that although the Damages Directive refers to Commission Recommendation 2003/361/EC in connection with SMEs, SMEs are, in fact, defined in EU law in Commission Regulation (EU) No. 651/2014 (Blažo, 2017, p. 253). However, in light of the Directive, a significant part of CEE countries refers to Commission Recommendation 2003/361/EC in connection with the definition of SMEs.

Pursuant to the Czech parliamentary proposition, the definition of SMEs may not only cover undertakings but also associations of persons.

To the elements of the definition of SMEs, the Hungarian legislator added that the infringer must fulfil the requirements of being a 'SME' during the whole duration of the unlawful behaviour (Miskolczi Bodnár, 2017, p. 129 and 140).

## 2. Whether SMEs are exceptions to joint and several liability?

In this point we examine whether the 11 CEE exempt SMEs from joint and several liability in cases provided for in the Damages Directive.

The vast majority of CEE countries follow the Damages Directive in connection with

(1) the exception to the general rule, namely SMEs are exempted from joint and several liability (Article 11(2) of the Damages Directive),
(2) the conditions (Article 11(2) a) and b) of the Damages Directive), and
(3) exceptions, namely SMEs are not exempted from joint and several liability (Article 11(3) a) and b) of the Damages Directive).

The legislation of some CEE countries considered, however, the protection of the injured parties more important than transposing the Directive verbatim.

Act 350 of 2016 passed in December 2016 in Slovakia obliges SMEs (just like immunity recipients) to compensate harm suffered by persons other than their direct and indirect purchasers if they were not compensated by other

co-infringers participating in the same competition infringement. By this solution, the Slovakian legislator seeks to balance the solution beneficial for SMEs and the principle of full compensation (Blažo, 2017, p. 253).

The Estonian draft follows, in general, the Directive literally. However, it differs from the Directive in connection with the exception to joint and several liability of SMEs. The exemption from joint and several liability shall not be applied to SMEs if the harm caused to their direct or indirect purchasers is not compensated by other co-infringers (Pärn-Lee, 2017, p. 113).

The national report from Croatia also states that the national legislator considered the difference in the detailed rules concerning the two exceptions to joint and several liability as unjustified. According to the Croatian standpoint, there is an unintended difference in favour of SMEs in the Damages Directive: while immunity recipients bear a certain obligation to reimburse (also if the degree of that duty is limited), SMEs do not have such obligation (Butorac Malnar, 2017, p. 65).

Czech legislation makes the SMEs liable for harm, if such harm has not been compensated by other co-infringers. According to the national report, this rule was inspired by the norm on immunity recipients (Petr, 2017, p. 91).

The Slovenian legislator also decided to extend the liability conditions applicable to immunity recipients also to SMEs – if the harm cannot be compensated by anybody else, these two groups shall pay the compensation as a last resort (Vlahek and Podobnik, 2017, p. 279).

Hungarian regulation considers only the situation if the damages may not, or not fully, be compensated by other – non-SMEs – undertakings liable for the same infringement. Thus, the Hungarian legislator also takes into consideration if there are further SMEs among the co-infringers (Miskolczi Bodnár, 2017, p. 129 and 140).

## 3. Circumstances underlying the exemption to joint and several liability of SMEs

The Polish national report points out that courts must face difficulties when they shall determine whether the application of the general rules regarding joint and several liability would cause a given SME to lose its economic viability and impairment of all its assets (Piszcz and Wolski, 2017, p. 220).

### 4. To what kind of harm is the principal responsibility of SMEs limited?

The Damages Directive differentiates among harms in connection with the liability of SMEs, and places harms caused by a SME to its own direct and indirect purchasers in the first category. This list concerns a narrower meaning of harms than the list applied in connection with the liability of immunity recipients. In case of SMEs, the Damages Directive does not mention harms caused to the direct and indirect providers of SMEs, just to its direct and indirect purchasers.

The majority of the CEE countries transposed literally the list found in the Damages Directive, thus SMEs are exempted from the obligation of compensating harm caused to their own direct and indirect providers.

However, some CEE countries have completed the list of relevant harms by the addition of harm caused to direct and indirect providers of SMEs. According to Hungarian law[16] (Miskolczi Bodnár, 2017, p. 140), the liability of SMEs covers also harms suffered by their direct and indirect providers (rather than only harms suffered by their direct and indirect purchasers). According to Czech law, SMEs are liable for harms caused to their providers as well (Butorac Malnar, 2017, p. 65). The Czech national rapporteur expressively describes the aforementioned divergence from the Damages Directive as reasonable, assuming that providers have simply been omitted in error in point 2 of Article 11 of the Directive. Also in connection with the Polish draft, Anna Piszcz informs us in the synthesis of the national reports that according to Polish law the liability of SMEs covers also harms suffered by their direct and indirect providers (Piszcz, 2017a, p. 302).

## VI. Links of the regulation

Joint and several liability as a general rule and its two exceptions are connected to the following questions.

### 1. Liability of a co-infringer reaching a settlement through consensual dispute resolution

In this study, we have not dealt with the special status of a competition law infringer who reaches a settlement with an injured party through consensual dispute resolution. In general, following a consensual settlement, the claim

[16] Art. 88/H(2) of the Hungarian Competition Act.

of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement of competition law inflicted upon that injured party.[17] In exceptional cases, it shall compensate these harms as well, if this part of the harm of the injured party will not be covered by other co-infringers. However, this liability of a compensatory nature may be excluded in the settlement itself.[18] Co-infringers may submit a claim for partial reimbursement in their internal relations. In such cases, national courts shall take sufficiently into account compensation paid as a result of a settlement reached earlier by way of consensual dispute resolution.[19]

Consensual settlements lead to faster compensation of a part of the harms and are not as costly. It depends on the injured party which part of its claim for damages it will waive in that regard, and makes future recovery riskier.

### 2. Liability of parent companies

If neither of the other co-infringers nor the defendant co-infringer gave compensation for the harm or part thereof, but the person obliged to compensate it has a parent company, then liability of its parent company may arise, as in competition law (Joshua, Bottemann and Atlee, 2011, p. 4). This may solve the problem, especially in case of insolvency of SMEs. The fact that the parent company withdrew its share capital from the subsidiary, or gave the profit stemming from the SME to another member of the corporate group, gives rise to the liability of the parent company towards the creditors i.e. the injured parties. This leads us into another legal field – corporate law – which is characterised by far greater diversion of national norms than tort law. For example, in Bulgaria there is no possibility of the application of the institution of 'piercing the corporate veil' (Petrov, 2017, p. 37).

## VII. Proposal

The normal course of an assessment related to the implementation of a directive is whether the Member States have performed their legal harmonization duties on time, whether the implementation of the rules of the directive was complete, and to what an extent national norms deviates from it. This study on the material issues of the implementation of the general

[17] Damages Directive, Art. 19(2).
[18] Ibidem, Art. 19(3).
[19] Ibidem, Art. 19(4).

rule of joint and several liability, as well as exceptions granted in this regard to immunity recipients and SMEs, may be concluded with a generally positive assessment following the traditional scenario. It is a fact that the norms of the Directive were implemented and that there is no deviation that might jeopardize either the enforcement of claims for damages or the integrity of the internal market.

The question arises how much the Damages Directive did facilitate the duties of transposition. We must note that the length of the harmonization process is largely attributable to the difficulties of the topic and its complexity. Many partly contradictory interests had to be taken into account, the aspects of public and private law had to be placed on a common platform, and the application of many legal instruments (compensation in civil law, protection of confidentiality, civil procedure) had to be harmonized. The Damages Directive largely explained the reasoning behind its chosen solutions, and clearly determined the norms to be implemented. However, there is an exception – the SMEs exemption – where it would not be appropriate to wait the whole 10 years for a routine review of the workings of the directive.

The doctrine related to the SMEs exemption draws attention to the realisation that it is unfortunate when a solution, that arose in a relatively late stage of the legislative process of a given directive, ultimately becomes part of that directive. Neither the Green Paper of 2005 nor the White Paper of 2008 mentioned SMEs with respect to exceptions to joint and several liability. This shows that the actual period of time spent on developing the final solution on this topic was much shorter.

The implementation of these rules is required by the Damages Directive only with regard to small and medium-sized enterprises. It would, however, seem practical, for example, to declare those rules applicable also to micro enterprises, in relation with the compensation of harms caused by infringements of competition law.

It would have been appropriate in any case to spell out the reasons for the introduction of such new legal institution in the Preamble of the Directive. Unfortunately, none of the 56 recitals of the Damages Directive deal with the special status granted to SMEs, thus a national legislator is forced to speculate during the implementation process.

It would have been duly justified to provide such an explanation, especially when two exceptions are established but their rules differ even from each other. It was visible that some CEE countries considered this difference unjustified, and thus uniformly ensured an opportunity for other co-infringers who actually compensated the harm of the injured party to submit a claim for reimbursement against the immunity recipient and SMEs. At the same time, other CEE countries considered that their powers do not cover it.

It would be worth reviewing the implementation of the exceptions to joint and several liability after a year, in conjunction with the issue of alternative dispute resolution. Though the national reports on laws and draft laws (which have not been adopted yet and have not entered into force) mainly highlighted substantive similarities, there is a significant chance that more discrepancies come to light in the future among the provisions concerning the final national legal texts and the Damages Directive. It would be appropriate to make a comparison again, after the European Commission explains in detail the discrepancies and the difficulties of interpretation that will emerge as to how, and who was meant to be exempted from joint and several liability. In our opinion, the currently visible discrepancies are partly due to Member States not having received sufficient information from the European Commission about the goals underlying the norms of the Directive.

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# Quantification of Harm and the Damages Directive: Implementation in CEE Countries

by

Valentinas Mikelėnas and Rasa Zaščiurinskaitė*

**CONTENTS**



## *Abstract*

Quantification of harm is regarded as one of the most significant obstacles for the full compensation of harm and development of private enforcement within

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the European Union, including CEE Member States. Consequently, the Damages Directive establishes general rules and requirements for the quantification of harm, such as a rebuttable presumption of harm in case of cartels, the power of national courts to estimate harm as well as others, which closely interact with the principle of full compensation emphasized by the case-law of the European Union and directly established in the Damages Directive. The main focus of this paper is the effectiveness of the rules on the quantification of harm in general, and how these rules will contribute to the development of private antitrust enforcement in CEE Member States. Therefore, one of the issues to be discussed in the paper is the analysis of how, and to what extent specific rules and requirements for the quantification of harm have been transposed into the national legislation of CEE Member States. As certain CEE national jurisdictions have had certain rules for the quantification of harm already before the implementation of the Damages Directive, the paper analyses how effective these rules have been, and how much they have contributed to the development of private antitrust enforcement of those CEE national jurisdictions. Previous experience of those CEE Member States in applying specific rules for the quantification of harm is important, in order to assess the possible impact of the newly introduced rules on the quantification of harm and on private antitrust enforcement in general in other CEE Member States. The rules for the quantification of harm will not enhance private antitrust enforcement on their own, however, their effective application by national courts together with other rules under the Damages Directive should contribute to a quicker development of private enforcement in CEE Members States.

## *Résumé*

La quantification du préjudice est considérée comme l'un des obstacles les plus importants à la réparation intégrale des dommages et au développement de l'application privée du droit de la concurrence au sein de l'Union européenne, y compris dans les États membres d'Europe centrale et orientale. Par conséquent, la Directive Dommages établit des règles et des exigences générales pour la quantification du préjudice, telles qu'une présomption réfragable de préjudice en cas des cartels, le pouvoir des tribunaux nationaux d'estimer le préjudice, ainsi que d'autres mécanismes qui interagissent étroitement avec le principe d'indemnisation intégrale - souligné par la jurisprudence de l'Union européenne et directement établi dans la Directive Dommages. L'objectif principal de cet article est de se focaliser sur l'efficacité des règles sur la quantification des dommages en général, et voir comment ces règles contribueront au développement de l'application privée du droit de la concurrence dans les États membres d'Europe centrale et orientale. C'est pourquoi, l'une des questions à examiner dans cet article est l'analyse de quelle manière et dans quelle mesure des règles et des exigences spécifiques pour la quantification des dommages ont été transposées dans la législation nationale des États membres d'Europe centrale et orientale. Étant donné que certaines juridictions nationales ont déjà adopté certaines règles pour la quantification des

dommages avant la mise en œuvre de la Directive Dommages, l'article analyse l'efficacité de ces règles et leur contribution au développement de l'application privée du droit de la concurrence. L'expérience de ces États membres d'Europe centrale et orientale dans l'application de règles spécifiques de quantification des dommages est importante pour évaluer l'impact éventuel des nouvelles règles sur la quantification des dommages et de l'application privée du droit de la concurrence en général dans les autres États membres d'Europe centrale et orientale. Les règles de quantification des dommages n'amélioreront pas l'application privée du droit de la concurrence elles-mêmes, mais leur application efficace par les tribunaux nationaux avec d'autres règles de la Directive Dommages devraient contribuer à un développement plus rapide de l'application privée du droit de la concurrence dans les États membres d'Europe centrale et orientale.

**Key words:** private antitrust enforcement; quantification of harm; full compensation; effectiveness; presumption of harm; implementation; Damages Directive; CEE Member States.

**JEL:** K13; K21; K41; K42

## I. Introduction

Quantification of harm has been identified as one of the most significant obstacles for the development of private enforcement within the European Union, due to 'overly demanding requirements regarding the degree of certainty and precision of a quantification of the harm suffered'.[1] Before the implementation of the Damages Directive,[2] domestic legal systems of EU Member State have by themselves determined their own rules on the quantification of harm caused by a competition law infringement. It was for the Member States and for their national courts to determine what requirements the claimant had to meet when proving the amount of the harm suffered, the methods that could be used in quantifying its amount, and the consequences of not being able to fully meet those requirements.[3]

[1] European Commission DG Competition Brussels (June 2011). Draft Guidance Paper Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union. Retrieved from: http://ec.europa.eu/competition/consultations/2011_actions_damages/draft_guidance_paper_en.pdf (01.06.2017).

[2] Directive 2014/104/EU of the European Parliament and of the Council of 26.11.2014 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, OJ L 349, 05.12.2014.

[3] Recital 46 of the Damages Directive.

As European Union jurisprudence guarantees the right to full compensation of harm caused by the breach of Articles 101 and 102 TFEU,[4] it was necessary to ensure that the requirements of national law regarding the quantification of harm in competition law cases should not be less favourable than those governing similar domestic actions (**principle of equivalence**), nor should they render the exercise of the Union right to damages practically impossible or excessively difficult (**principle of effectiveness**).[5]

For that purpose, Article 17(1) of the Damages Directive stipulates that Member States must ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. In addition, the Damages Directive establishes common principles and requirements for the quantification of harm. Firstly, a rebuttable presumption that cartel infringements result in harm has been established. Secondly, the Damages Directive empowers national courts to estimate the amount of the harm caused by the competition law infringement, subject to conditions. Thirdly, national competition authorities (hereinafter, NCAs) may provide guidance to national courts on the quantum of the harm. Finally, the European Commission should provide general guidance on this issue at the Union level.[6] All these principles and requirements closely interact with the principle of full compensation established in the Damages Directive.

Therefore, the objective of this paper is to analyses and compare the rules on full compensation and the quantification of harm in CEE Member States according to existing national legislation, the impact of the Damages Directive on the national legislation of those countries, as well as possible further developments of the legislation and its application in this area. This paper, however, shall not analyse the specific methods of quantifying harm. Firstly, this paper reviews how the aforementioned rules of the Damages Directive had been, or intended to be transposed in different CEE Member States, and assesses whether the national rules are compliant with the Damages Directive.[7] Furthermore, the paper reviews the peculiarities of the legislation of certain CEE Member States, which went beyond the minimum scope and requirements of the Damages Directive and introduced additional rules related

[4] See judgment of 20.09.2001, *Courage and Crehan*, case C–453/99, ECLI:EU:C:2001:465, para. 26; judgment of 13.06.2006, *Manfredi*, joined cases C–295/04 to C–298/04, ECLI:EU:C:2006:461, para. 60; judgment of 14.06.2011, *Pfleiderer*, case C–360/09, ECLI:EU:C:2011:389, para. 36 and judgment of 06.11.2012, *European Community v. Otis NV and others*, case C–199/11, ECLI:EU:C:2012:684.

[5] Recital 46 of the Damages Directive.

[6] Recitals 46 and 47 of the Damages Directive.

[7] Rules related to passing-on of overcharges shall not be covered by this paper.

to the quantification of harm. As certain CEE Member States were still in the process of implementing the Damages Directive during the preparation of this paper, the paper is *inter alia* based on draft legislation proposals indicated by the respective contributors from those CEE Member States. Finally, the paper assesses whether and to what extent the new rules on the quantification of harm, both the rules implementing the Damages Directive and particular national rules of specific CEE countries, will contribute to the enhancement of private antitrust enforcement in CEE Member States.

## II. Full compensation of harm and quantification of harm

### 1. Introductory remarks

The Damages Directive establishes the principle of full compensation of damages (*restitution in integrum*), which means that a person who has suffered harm should be placed in the position in which that person would have been if the infringement of competition law had not been committed.[8] Full compensation should, nevertheless, not lead to overcompensation, whether by means of punitive, multiple or other types of damages.[9]

Following the Damages Directive, full compensation shall cover the right to compensation for actual loss (*damnum emergens*) and for loss of profit (*lucrum cessans*), plus the payment of interest.[10] The Damages Directive does not define the aforementioned types of harm, except for the notion of overcharge[11] as the latter relates to the novelties introduced by the Damages Directive regarding the passing-on of overcharges.[12]

The principle of full compensation has been well-established in most CEE countries already before the implementation of the Damages Directive. However, some of the related rules differed (in particular with regard to the quantification of harm as overcharge, loss of profit and interest calculation). Furthermore, peculiarities with respect to the quantification of harm as loss of profit and interest will be overviewed before and after the implementation of the Damages Directive.

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[8] Art. 3(2) of the Damages Directive.

[9] Art. 3(3) of the Damages Directive.

[10] Ibidem.

[11] The difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law (Art. 2(20) of the Damages Directive).

[12] Art. 12–16 of the Damages Directive.

## 2. Quantification of lost profit

Some of the CEE Member States have imposed quite a high burden of proof on the party claiming damages, in the form of lost profit, before the implementation of the Damages Directive. Namely, Latvian Civil Law (Article 1787) states that 'mere possibilities shall not be used as the basis for calculating lost profits, rather there must be no doubt, or it must at least be proven to a level that would be credible as legal evidence, that such detriment resulted, directly or indirectly from the act or failure to act which caused the loss'. It follows from the above that in order to prove lost profit, the claimant will be forced to prove that a specific violation by the infringer was the only credible explanation for the fact that the claimant lost specific profit. It seems that such proof will rarely be possible, and claimants would be forced to ask for the court to give an estimate, at the court's discretion, of the amount of the profit lost (Jerneva and Druviete, 2017, p. 162–165).

Similarly, Czech case-law requires a rather high level of proof for the damages in the form of lost profit. No hypothetical calculations of theoretical profits are allowed. The court practice requires some form of a 'comparator-based' method to be employed by the claimant, in order to prove that in the ordinary course of its business activities it would have generated some profit (with practical certainty), and the only reason why it did not was an intervening event in the form of an illegal conduct of the infringer.[13] Several antitrust cases where the plaintiff claimed lost profit due to abuse of dominance were thus dismissed as 'hypothetical'.[14] In Slovenia, the court must be (practically) convinced of the existence of a certain amount of damages by the claimant. Article 216/1 of Slovenian Civil Procedure Act, however, provides that when the liability of the infringer is established, and only the amount of damages remains in dispute, a court may, in exceptional circumstances, use its judicial discretion to establish the missing facts (Vlahek and Podobnik, 2017, p. 280–282). This discretion should, however, by no means be a safe harbour for judges who are unwilling, or unable to objectively determine easily determinable facts through means of evidence (Vlahek and Podobnik, 2017, p. 280–282).

As the aforementioned national legislation and case-law establishes a rather high standard of proof for the quantification of lost profit, in order to comply with the Damages Directive (including the principles of effectiveness and equivalence under Article 4 of the Damages Directive), certain changes

[13] See e.g. the Judgment of the Supreme Court of the Czech Republic of 17.04.2012, Ref. No. 28 Cdo 1824/2010. For more details see commentary to sections 2988 and 2990 by: Kindl, 2016.

[14] See e.g. the Judgment of the Superior Court in Prague of 29.07.2015, Ref. No. 3 Cmo 316/2014.

should be introduced into national legislation and/or case-law with respect to the quantification of harm in the form of lost profit in competition based damages cases.

In addition, Slovenian law has introduced additional rules for the quantification of damages while implementing the Damages Directive. Article 62k/1 of Slovenian Prevention of Restriction of Competition Act[15] states that in determining damages 'the court may take into account also part of the defendant's profit gained by the breach of competition law'. This provision was introduced into the proposal of the Prevention of Restriction of Competition Act by the Ministry only at the latest stage of the implementation process, depriving the stakeholders of the opportunity to comment on it. It is doubtful whether any analysis of the need and of the appropriateness of this provision has actually been made. This provision, as it stands now, is not clear enough as to what 'taking into account also part of the defendant's profit' means. No explanations whatsoever are given in the commentary to the proposal that has been submitted to the National Assembly (Vlahek and Podobnik, 2017, p. 280–282). Nevertheless, it is believed that the aforementioned novelty should be used in compliance with the principle of full compensation and avoiding any overcompensation as established under the Damages Directive.

It should be noted that a possibility for a claimant to require the infringer's profit as this claimant's damages has been effective in Lithuanian law since 2001, when the Civil Code had come into effect (Article 6.249 (2) of the Civil Code). Nevertheless, this provision has not been used in private antitrust cases yet, albeit it was used in a few cases for damages compensation resulting from actions of unfair competition[16] with respect to competitors (their legal basis lies in Article 15 of the Lithuanian Law on Competition). The Supreme Court of Lithuania emphasized that when the lost profit of the injured person and the infringer's gain from the illegal actions coincide, they cannot be awarded together, otherwise the principle of full compensation and *ne bis in idem* principle shall be violated.[17] Such jurisprudence is in line with the principle of full compensation under the Damages Directive.

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[15] Law Amending the Law on the Prevention of Restriction of Competition of Slovenia. Retrieved from: https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2017-01-1208?sop=2017-01-1208 (01.06.2017).

[16] For instance, the company claims damages compensation jointly and severally suffered due to the illegal usage of its business secrets by its rival where an ex-employee of the company discloses illegally such business secrets to the rival company.

[17] See Resolution of the Supreme Court of the Republic of Lithuania of 05.02.2016, civil case No. 3K–7–6–706/2016.

### 3. Calculation of interest

Full compensation under Article 3(2) of the Damages Directive covers *inter alia* the payment of interest. As Recital 12 of the Damages Directive indicates, '[t]he payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time (…)'. It coincides with the jurisprudence of the Court of Justice that full compensation for the harm sustained must include the reparation of the adverse effects resulting from the lapse of time since the occurrence of the harm caused by the infringement.[18]

Therefore, Recital 12 of the Damages Directive establishes that the interest should be calculated from the time when the harm occurred until the time when compensation is paid. However, the Damages Directive leaves it to the Member States to establish the qualification of such interest (as compensatory or default interest), and whether the laps of time is taken into account as a separate category (interest) or as a constituent part of actual loss or loss of profit. The Damages Directive does not establish any criteria for the calculation of the interest rate. Nevertheless, the general principle established under Article 3(3) of the Damages Directive that full compensation under the Damages Directive should not lead to overcompensation should be followed. Therefore, Member States are free to establish their own rules on the calculation of interest, provided they do not lead to overcompensation.

Most of the CEE countries transposed the aforementioned provisions granting a right to the claimant to interest from the moment the harm occurred and until the date of the compensation of the harm caused.

The calculation of the interest rate varies between countries. For instance, the Civil Code of Poland sets forth in Article 363 § 1 that 'if the redress of damage is to be made in cash, the amount of damage shall be determined according to the prices on the date of calculating damage unless particular circumstances require that the prices existing at a different moment be adopted as its basis'.[19] Having this in mind, as well as the motive of Recital 12 of the Damages Directive in relation to the time when the injured party can demand interest, Polish lawmakers provided in Article 8 of the Act[20]

[18] See judgment of 27.03.1990, *Grifoni II*, Case C–308/87, ECLI:EU:C:1990:134, para. 40 and Opinion of Advocate General Tesauro in case C–308/87 *Grifoni II*, ECLI:EU:C:1989:624, para. 25; judgment of 19.05.1992, *Mulder and others v. Council and Commission,* joined cases C–104/89 and C–37/90, ECLI:EU:C:1992:217, para. 51. In the context of loss of purchasing power, see judgment of 26.02.1992, *Brazzelli Lualdi*, joined cases T–17/89, T–21/89 and T–25/89, ECLI:EU:T:1992:25, para. 40.

[19] English version: Bil, Broniek, Cincio and Kiełbasa, 2011, p. 161.

[20] Act on Claims for Damages for Infringements of Competition Law of Poland.

that if the basis for calculating damages are prices from a date other than the date of calculating the damages, the party injured by the infringement of competition law can demand interest in the amount of the reference rate of the NBP[21] for the period of time from the day the prices of which were the basis for calculating the damages until the day when the claim for damages is due. Based on that, the injured party can demand compensatory interest for the aforementioned period (Piszcz and Wolski, 2017, p. 222–223).

In Lithuania, the new Law on Competition does not directly establish the interest rate, nor does it refer to the Civil Code with respect to its rate. However, it is assumed that the general interest rate of 5% or 6% (depending on the nature of the parties to the court proceedings[22]) established under Article 6.210 of the Civil Code of Lithuania shall apply. The Civil Code does not directly provide any discretion for the courts to reduce or increase interest payments,[23] if this is necessary to avoid overcompensation or under-compensation.

## III. Presumption of harm

One of the main novelties introduced by Article 17(2) of the Damages Directive is a rebuttable presumption that cartel infringements cause harm. As Recital 47 of the Damages Directive stipulates, such a presumption has been established in order to 'remedy the information asymmetry and some of the difficulties associated with quantifying harm in competition law cases, and to ensure the effectiveness of claims for damages (…)'. Therefore, the claimant shall be relieved from the duty to prove the fact that he has suffered damages due to a cartel infringement. As the presumption is rebuttable, the defendant shall have a right to prove that no damages have been caused due to the cartel.

The presumption of harm under the Damages Directive applies only to cartel infringements,[24] in other words, no presumption of harm (even rebuttable) is applicable in the case of damages suffered due to other restrictive

[21] Polish National Bank.

[22] The 6% rate shall apply when the parties are private legal persons or businessmen, in other cases the 5% rate will apply.

[23] The court may only reduce the amount of damages if awarding full compensation would lead to unacceptable and grave consequences under Art. 6.251(2) of the Civil Code.

[24] Art. 2(14) of the Damages Directive defines a cartel as 'an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or

agreements and the abuse of a dominant position. The explanation for limiting this presumption in such way is given in Recital 47 of the Damages Directive: a rebuttable presumption is limited to cartels, 'given their secret nature, which increases the information asymmetry and makes it more difficult for claimants to obtain the evidence necessary to prove the harm'.

Most of the CEE countries have not been familiar with the aforementioned rebuttable presumption before the implementation of the Damages Directive. Therefore, this novelty has been introduced, or is intended to be introduced into the national legislation of such countries as Bulgaria (Petrov, 2017, p. 38–41), Czech Republic (Petr, 2017, p. 92–94), Estonia (Pärn-Lee, 2017, p. 117–118), Lithuania,[25] Slovakia (Blažo, 2017, p. 255–256), Slovenia (Vlahek and Podobnik, 2017, p. 280–282), etc.

Some of the CEE countries, namely Latvia and Hungary, have had the presumption that cartel infringements result in harm even before the implementation of the Damages Directive. Furthermore, those countries have extended the aforementioned presumption to also cover the amount of harm caused by the cartel infringements, namely it is presumed that cartel infringements cause a price increase of 10%.[26] For instance, Section 88/C § of the Competition Act of Hungary provides that '[i]n the course of civil proceedings for any claim conducted against a party to a restrictive agreement between competitors aimed at directly or indirectly fixing selling prices, sharing markets or setting production or sales quotas that infringes Article 11 of this Act or Article [101 TFEU], when proving the extent of the influence that the infringement exercised on the price applied by the infringer, it shall be presumed, unless the opposite is proved, that the infringement influenced the price to an extent of ten per cent'. This provision was introduced into Hungarian law in 2009 and it is applicable to actions filed after 1 June 2009, even if the unlawful behaviour occurred before the entry into force of this provision (Nagy Csongor, 2016, p. 447–457).

It is doubtful whether this presumption is in accordance with Recital 47 of the Damages Directive (Miskolczi Bodnár, 2017, p. 143–144), which does not encourage the presumption of the concrete amount of harm (Recital 47 of the Damages Directive). The effect of such a presumption is also not unambiguous. On one hand, such an extended presumption helps injured persons to fulfil their duty to prove the civil liability of the cartelists, as both

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sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors'.

[25] Art. 44(3) of the Law on Competition of the Republic of Lithuania.

[26] The 10% price increase presumption cannot be equated to 10% damage, one reason being the passing on of the price increase, another one being the negative effect on the quantities sold at a higher cartel price (Tóth, 2016, p. 399–420).

the fact and the quantum of the price increase is presumed. In such cases, it is for the defendant to prove that no harm and a lower quantum of damages have occurred as a result of his conduct in a cartel.[27] On the other hand, the presumed amount of the price increase does not necessarily coincide with the quantum of harm, and so the actual amount of the harm might have been higher. In addition, as the presumption is rebuttable, from the practical points of view, the defendant in all cases will rebut the quantum of harm and the claimant will then have to defend the presumption or provide evidence on the actual harm suffered. Lack of case-law in Hungary (Miskolczi Bodnár, 2017, p. 143–144) and Latvia, where the presumption would have been applied, shows that the presumption of damages caused by cartels and their quantum will not in itself boost private antitrust enforcement in national jurisdictions.

The Polish legislator went even further than stipulated in Article 17(2) of the Damages Directive, and extended the presumption of damages caused by any infringement of competition law (Article 7 of Act on of Claims for Damages for Infringements of Competition Law). As stated in the reasoning of the draft Explanatory Notes accompanying the indicated law, the Damages Directive does not oppose such solution. Additionally, according to the aforementioned Explanatory Notes, there is a need to help injured parties to bring competition-based damages claims in relation to the premises of liability of the infringer in cases of other, than cartels, infringements of competition law too (Piszcz and Wolski, 2017, p. 222–223). The aforementioned presumption is rebuttable according to Article 234 of the Code of Civil Procedure of Poland.

The presumption has been limited to cartels under the Damages Directive, given the information asymmetry and difficulties to obtain the evidence necessary to prove the harm (Recital 47 of the Damages Directive). Nevertheless, as mentioned above, the Damages Directive does not restrict national jurisdictions from extending such presumption to other competition law infringements as well. It is obvious that the injured person might face similar challenges of information asymmetry, as well as difficulties to obtain evidence to prove harm, also in the case of other competition law infringements (for instance, in case of predatory or excessive pricing by the dominant undertaking).

In any case, the presumption of harm under the Damages Directive and national jurisdictions has been welcomed by legislators and practitioners, and it is expected to facilitate and even enhance private antitrust litigation. The

[27] Organisation for Economic Co-operation and Development. (2011). Policy Roundtables. Quantification of Harm to Competition by National Courts and Competition Agencies, p. 112. Retrieved from: http://www.oecd.org/daf/competition/QuantificationofHarmtoCompetition2011.pdf (01.06.2017).

success of this novelty will, however, highly depend on the efficiency of public enforcement by competition authorities in the field of cartel infringements.

## IV. Quantification of harm by national courts

A general rule with regard to the quantification of harm is that the burden of proof rests upon the claimant. In quantifying damages in antitrust cases, information asymmetries between the parties should be taken into account, as well as the fact that quantifying the harm means assessing how the market in question would have evolved in the absence of the competition law infringement. This assessment implies a comparison with a situation which is by definition hypothetical, and can thus never be made with complete accuracy.[28]

Considering the fact that it is a difficult task for the claimant to quantify the harm precisely for the aforementioned reasons, Article 17(1) of the Damages Directive requires Member States to ensure that national courts have the power to estimate the amount of harm, if it is established that a given claimant suffered harm, but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the available evidence.

In most CEE countries, for example in Bulgaria (Petrov, 2017, p. 38–41), Croatia (Butorac Malnar, 2017, p. 68–70), Czech Republic,[29] Estonia (Pärn-Lee, 2017, p. 117–118), Hungary (Miskolczi Bodnár, 2017, p. 143–144), Latvia (Jerneva and Druviete, 2017, p. 162–165) and Lithuania,[30] national courts were empowered to estimate the size of the harm by themselves already before the implementation of the Damages Directive. Therefore, the aforementioned provisions of the Damages Directive have already been in place before the implementation of the Damages Directive. However, it is difficult to evaluate the effect of such court competences in practice, due to the lack of relevant case-law in those national jurisdictions from the time before the implementation of the Damages Directive.

As national courts of some CEE Member States have not been empowered to estimate the quantum of harm, such discretion and power has been granted to them by the implementation of Article 17(1) of the Damages Directive. For instance, Slovakia has introduced the power of the national courts to estimate the amount of damages when the quantification is 'unevenly difficult or absolutely impossible' (Blažo, 2017, p. 255–256). Although the wording is

[28] Recital 46 of the Damages Directive.

[29] Czech, Civil Procedure Code, Sec. 136; Civil Code, Sec. 2955.

[30] Art. 6.249 (1) of Civil Code of the Republic of Lithuania.

different and there can be discussion on the meaning of these differences ('practically' impossible in the Damages Directive and 'absolutely' impossible in the Slovak law; 'excessively difficult precisely' in the Damages Directive comparing to 'unevenly difficult' in the Slovak law), the meaning of the sentence in Slovak law should be the same as in the Damages Directive due to the obligation of an Euro-conform application of national law (Blažo, 2017, p. 255–256).

In the opinion of the authors, considering the principle of effectiveness under the Damages Directive, national courts, to the extent allowed by their national legislation, should be more proactive in using their powers to estimate the quantum of ham if the conditions for such estimation are met. Also, the laws related to the quantification of harm should be interpreted and applied by national courts in the light of the goals sought and principles established by the Damages Directive. A more proactive role of national courts in interpreting and applying national legislation related to the quantification of harm (such as loss of profit) would at least reduce the current obstacles for the development of private antitrust enforcement in certain CEE Member States.

Nevertheless, as indicated, national courts cannot use the power to estimate the quantum of the harm in an arbitrary manner. First of all, at least in certain CEE Member States (for example Latvia, Lithuania), a court may not at its own discretion decide to use such power – a request of the claimant has to be submitted. In Lithuania, following the Code of Civil Procedure, a claimant should submit such a request during the preparations for a court hearing (Article 226). Otherwise, the court might refuse to satisfy such a request, if it was possible to submit it earlier (Article 245(2)). In any case, the latest time when the claimant might submit such a request is before the beginning of the closing arguments in the court of first instance. In order to ensure fairness of court proceedings, it is important for the court to have informed the procedural parties in advance about its intention to implement the court's right to estimate damages.

More stringent rules with regard to the submission of the claimant's request apply in Latvia. Article 192 of the Latvian Civil Procedure Law precludes the court from deciding by itself on such estimate when no specific request of the claimant is submitted. This means that even if the court finds the calculations of the damages amount unsatisfactory, the court cannot on its on motion substitute the quantification of the claimant with its own estimate. In addition, following established case-law of Latvian courts, the claimant is precluded in Latvia from submitting alternative claims. Therefore, the claimant has to decide before the submission of the claim on (1) whether to submit his own calculations; or (2) to ask the court to estimate the damages. However, it is rather difficult to adopt such a strategic decision at such an early stage of

a private antitrust case; as in most cases, the relevant evidence related to the quantification of harm are not yet available to the claimant (including evidence regarding the quantification of harm of the defendant) (Jerneva and Druviete, 2017, p. 162–165). Therefore, it is discussable if such an approach would not hamper the goals sought by the Damages Directive. It is suggested that the Latvian law would empower the court to give an estimate of the damages even if not initially asked for by the claimant and/or explicitly would allow the claimants to submit alternative claims in competition cases (Jerneva and Druviete, 2017, p. 162–165).

Furthermore, all the relevant facts and evidence have to be taken into account in order to determine the amount of the claim, and only where there are no other indications the amounts should be estimated by the national court following its own evaluation. We agree with the opinion of dr. A. Petrov (Petrov, 2017, p. 38–41), that where the available evidence points to a specific manner of calculation of the amount of damages (such as market benchmark, annuity formula, etc.), the court may not use its own estimation by not taking into account the available evidence. Moreover, even where the court is entitled to estimate the harm in accordance with its own understanding of justice, it is still recommended that it first asks for expert help in a way that would allow the court to consider the relevant facts to the maximum extent. For instance, the Bulgarian Supreme Cassation Court emphasized that an expert evaluation may be commissioned not only upon a request of one of the litigating parties, but also *ex officio* by the court and this would not violate the adversarial nature of the proceedings (Petrov, 2017, p. 37–38). In Lithuania, following its Code of Civil Procedure, the court will appoint an expert subject to the opinion of the participants in the proceeding.[31]

Assistance of competent experts in the quantification of harm is crucial for national courts. The estimation of harm is a difficult task, requiring not only the proper qualification and application of the legal rules related to the assessment of damages caused by a competition law infringement, but also proper estimation and application of economic knowledge related to the quantification of harm issue (in order to assess reliability and suitability of methods employed for the establishment of counterfactual scenarios and assessment of damages, compounding and discounting of damages, etc.) (Ashton and Henry, 2013, p. 235–258). Therefore, the synergy of law and economics is crucial in this field.

A common challenge for the jurisdictions of most CEE Member States is the selection and appointment of proper experts for the quantification of harm in private antitrust cases. For instance, in Bulgaria such selection is usually made

[31] Art. 212 of the Code of Civil Procedure of the Republic of Lithuania.

from a list of designated experts. It is possible to nominate a person beyond the list, though the practice is rare since judges usually prefer to entrust the task to people they are used to work with. Unfortunately, this approach does not guarantee that the expert opinion will be prepared by the person with an adequate expertise (Petrov, 2017, p. 37–38). In Latvia, there is also a striking lack of experts that may serve for the purpose of quantifying harm in private antitrust cases, and who would be able to professionally quantify the harm in such a case (Jerneva and Druviete, 2017, p. 162–165).

Similarly, the Lithuanian Code of Civil Procedure and Law on Court Expertise directly establish the duty of the court to appoint as an expert a person who has the necessary qualifications to produce an expert opinion, and who is included in the official list of designated court experts in Lithuania or regarded as court experts in other Member States. Only if there are no court experts who have sufficient qualifications, or if existing experts may not produce an expertise due to other reasons (conflicts of interest, business in other cases, etc.), the court may appoint other qualified persons as experts to produce an expert opinion. In practice, Lithuanian courts usually preferred to appoint experts from the aforementioned list, irrespective of their quite limited understanding and experience in quantifying harm in private antitrust cases. Following Lithuanian law and case-law, an expert opinion does not have *prima facie* value and has to be evaluated in the context of other evidence. In practice, however, the court will highly likely refer to such opinions in order to quantify damages. Therefore, competences in the field of competition economics, sufficient knowledge of the relevant sector and related damages' quantification are crucial not only for court appointed, but also for other experts.

The Damages Directive is silent about the methods applicable to the quantification of harm by national courts; it only refers to guidelines on how to estimate the share of overcharge which was passed on to the indirect purchaser under Article 16 of the Damages Directive. National legislation of some CEE Member States (for example Croatia) implementing the Damages Directive is also silent about such methods. One of the reasons for such an approach is that national courts should not be limited in that regard, 'as different methods may be suitable depending on the concrete circumstances of a particular case' (Butorac Malnar, 2017, p. 68–70). It is, nevertheless, expected that judges and court appointed experts will avail themselves of the Practical Guide Quantifying Harm in Actions for Damages based on Breaches of Article 101 and 102 TFEU published by the European Commission (Butorac Malnar, 2017, p. 68–70).

Certain countries, however, have introduced specific rules for the quantification of harm by national courts by implementing the Damages

Directive. For instance, in Lithuanian legislation significant importance has been directly given to the guidelines of the European Commission regarding the quantification of harm. The Law on Competition of Lithuania does not specify the guidelines regarding the quantification of harm,[32] Article 44(4) of the Law on Competition just indicates that the court will refer to these guidelines, as well as other circumstances important for the implementation of the principle of full compensation, when the court uses its discretion to estimate the amount of damages. The court will inform the procedural parties of its intention to use such discretion. In addition, the new Lithuanian Law on Competition obliges the court appointed expert to always follow the guidelines of the European Commission regarding the quantification of damages in antitrust damages cases.[33] The Law on Competition is silent whether the aforementioned guidelines are also obligatory with respect to private expert opinions submitted by the parties to the court proceedings. However, it might be concluded that private experts should also follow these guidelines, because otherwise their opinion would be criticized by the other procedural parties and the court itself. It is expected that these new requirements to be followed by experts while quantifying harm in private antitrust cases will ensure the use of proper methods in quantifying damages, and therefore improve the quality and reliability of expert opinions.

Similarly, in Poland a national court may refer to the guidelines included in the Communication from the European Commission 2013/C 167/07[34] as well as guidelines of the Commission indicated in Article 16 of the Damages Directive.[35]

It is expected that these new requirements to be followed by both national courts and experts while quantifying harm in private antitrust cases will ensure the use of proper methods in quantifying damages and, as a result, facilitate a more reliable assessment of actions for damages in private antitrust cases.

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[32] However, it is understood that the Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, 2013/C 167/07.

[33] Includes *inter alia* Practical Guide Quantifying Harm in Actions for Damages based on Breaches of Article 101 and 102 TFEU published by the European Commission, Strasbourg, 11.06.2013, SWD(2013) 205.

[34] Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, 2013/C 167/07.

[35] Art. 30(1) of the Act on of Claims for Damages for Infringements of Competition Law of Poland.

## V. Assistance of national competition authorities in the quantification of harm

Article 17(3) of the Damages Directive establishes an additional tool for the quantification of harm. Namely, 'Member States shall ensure that, in proceedings relating to an action for damages, a national competition authority may, upon request of a national court, assist that national court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate'. Before the adoption of the Damages Directive, based on Article 15 of Regulation 1/2003[36] and EC Notice,[37] national courts might request the opinion of the European Commission. Moreover, also the European Commission itself, as well as National Competition Authorities (NCAs) acting on their own initiate, might submit written observations (*amicus curiae*) to national courts of their Member States on issues relating to the application of Article 101 or Article 102 TFEU. Hence, the Damages Directive has extended the scope of the possible assistance of NCAs to also cover the determination of the quantum of damages.

Cooperation with a NCA with respect to the quantification of harm has not been available in CEE Member States – except for Estonia (Pärn-Lee, 2017, p. 117) – before the implementation of the Damages Directive. This novelty was therefore introduced into the national legislations of CEE countries, albeit not identically.

As the Damages Directive does not establish the duty of a NCA to provide its assistance to national courts in the quantification of harm, CEE countries followed the same approach by introducing a right and not an obligation onto NCAs.

For instance, according to the Lithuanian Law on Competition, the Lithuanian competition authority shall be entitled to provide its opinion on the determination of the quantum of damages upon the request of a court. That means that the NCA will decide, at its own discretion, whether to provide such an opinion or not. Article 51(8) of the Law on Competition does not set any criteria for the assessment by the NCA whether to assist the court or not in that respect. However, the NCA should interpret such discretion in the light of the Damages Directive (that is, **where that NCA considers such assistance to be appropriate**). This approach differs from the general rule under the

[36] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU], OJ L 001, 04.01.2003, p. 1–25.

[37] Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles [101] and [102 TFEU], OJ C 127, 09.04.2016, p. 13–21; OJ C 101, 27.4.2004, p. 54–64.

Lithuanian Code of the Civil Procedure, whereby the Lithuanian Competition Authority is obliged to provide its opinion if a national court requests it with respect to the application of competition law in general. However, the Law on Competition is considered to be a *lex specialis,* hence the aforementioned duty under the Code of Civil Procedure will not apply to the Competition Authority with respect to the determination of the quantum of damages.

In Poland, the discretion of the NCA to refuse to provide assistance to a national court regarding the quantification of damages depends on whether the evidence collected and information possessed by the NCA allow it to do so.[38]

Interestingly, Polish legislation entitles national courts to refer both to the Polish competition authority (UOKiK President) and to the NCAs of other Member State for support in determining the quantum of damages (Piszcz and Wolski, 2017, p. 222–223). Similarly, a Slovenian court may also ask the NCAs of other Member States to provide such opinions. Likewise, following the Slovenian legislation, the Slovenian competition agency may provide assistance to national courts of other Member States (Vlahek and Podobnik, 2017, p. 280–282). In addition, unlike other Member States, Slovenian law establishes a 30-day deadline for the submission of the opinion of the Slovenian competition agency on the determination of the amount of damages. In Croatia, the Draft Act does not provide explicitly which competition authority is entitled to support a national court in quantifying harm. However, following the definitions of the Draft Act on Antitrust Damages, the term 'national competition authority' covers the Croatian Competition Agency, the NCAs of other Member States, as well as the European Commission.[39] Therefore, it is ambiguous whether it may be interpreted in such a way, or whether this right should be confined to the assistance of the Croatian Competition Agency only (Butorac Malnar, 2017, p. 68–70).

In any case, it will be interesting to follow whether and to what extent NCAs (especially of other Member States) will prove eager to cooperate with national courts in the determination of the quantum of damages. The increase of the role of NCAs in private enforcement will strongly depend on the resources available to such institutions, and their willingness to be active with respect to the quantification of harm. However, it is doubtful whether NCAs would act as court appointed experts in quantifying damages. It is more likely that NCAs would assist courts in providing their opinion about evidence held in the case material regarding the quantification of damages. In any event, closer cooperation of national courts and NCAs would contribute both to the

[38] Art. 30(2) of the Act on of Claims for Damages for Infringements of Competition Law of Poland.

[39] Art. 3(12) of the draft Act on Antitrust Damages of Croatia.

enhancement of private enforcement as well as to deterrence of competition law infringement, a direct goal pursued by competition authorities.

## VI. Conclusions

The Damages Directive has established certain novelties with respect to full compensation of harm caused by competition law infringements and the quantification of such harm. Certain CEE countries had already introduced some of these rules into their national legislation before the implementation of the Damages Directive, such as the presumption of harm (in Hungary and Latvia), national court's power to estimate the harm (in Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia and Lithuania). However, due to lack of relevant national case-law, it is quite difficult to estimate the effectiveness of such provisions with respect to the development of private antitrust enforcement.

While implementing the Damages Directive, some CEE Member States have chosen to transpose the rules on the quantification of harm under the Damages Directive to the minimum extent permitted, that is, by introducing the same rules as the Damages Directive. This applies particularly to the calculation of interest from the time of the occurrence of harm, and a rebuttable presumption of harm caused by cartel infringements. As indicated in Part III of this paper, certain CEE Member States have decided to extend the presumption of harm in their national legislation, complementing it by a presumption of the amount of the price increase. Therefore, no new rules regarding the presumption of harm have been introduced in these jurisdictions.

In other cases, some of the CEE countries have decided to go beyond the literal scope of the Damages Directive by introducing additional rules while transposing the Damages Directive. For instance, Poland has chosen to extend the presumption of harm to any competition law infringements. Also in Poland as well as in Lithuania, significant importance has been directly given to the guidelines of the European Commission regarding the quantification of harm by national courts and (or) court appointed experts. It is expected that this will ensure more comprehensive and reliable quantification of harm in private antitrust cases. Also, some of the countries (Poland and Slovenia) have extended the possibility for national courts to apply for assistance in determining the quantum of harm also to the NCAs of other Member States. However, considering the soft nature of the discretion of NCAs whether to provide such support or not, the significance of such a novelty in practice is debatable.

Novelties in the quantification of harm as well as other novelties under the Damages Directive are expected to facilitate and enhance private antitrust enforcement within the Union. However, the lack of case-law even in those CEE jurisdictions where specific rules for quantifying harm have already been introduced before the implementation of the Damages Directive do not lead to great optimism about a quick enhancement of private antitrust enforcement. Furthermore, practice shows that the private enforcement process has not changed significantly after transposition. These changes will largely depend on how successfully the courts will apply these and other novelties under the Damages Directive in practice. Strong knowledge of EU and national competition law and case-law is also crucial for the courts in order to enhance the private enforcement culture.

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# Passing-on of Overcharges and the Implementation of the Damages Directive in CEE Countries

by

Raimundas Moisejevas*

**CONTENTS**



## *Abstract*

The article focuses on the concept of passing-on of overcharges and the peculiarities of its regulation by the Damages Directive. The Damages Directive obliges Member States to ensure that the defendant in an action for damages may invoke the passing-on defence. Moreover, the Directive establishes the new framework and the main principles that govern the application of the passing-on defence. The national case law on passing-on is very insignificant in Central and Eastern European countries and many questions are expected to be raised in the courts of the CEE Member States. While discussing the concept of passing-on in the Damages Directive, a lot of emphasis should be paid to the issue of causation. Causation will definitely be the subject of most of the questions in cases when an indirect purchaser will bring a claim for damages. Causation may be tricky when an indirect purchaser claims it suffered an 'overcharge harm' because of passing-on. In

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most cases, the issue of causation will be decided mainly by national courts based on national procedural rules. Depending on the situation, passing-on may be used as a basis for the claim (as a 'sword') or as a defence (as a 'shield'). It could be used as a basis for the claim by an indirect purchaser, in case s/he has suffered any harm because of the illegal actions of a cartelist or a dominant company. At the same time, it could be used as a defence by the infringer against a claim for damages. The article also analyses the specifics of the implementation of the Directive into the national laws of CEE Member States.

## *Résumé*

L'article se concentre sur le concept de répercussion du surcoût et sur les particularités de sa réglementation par la Directive Dommages. La Directive Dommages oblige les États membres à veiller à ce que le défendeur, dans une action en dommages, puisse invoquer un moyen de défense invoquant la répercussion du surcoût. En outre, la Directive établit le nouveau cadre et les grands principes régissant l'application de la défense invoquant la répercussion du surcoût. La jurisprudence nationale sur la répercussion du surcoût est très insignifiante dans les pays d'Europe centrale et orientale et de nombreuses questions devraient être soulevées devant les tribunaux des États membres d'Europe centrale et orientale. En discutant du concept de répercussion du surcoût dans la Directive Dommages, il convient de mettre l'accent sur la question du lien de causalité. La causalité fera certainement l'objet de la plupart des questions dans les cas où un acheteur indirect intentera une action en dommages et intérêts. La causalité peut être délicate lorsqu'un acheteur indirect affirme avoir subi «un préjudice du surcoût» en raison de la répercussion du surcoût. Dans la plupart des cas, la question de la causalité sera tranchée principalement par les tribunaux nationaux sur la base des règles de procédure nationales. Selon la situation, la répercussion du surcoût peut servir de base pour prétendre à une indemnisation (comme une «épée») ou en tant que défense (comme un «bouclier»). Il pourrait servir pour prétendre à une indemnisation par un acheteur indirect, au cas où il aurait subi un préjudice en raison des agissements illégaux d'un cartel ou d'une société dominante. Dans le même temps, il pourrait être utilisé comme un moyen de défense par l'auteur d'une infraction contre une action en dommages. L'article analyse également les spécificités de la mise en œuvre de la Directive dans les législations nationales des États membres d'Europe centrale et orientale.

**Key words:** antitrust damage; consumers; passing-on of overcharges; Lithuania; private enforcement of competition law; antitrust damage claims; Directive on antitrust damages actions; calculation of damages.

**JEL:** D40; K21; K23; L40; L42; L44

## I. Introduction

Directive 2014/104/EU (hereinafter, **the Damages Directive**) was signed into law on 26 November 2014 and published in the Official Journal of the European Union on 5 December 2014.[1] The Damages Directive has introduced many new elements aimed to increase the amount of private enforcement in EU Member States. The Damages Directive also coined harmonized rules concerning the passing-on of overcharges, which is quite a new idea for some jurisdictions. All Member States were obliged to implement the Directive till 27 December 2016; however this was not an easy task bearing in mind a big number of new concepts.

It should be noted that many concepts established in the Damages Directive, including the concept of passing-on, might by understood differently in separate Member States. The difficulty of the task of implementing the Damages Directive is especially obvious considering that many EU Member States have failed to implement it by its due date, as it was initially envisaged. Moreover, in Lithuania for example, national officials discussed whether it is enough for the implementation of the Directive to amend the Law on Competition, or whether the Civil Code and the Civil Procedure Code should also be amended. Therefore, the Damage Directive was initially a big challenge for Member States' legislators and the implemented provisions may now become a challenge for national judges and attorneys.

We believe that problems related to passing-on would be best understood in a practical case, when an attorney or a judge faces a legal puzzle. Let's imagine that as attorney you need to advice a shop that specializes in the sale of different cheeses. The Competition Council finds out about a three-year long cartel between farmers who produced milk and that the cartel could have caused an around 15% price increase of milk. The cheese shop doesn't buy milk directly from the farmers. Farmers sell milk to big dairy manufacturers. After this, your client buys cheese from milk-processing companies. Your client asks you to evaluate his chances for a successful litigation against the cartelists (milk producers). **First**, you need to identify who has the right to make a claim against the cartelists. Are all entities that could have experienced damage in the production and distribution chain of milk entitled to bring a damages claim? What about milk-processing companies, resellers of milk products or end-consumers? Are they all entitled to bring a damages claim on the same

[1] Directive 2014/104/EU of the European Parliament and of the Council of 26.11.2014 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, OJ L 349, 05.12.2014.

basis? **Second**, it is important to evaluate how the damages experienced by the milk-processing companies, resellers of milk products or end-consumers should be assessed. Is there one universal rule or are different rules applicable depending on your position in the distribution chain? Is it important to evaluate the proportion of the cost of milk in the overall production costs of the product? **Third**, one of the key issues here is causation. Proving causation is always tricky in antitrust damages cases, and especially when we deal with indirect purchasers.

The implementation of the provisions concerning passing-on and indirect purchasers may also help assist end-consumers in the recovery of damages. This is especially important bearing in mind the calculations of the European Commission that cartels in the EU cause every year damages to the victims of more than EUR 10 billion.[2] The Damages Directive provides quite wide assistance to injured parties, including consumers, in seeking damages compensation (Bovis and Clarke, 2015, p. 49–71). On the other hand, for the effective protection of consumers as indirect purchasers, a simple transposition of the Directive is insufficient, and some of the Member States should make additional changes to their procedural rules (Butorac Malnar, 2017, p. 72). However, this article does not aim to answer the question concerning amendments of procedural rules in order to facilitate litigation by consumers.

The article aims to analyze the changes that the Damages Directive has made to the passing-on of overcharges in the private enforcement domain. The author does not attempt to cover all Member States' cases related to passing-on. The task is to provide the reader with the analysis of the key problems while implementing the right of an indirect purchaser to sue for damages as well as the use of passing-on as a defence. The tasks of the article are aimed to be achieved by reviewing some relevant cases, the provisions of the Damages Directive, national reports from Central and Eastern European countries (hereinafter, **CEE countries**), and available relevant studies. It should be emphasized that there is very little relevant literature on the object of the article, since the Damages Directive was only adopted at the end of 2014 and is still being transposed in some Member States. Moreover, there is almost no relevant case law or literature in CEE countries that would provide a basis for a comparative and detailed analysis of the application of passing-on. The present article is likely to be one of the first in Lithuania aimed to cover the issue of passing-on. The subject matter of the research of this article was

[2] European Commission, Commission Staff Working Document. Impact Assessment Report. Damages actions for breach of the EU antitrust rules, SWD (2013) 203 final, p. 22. Retrieved from: http://ec.europa.eu/competition/antitrust/actionsdamages/impact_assessment_en.pdf (22.08.2017).

analyzed with the help of a logical, systematic analysis and comparative and linguistic research methods.

## II. The concept of passing-on

The passing-on of overcharges is quite a new and widely discussed topic in European Union law. The roots for the passing-on idea could be found in the *Courage*[3] and *Manfredi*[4] decisions of the European Court of Justice. The Court acknowledged therein that **any individual** is entitled to claim damages for the loss caused. The term 'any individual' is meant to cover both direct and indirect purchasers of the products or services.

The concept of passing-on enshrined in the Directive is focused on indirect purchasers. The Directive defines 'indirect purchaser' as a natural or legal person who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser, products or services that were the object of a competition law infringement, or products or services containing them or derived therefrom.

The basis of the claim of an indirect purchaser derives from the harm suffered after the undertaking directly and negatively affected by the cartel (direct purchaser) increases the prices it charges lower down in the supply line. For example, when producers of milk form a cartel their direct purchasers would be dairy product manufacturers. In such case, indirect purchasers are all buyers (retailers, supermarkets etc.) of dairy products from the milk-processing companies. The chain of indirect purchasers may be even longer, since the retailers (indirect purchasers) could resell the dairy products further down the line, for example to end-consumers or other business entities (to other retailers).

It is important to note that depending on the situation, passing-on may be used as a basis for the claim (as a 'sword') or as a defence against a claim (as a 'shield') (Strand, 2014, p. 381). It could be used as a basis for the claim (as a 'sword) by an indirect purchaser, where the latter has suffered any harm because of the illegal actions of the cartelists or a dominant company. At the same time, it could be used as a defence (as a 'shield) by the infringer against a damages claim.

Below we would like to use a reference for a scheme of scenarios of passing-on, which was proposed in the Study on the passing-on of overcharges

[3] Judgment of 20.09.2001, *Courage and Crehan*, case C–453/99, ECLI:EU:C:2001:465, para 26.

[4] Judgment of 13.06.2006, *Manfredi*, case C–295/04, ECLI:EU:C:2006:461, para 60.

that was prepared by external consultants for the Directorate-General for Competition of the European Commission (Durand, Williams, Hitchings, Quintana, Hain-Cole and Loras, 2016).

**Table 1. Scenarios of passing-on**

| Scenario 1 | Scenario 2 | Scenario 3 |
|---|---|---|
| **Infringer** | **Infringer** | **Infringer** |
| **Overcharge** | **Overcharge** | **Overcharge** |
| Claimant = Direct purchaser | Direct purchaser | Direct purchaser |
| **Passing-on 1** | **Passing-on 1** | **Passing-on 1** |
| Indirect Purchaser 1 | Claimant = Indirect purchaser 1 | Indirect Purchaser 1 |
| | Passing-on 2 | Passing-on 2 |
| | Indirect Purchaser 2 | Claimant = Indirect purchaser 2 |

From the present table, three types of scenarios of passing-on could be distinguished.

In **scenario 1**, the direct purchaser acts as a claimant. In this case therefore, passing-on may be used as a defence by the infringer. S. Peyer argues that the passing-on defence may have a negative effect on the incentive of direct purchaser to start legal action, since the expected reward from litigation may be reduced because of passing-on. Moreover, it is alleged that legal costs may increase by requiring the quantification of the overcharge (Peyer, 2016, p. 107).

In **scenario 2**, the Indirect purchaser 1 acts as a claimant. Therefore, passing-on is the basis for the claim of the Indirect purchaser 1. At the same time, passing-on in this case could be used as a defence by the infringer.

In **scenario 3**, passing-on is used as a basis for the claim of the Indirect purchaser 2 as the end-customer. In this case, the Infringer is not able to use passing-on as a defence, since the end-customer has not passed the overcharge to anyone.

We believe that the above mentioned scenarios provide good assistance to understand how the passing-on might be implemented practically, and what sort of parties could be active in a real litigation.

## III. The Damages Directive and passing-on of overcharges

### 1. Some provisions in the Damages Directive related to the passing-on of overcharges

The Directive introduced a separate Chapter governing the passing-on of overcharges and passing-on is, indeed, one of the key topics of the Directive. Bearing in mind the right to full compensation recognized in the jurisprudence of the Court of Justice, the Directive acknowledges in Article 12(1) that all injured parties, including direct and indirect purchasers of the infringer, are entitled to bring a claim. The main novelty of the Directive relates to a detailed description of the right of indirect purchasers to make a claim, since the rights of direct purchasers are more obvious.

There is hope, especially, that the Directive will facilitate claims of indirect purchasers. The Directive establishes a presumption of a passing-on to indirect purchasers, when certain conditions are met. An indirect purchaser should prove the following elements according to Article 14(2) of the Directive: a) that the defendant breached competition law; b) the breach of law caused an overcharge for the direct purchaser; c) the indirect purchaser acquired the goods that were the object of the competition law breach. We welcome the introduction of provisions on indirect purchasers to the Directive. However for the Member States to effectively implement the rights of indirect purchasers, it is also necessary to make amendments to their procedural rules concerning collective redress.

Article 14 of the Directive also provides that the presumption will not apply when the infringer can prove that the overcharge was not, or was not entirely, passed on to the indirect purchaser. It is claimed that finding that a passing-on of an overcharge took place will substantially depend on the question whether the overcharge could have affected a large proportion of the final product's price. At the same time, if the allegedly overcharged product (element) was not of key importance for the final price, then this increases the chances that the passing-on of an overcharge will not be recognized. For example, the Appeal Court of Madrid found in one of its cases that since sugar constituted around 75% of the total cost of some candy products, the passing-on of overcharges was deemed to be persuasive.[5] On the other hand, if the overcharged product would equal to only 1%–5% of the overall cost, the passing-on might not be sufficiently proven.

[5] Judgment of Appeals Court of Madrid of 03.10.2011, *Nestlé & ors v. Ebro Puleva,* case No. 370/2011.

The number of the affected parties is also important for the evaluation of passing-on. In the *Arkopharma* case, it was established that a cartel involved approximately 80% of the producers of vitamins. Therefore, it seems persuasive that direct purchasers will experience an overcharge. If only a few companies are affected, the court may conclude that there was no passing-on.[6]

Article 16 of the Directive provides that the Commission shall issue guidelines for national courts on how to estimate the share of the overcharge that was passed on to the indirect purchaser. However, although 2 years since the adoption of the Directive have passed, the promised guidelines have still not been prepared. Currently, we can refer only to the above mentioned Study on the passing-on of overcharges (Durand, Williams, Hitchings, Quintana, Hain-Cole and Loras, 2016).

## 2. Causation

The Damages Directive hardly addresses the issue of causation, although it is one of the key questions in private damage claims. The national reports from Estonia and Croatia concerning the implementation of the Damages Directive have also emphasized the importance of causation for the establishment of passing-on (Pärn-Lee, 2017, p. 115; Butoca Malnar, 2017, p. 72.). Paragraph 11 of the Preamble to the Directive provides that all national rules governing the exercise of the right to compensation for harm, including the notion of a causal relationship between the infringement and the harm, must observe the principles of effectiveness and equivalence. It also states that national rules should not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation.

The principles of effectiveness and equivalence are, indeed, of key importance while evaluating causation. In the *Kone* case,[7] the Court of Justice dealt with the question whether Article 101 TFEU has to be interpreted as meaning that any person may claim damages from the members of a cartel for the loss caused by a person not party to the cartel who, benefiting from the protection of the increased market prices, raises his/her own prices more than s/he would have done without the cartel ('umbrella pricing'). The Court of Justice held that on the basis of the principle of effectiveness, any individual could claim compensation for harm suffered regardless of the existence

[6] Judgment of Commercial Court of Nanterre of 11.05.2006, *Arkopharma v. Group Hoffmann la Roche*, case No. 2004F022643.

[7] Judgment of 05.06.2014, *Kone AG, Otis GmbH, Schindler Aufzüge und Fahrtreppen GmbH, Schindler Liegenschaftsverwaltung GmbH, Thyssen Krupp Aufzüge GmbH v. ÖBB-Infrastruktur AG*, case C–557/12, ECLI:EU:C:2014:1317.

of a direct causal link. Victims of 'umbrella pricing' should be able to get compensation for the loss caused by the cartel, even if it had no contractual links with them, where it is established that the cartel could have had the effect of umbrella pricing benefiting third parties acting independently, and that those specific circumstances could not be ignored by the members of the cartel.

The ruling in the *Kone* case has far-reaching consequences for the understanding of the concept of a causal link, which is also important to the calculation of the passing-on of overcharges.

**First,** it is obvious that the Court of Justice does not require a direct causal link and that indirect causation may be sufficient. This also automatically expands the circle of potential plaintiffs and includes also indirect purchasers and consumers.

**Second,** from the rationale of the Court of Justice on 'umbrella pricing', we presume that the Court may be encouraged to refer to the 'foreseeability' of the occurrence of the damage as a one of the conditions for proving a causal link. It seems that the Court already decided to refer to the principle of the 'foreseeability' of the damage, although it is still not formulated black on white.

**Third,** the development of the notion of causation in relation to private enforcement claims and passing-on of overcharges may have a much wider influence on the development of causation in regular civil law litigation of the Member States. We may even presume that the development of private enforcement principles established in the Damages Directive (including passing-on, causation, etc.) could facilitate the harmonization of the tort law all around the European Union.

It should be noted that there are currently a couple of interesting civil litigations underway in Lithuania against audit companies who made audit reports for banks that later went bankrupt. Some of the claimants are depositors of the bankrupt banks who had put their money into these specific banks relying *inter alia* on the audit reports prepared by some reputable Big 4 audit companies. The claimants allege *inter alia* that the auditors should have foreseen that their audit report will be read by third parties, including depositors. Therefore, if the third parties (depositors) suffer damages because of the content of the audit reports then the auditors should be liable. These disputes are currently only before first instance courts in Lithuania and will probably reach the Supreme Court. There is, therefore, quite a long time to wait for the final decisions.[8]

[8] The author as an attorney represents depositors in a few dozen million claims against one of the Big 4 of the audit company. One of the key issues in this case is proving the causation.

The issue of causation will probably be comprehensively analyzed, especially in cases when indirect purchasers will file a claim for damages. Causation may be tricky when an indirect purchaser claims that s/he suffered an 'overcharge harm' because of passing-on. In most cases, the issue of causation will be decided mainly by national courts based on national procedural rules. However, if the recognition of causation is left completely to national courts, they could find that the loss is too remote. Therefore, there was a need for harmonization through the directive, since otherwise such rights may not be implemented at all.

The recognition of the right to full compensation enshrined in the Directive is of key importance, since it also means that any injured person may claim damages. Moreover, the principles of effectiveness and equivalence require that the exercise of all the rights stemming from EU law is protected. Practically, it also means that national substantive and procedural rules may not be applicable, if they preclude the effective exercise of EU rights. We believe that arguing in the courts will be aplenty in the future that certain national regulations (including procedural rules) preclude effective private enforcement litigations.

Another important factor in dealing with causation is economics. Economists and economic theories are meant to be used to a high extent in cases concerning passing-on (Smuda, 2014, p. 63–86). The courts will need economists to evaluate whether specific evidence satisfactorily proves the reality of passing-on (Durand, Williams, Hitchings, Quintana, Hain-Cole and Loras, 2016). Professors Lianos, Davis and Nebia also share the opinion that causation is one of the most difficult topics that need to be assisted by a comprehensive use of economic methods (Lianos, Davis and Nebbia, 2015, p. 74). We would definitely need economic assistance in order to calculate the amount of the overcharge in the above mentioned example of the alleged passing-on by dairy products manufacturers to the cheese shop. Moreover, without economic methods it would not be possible to determine what persons and at which level of the supply chain could have been negatively affected by the cartel.

## 3. Impact of the overcharge

As previously mentioned, the evaluation of the exact impact of an overcharge is quite complex and should be properly done with the assistance of economists. Economists distinguish a couple of elements of an overcharge.

The first element is the overcharge (cost) effect. The increase in prices by members of the cartel causes damage to direct purchasers. For example,

if milk producers conclude a cartel then a dairy product manufacturer who buys milk in order to produce cheese will face increased costs of the raw material (milk). To calculate the exact level of the overcharge we should consider the level of the output and the amount of the unit cost increase. The Damages Directive does not cover the issue of the quantification of harm, but the Practical guide quantifying harm in actions for damages (hereinafter, **Practical guide**) lends a helping hand in this context.[9] However, in some cases, the Practical guide may not offer enough assistance and a consultation from a national competition authority might be needed. Article 17 of the Damages Directive provides that national court may request a national competition authority to assist the court with respect to the determination of the quantum of damages.

The second element is the passing-on of the overcharge. The direct purchaser will usually try to pass on at least part of the overcharge to its customers (indirect purchasers). The amount of the passing-on of the overcharge might be calculated by multiplying the level of the output with the downstream price increase. This element indicates the additional revenue received by the direct purchaser.

The third element that needs to be considered is the volume effect (lost business). In most cases after the direct purchaser increases its prices, the customers will start buying fewer products. This may mean a decrease in sales and less money for the direct purchaser. Therefore, this needs to be considered while calculating damages suffered by the direct purchaser. Moreover, to our knowledge, there has only been one instance so far of a Member State's court assessing the volume effect in a case named *Cheminova*.[10] Therein, Cheminova (producer of pesticides) filed a claim for damages against Akzo Nobel for its participation in a cartel. It was concluded that Cheminova had passed on around 50% of the overcharges. It was also found that Cheminova, because of the passing-on, suffered losses in the amount of 20% of the overcharges. Finally, the Court considered the volume effect and increased the amount of the compensation for Cheminova.

To calculate the damage experienced by a direct purchaser, we should calculate the overcharge effect, then take away the passing-on of the overcharge, and finally add the volume effect. This is the way for the calculation of damages

[9] European Commission, Commission Staff Working Document. Practical guide quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD (2013) 205. Retrieved from: http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf (22.08.2017).

[10] Judgment of Maritime and Commercial Court of 15.01.2015, *Cheminova A/S v. Akzo Nobel Functional Chemicals BV and Akzo Nobel Base Chemicals AB*, case No. U–4–07.

proposed in the Study on the passing-on of overcharges (Durand, Williams, Hitchings, Quintana, Hain-Cole and Loras, 2016, p. 12).

On the other hand, the amount of the damage experienced by the end-customer equals the second element, that is, the downstream overcharge. There is also a lost consumption effect (or a deadweight loss), which is used by some economists in order to calculate the comprehensive damage to consumers. Deadweight loss is sometimes described as 'the loss of satisfaction of end customers, which would result from being denied the enjoyment of some consumption as a result of inflated prices' (Durand, Williams, Hitchings, Quintana, Hain-Cole and Loras, 2016, p. 13). It should be added that currently Member States' courts do not consider deadweight loss as recoverable by end-consumers.

## 4. Member States' regulation on passing-on

The rules on passing-on of overcharges are quite new to the legal acts of many Member States. Moreover, in most Member States the legislator chose a very simple solution and quite literally transposed the provisions of the Directive. Therefore, in most cases there is not a lot left for interpretation. The national reports are quite short-spoken on passing-on. At the same time, for example the national report from the Czech Republic states that Article 15 of the Directive, concerning actions for damages by claimants from different levels in the supply chain, was not transposed into Czech law, since such rules were already applicable in Czech law. The Czech legislator also chose not to transpose the Directive's provisions concerning full compensation and the prohibition of overcompensation concerning passing-on, since it was chosen to rely only on the general principles (Petr, 2017, p. 95).

It is also interesting to note that Estonian law does not use the concept of the passing-on defence that is defined in Article 13 of the Directive. On the other hand, it is stated that this concept is already practically applicable according to Estonian law, since the defendant is entitled to rebut the damages claims of the applicant (Pärn-Lee, 2017, p. 115).

The national reports concerning the implementation of the Damages Directive in Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania Slovakia and Slovenia provide that there are no decisions yet of the national courts elaborating on the concept of passing-on (Piszcz, 2017). We believe that there are several reasons for the lack of corresponding practice in Lithuania and other Baltic states.

**First,** there are certain barriers that in general prevent the increase of antitrust damage claims (Moisejevas, 2015). Key among those barriers are: the

complexity of competition cases; lack of clear-cut jurisprudence of Lithuanian courts; prolonged litigation in antitrust damage claims; high legal standard for proving the causal relationship between the anti-competitive action and the damages incurred; and difficulties related to the calculation of the quantum of antitrust damage. Slow development of private enforcement in the EU is recognized by some scholars as a reason for the lack of case law on passing-on (Parlak, 2010, p. 44; Petrucci, 2008, p. 41).

**Second,** after analyzing private enforcement cases brought forward in Poland, Latvia, Estonia, Slovakia and other CEE countries, it came as no surprise that most private enforcement cases originated from an abuse of dominance (Brkan and Bratina, 2013, p. 75–106; Jurkowska-Gomułka, 2013, p. 107–128; Piszcz, 2012, p. 55–77; Sein, 2013, p. 129–140). Moreover, in most cases antitrust damage claims in CEE countries are submitted as follow-on actions. On the other hand, it is fair to presume that most of the cases related to the passing-on of overcharges relate to cartels. Such statement is also supported by existing court practice.

## V. Conclusions

The concept of the passing-on of overcharges is one of the most complicated in the Damages Directive. It is highly probable that in most cases the passing-on will need to be evaluated with the assistance of economists. Passing-on may be used as basis for a claim (as a 'sword') or as a defence (as a 'shield'). It could be used as a basis for a claim by an indirect purchaser where the latter has suffered any harm because of the illegal actions of cartelists or a dominant company. At the same time, it could be used as a defence by the infringer against a damages claim.

Causal link is very important for the assessment of passing-on. The Court of Justice recognizes indirect causation as sufficient. This also automatically expands the circle of potential plaintiffs and includes also indirect purchasers and consumers. From the rationale of the Court of Justice on the issue of 'umbrella pricing', we presume that the Court may be encouraged to refer to the 'foreseeability' of the occurrence of the damage as one of the conditions for proving the causal link. Moreover, the development of the notion of causation in relation to private enforcement claims and the passing-on of overcharges may exercise a much wider influence on the development of causation in regular civil law litigation of the Member States. We even make a guess that the development of private enforcement principles established in the Damages Directive (including passing-on, causation, etc.) could facilitate the harmonization of tort laws all around the European Union.

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# Provisions of the Damages Directive on Limitation Periods and their Implementation in CEE Countries

by

Ana Vlahek and Klemen Podobnik*

*A limitation prevents stale claims, encourages plaintiffs to not wait to bring a claim, and, by limiting old liabilities, provides finality and certainty to business transactions.*

Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law, 2007

## CONTENTS



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## *Abstract*

The article analyses the provisions on limitation of antitrust damages actions set out in Directive 2014/104/EU 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. It presents (draft) implementing legislation of CEE countries from the perspective of their general rules on limitation, and the problems the Member States have faced in the process of transposing the Directive into their national legal systems. Within that, focus is placed upon the analysis of the types of limitation periods, their length and their suspension or interruption. In addition, the authors present the effects of the new limitation regime on the balance between the interests of the claimants and of the defendants, as well as on the relation between public and private antitrust enforcement.

## *Résumé*

L'article analyse les dispositions relatives à la limitation des actions en dommages prévues par la directive 2014/104/UE relative à certaines règles régissant les actions en dommages et intérêts en droit national pour les infractions aux dispositions du droit de la concurrence des États membres et de l'Union européenne. Il présente (un projet) la législation de mise en œuvre des pays d'Europe centrale et orientale du point de vue de leurs règles générales en matière de limitation, et les problèmes rencontrés par les États membres dans le processus de transposition de la Directive dans leurs systèmes juridiques nationaux. Dans ce cadre, l'accent est mis sur l'analyse des types de délais de prescription, de leur durée et de leur suspension ou interruption. En outre, les auteurs présentent les effets du nouveau régime de limitation sur l'équilibre entre les intérêts des demandeurs et des défendeurs, ainsi que sur la relation entre l'application publique et privée du droit de la concurrence.

**Key words:** limitation of antitrust damages claims; limitation; limitation periods; suspension of limitation; interruption of limitation; competition law; antitrust; liability for damages; Directive 2014/104/EU; CEE countries; private enforcement of antitrust.

**JEL:** K21; K15

## I. Introduction

The main aim of statutes of limitations is the prevention of infinite controversies (Cigoj, 1984, p. 1141). It is described as a concept that sanctions the inactivity of the creditor, and thereby protects legal certainty and legal peace (Brus, 2011, p. 343). Some authors name it 'a dead period', that is, a period without any legally relevant activities of the parties or relevant outer circumstances (Blagojević and Krulj, 1983, p. 1152–1153). Best CJ eloquently put it in *A'Court v. Cross* in 1825[1] that the statute of limitation is a statute of peace, as vexing, long dormant claims can hold in them more cruelty than justice. Areeda and Hovenkamp argue that in antitrust, the statute of limitations is aimed at preventing stale claims, encouraging the litigation activity of creditors and ensuring the finality of commercial transactions (Areeda and Hovenkamp, 2007, p. 282). Adding to that, Pearl points out that the statute of limitations is 'an implicit approximation of when the enforcement of an action may start doing more harm than good – chilling competition rather than fostering it – whether because the injuring act is too removed to correct a market failure or because a longer limitations period would introduce too much uncertainty about past liabilities' (Pearl, 2017).

One cannot overlook that private enforcement of antitrust has special characteristics (mainly due to the constant intertwining of public and private spheres), which to a certain extent warrant a special regime of damages claims and, arguably, statutes of limitations. Should there be a deviation from general rules on statutes of limitation in the antitrust field? How intense should it be? Those questions were already dealt with by the American legislature when forming and passing the Clayton Act, and have been intensively analysed by the EU and its Member States in the last decade.

The regulation of limitation of antitrust claims has been one of the focal issues 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 (hereinafter, the Directive).[2] In *Manfredi*,[3] the only CJEU judgment addressing the issue of limitation of antitrust damages claims, the Court has given only limited guidance as to the proper content of the limitation regime in the field of EU competition rules. Focusing on the questions put forward by the referring national court, the CJEU stated that '[i]n the absence of Community rules governing the matter,

[1] (1825) 3 Bing 329.

[2] OJ L 349, 05.12.2014, p. 1–19.

[3] Judgment of 13.06.2006, *Manfredi*, case C–295/04, ECLI:EU:C:2006:461.

it is for the domestic legal system of each Member State to prescribe the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 81 EC, provided that the principles of equivalence and effectiveness are observed', and that '[i]n that regard, it is for the national court to determine whether a national rule which provides that the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 81 EC begins to run from the day on which that prohibited agreement or practice was adopted, particularly where it also imposes a short limitation period that cannot be suspended, renders it practically impossible or excessively difficult to exercise the right to seek compensation for the harm suffered'. The Commission and the European legislator were thus given a fair amount of leeway in drafting the new regime of limitation.

It is this regime that is addressed in this paper. Article 10 of the new Directive and relevant *travaux préparatoires* are examined in detail.[4] Focus is placed upon the analysis of the types of limitation periods, their length and their suspension or interruption. Within that, (draft) implementing legislations of the respective CEE countries (i.e. Slovenia, Croatia, Bulgaria, Romania, Hungary, Poland, Latvia, Lithuania, Estonia, Slovakia, the Czech Republic)[5] are analysed and compared to the provisions of the Directive as well as to their national general rules on limitation. The problems Member States have encountered in the process of transposing the Directive into their national legal systems are also presented. Furthermore, the paper discusses the effects of the new limitation regime on the balance between the interests of the claimants and of the defendants, as well as on the relation between public and private enforcement of antitrust.

[4] Article 18(1) of the Directive regulating the suspension of limitation during ADR is not being adressed here. Suffice to say that this rule, too, additionally postpones the running out of the limitation period and that here, too, the Member States faced challenges in correctly understanding the provisions of the Directive (Vlahek and Podobnik, 2017, p. 290–291; Piszcz, 2017, p. 306–307).

[5] Member States' legislative proposals and enacted implementing acts that are being analyzed in this paper, are available at http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html (01.09.2017). Data shows that, until 14.06.2017, seven of the analyzed CEE Member States (Estonia, Hungary, Lithuania, Poland, Romania, Slovakia and Slovenia) have already transposed the Directive. Croatia followed in July whereas three CEE Member States (Latvia, Czech Republic and Bulgaria) have not yet enacted the implementing legislation although the implementation deadline expired on 27.12.2016.

## II. Analysis of the limitation regime and its implementation in CEE Countries

### 1. One or two-tier system of limitation periods

#### 1.1. Definition of the two systems

Article 10 of the Directive regulates a limitation period that is – at least in two-tier systems of limitation periods – denoted as 'subjective' or 'short', sometimes also 'relative' limitation period. Such periods generally begin to run when the claimant knows, or can reasonably be expected to know of the infringement, the harm and the identity of the infringer. Such limitation periods are shorter than the 'long-stop' (called also 'objective' or 'maximal' or 'absolute') limitation periods, which usually begin to run already from the moment when the loss has occured (or, sometimes, already from the moment the infringement took place). Legal systems combining the two types of limitation periods are called two-tier limitation systems, whereas systems with only one limitation period (usually that with a subjective criterion[6]) are called one-tier limitation systems. In two-tier limitation systems, claims are time-barred when one of the two limitation periods runs out.

Article 10(2) of the Directive sets out antitrust-specific criteria for what triggers the start of the 'short' limitation period: knowledge of or discoverability of (i) the behaviour and the fact that the behaviour constitutes an infringement of competition law, (ii) the fact that the infringement of competition law caused harm to the claimant, and (iii) the identity of the infringer, whereby the limitation period does not begin to run before the infringement of competition law has ceased. A combination of specific subjective (knowledge or discoverability criterion) and objective criteria (cessation of the infringement) is thus set out as the starting point of the 'short' limitation period. According to Article 10(3) of the Directive, this limitation period has to be at least five years long.

Although the definition of the 'short' period contains an objective element (that is, cessation of the infringement), Article 10 of the Directive does not provide for a long-stop limitation period that would run from the moment

[6] That is the case in all of the analyzed CEE countries that set out a one-tier system with the exception of Hungary where, as is explained below, the general rules on limitation of damages claims that applied also to antitrust damages actions, provide only for an objective period (Miskolczi Bodnár, 2017, p. 139; see also Pusztahely, 2013). In the US, too, only the objective period is set out for bringing antitrust damages claims as the subjective period was perceived as practically eliminating limitation (Stewart, 2012, p. 71, 74).

the damage occured (or from the moment the infringement took place as set out in some national rules). Paragraph 36 of the Preamble of the Directive, however, allows for the possibility of introducing or maintaining 'absolute limitation periods' that are of general application, provided that the duration of such absolute limitation periods does not render the exercise of the right to full compensation practically impossible or excessively difficult. The draft Directive did not mention this 'absolute limitation period'. It seems that it was inserted into the final text of the Directive (though only into the Preamble) on the basis of the opinions of the Council and the European Parliament. The Committee for Economic and Monetary affairs and the Internal Market and Consumer Protection Committee proposed that the Commission's text is supplemented with a paragraph stating that irrespective of the rules on length, beginning and suspension of the shorter limitation period, damages actions should be filed within ten years after the act causing the damage has taken place.[7] In its Impact Assessment, the Commission in fact provided for an option of setting out a twenty-year limitation period that would start to run from the moment the damage had occurred. The Commission also explained in its Impact Assessment that in order to guarantee legal certainty, some of the businesses proposed the creation of an objective limitation period running from the moment the damages occurred.[8]

It should be noted that the term 'absolute limitation period' usually denotes one of the two types of limitation periods known in some jurisdictions within the ambit of criminal law and minor offences law (and not within civil law). In contrast to the 'relative limitation period' in which persecution of the act is to be initiated, the 'absolute limitation period' denotes a period in which criminal or minor offences proceedings have to become final, i.e. a judgment has to be rendered and become final. Both periods start running from the moment the offence has been committed. 'Objective limitation period' and 'subjective limitation period' are, on the other hand, descibing a period in which damages actions have to be filed with the court, whereby one runs from the moment the relevant facts are or could have been discovered, the other from the moment the damage has occured or from the moment the infringement took place.

[7] Commission staff working document, Impact assessment report, Damages actions for breach of the EU antitrust rules Accompanying the proposal for a Directive of the European Parliament and of the Council 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, COM(2013) 404 final, p. 87.

[8] Ibidem, p. 76, 79.

### 1.2. Implementation in CEE countries

Member States with a one-tier limitation system in their general civil law (setting out a subjective limitation period) have obviously opted for a one-tier system also within their antitrust damages actions regimes. Among the analyzed CEE countries, Bulgaria (Petrov, 2017, p. 36), Romania (Mircea, 2017, p. 239), Estonia (Pärn-Lee, 2017, p. 112–113), Lithuania (Mikelenas and Zaščiurinskaité, 2017, p. 191) and Latvia (Jerneva and Druviete, 2017, p. 161) have done so. With the exception of Latvia, they have all set a five year limitation period in line with Article 10(2) of the Directive, which is in the majority of these States longer than their respective general limitation periods for damages claims; only in Bulgaria, has the general limitation period been five years already prior to implementing the Directive (Petrov, 2017, p. 36). Mirroring its general rules on limitation, Latvia decided for a ten-year limitation period starting to run as defined in Artice 10(2) of the Directive (Jerneva and Druviete, 2017, p. 161).

The majority of the Member States with a two-tier limitation system in their general rules on limitation of damages actions have added an objective limitation period also for the cases of antitrust damages claims. Among the analyzed CEE countries, Slovenia, Croatia and Poland implemented a two-tier system. Slovenia opted for a combination of limitation periods of five and ten years (three and five years being the general subjective and objective limitation periods for bringing damages actions (Vlahek and Podobnik, 2017, p. 277–278)). Croatia chose a combination of five and fifteen years (three and five years being the general subjective and objective limitation periods for bringing damages actions), while Poland of five and ten years (three and ten years being the general limitation periods for bringing damages actions). In Croatia and Slovenia, for example, the general long-stop period runs from the moment the damage is sustained. In Slovenia, the antitrust-specific ten-year limitation period starts to run when the damage is sustained and it cannot run before the infringement has ceased; the antitrust-specific fifteen-year long-stop period in Croatia is set to run from the moment the infringement has ceased (Butorac Malnar, 2017, p. 64). In Poland, the general objective ten-year limitation period starts to run the moment the act causing harm takes place, whereas the new antitrust-specific period starts to run when the antitrust infringement ceases to exist. The differences in the starting points might in some cases lead to different outcomes in terms of when the claim was time-barred.

Interestingly, Slovakia and the Czech Republic decided for a one-tier system of limitation of antitrust damages claims with a five-year limitation period despite the fact that a two-tier system has traditionally been part of their

private law regimes. Czech civil law provides for a subjective three-year and objective ten- or fifteen-year limitation periods, whereby the objective period runs from the date the infringement took place (Petr, 2017, p. 89–90). Slovak civil law sets out a subjective four-year and objective ten-year period, the later running from the end of the injurious harmful behaviour (Blažo, 2015, p. 270). It ensues from one of the commentaries of the Czech implementation provisions that the reason behind such decision in the Czech Republic was to align the national provisions to those of the Directive (Petr, 2017, p. 89–90). However, commentators of the novel Slovak regime emphasize that the new system is ambiguous, and that it is not completely clear whether the ten-year long-stop period applies also in antitrust damages cases or not (Blažo, 2017, p. 252).

A somewhat unique system of limitation of damages claims seems to be set out in Hungarian law. Namely, according to Article 6:22 of the Hungarian civil code, the general limitation period for damages claims is five years, starting the moment when the damage occurs (thus, only an objective limitation period is set out). Article 6:24 of the code then states that if the creditor is unable to enforce a claim for an excusable reason, prescription shall be suspended and the creditor is entitled to submit a claim within one year after the excusable reason is no longer in place, even if less than one year is left until the end of the initial five-year period. It ensues from some commentaries that the term 'excusable reason' encompasses also lack of creditors' awareness of the damages (Miskolczi Bodnár, 2017, p. 139; see also Pusztahely, 2013). If this is in fact so, the Hungarian system could be categorized as a unique two-tier system. If it is not, then it is to be categorized as a unique one-tier system where the sole limitation period is an objective one (and not subjective as is usually the case of one-tier systems). After the implementation of the Directive, the system of limitation of antitrust damages claims is diametrically opposite, as only a subjective five-year limitation period as defined in Article 10(2) of the Directive is now being laid down.

In virtually all jurisdictions, the definition of the limitation periods and/or their length has been altered to some extent in comparison to their general rules on limitation. It is also to be stressed that the moments from which the periods begin to run, as well as application of the rules on suspension/interruption to long-stop periods differ from Member State to Member State. A comparative analysis of the limitation periods should therefore not only consist of the length of the periods but should also cover other elements of the limitation system.

## 2. Beginning of the running of the Article 10(2) limitation period

### 2.1. Introductory remarks

As has already been explained in the previous chapter, Article 10(2) of the Directive deals with the beginning of the running of the 'shorter' limitation period. It provides that the period shall not begin to run, first, before the infringement of competition law has ceased, and second, before the claimant knows, or can reasonably be expected to know of the following: (i) the infringer's behaviour and the fact that it constitutes an infringement of competition law, (ii) the fact that the infringement of competition law caused harm to the claimant, and (iii) the identity of the infringer. It can therefore be said that within this limitation period, the Directive sets out a combination of an objective and a subjective trigger for the beginning of the running of such limitation period.

### 2.2. Objective trigger starting the running of the Article 10(2) limitation period

As an objective trigger causing the start of the running of the limitation period regulated in Article 10, the Directive provides for a negative definition: the limitation period should not run until the infringement of competition law has ceased. This was surely inspired by the interpretation given by the CJEU in *Manfredi*[9] where it stated that '[a] national rule under which the limitation period begins to run from the day on which the agreement or concerted practice was adopted could make it practically impossible to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice, particularly if that national rule also imposes a short limitation period which is not capable of being suspended', and added that '[in] such a situation, where there are continuous or repeated infringements, it is possible that the limitation period expires even before the infringement is brought to an end, in which case it would be impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action. It is for the national court to determine whether such is the case with regard to the national rule at issue in the main proceedings'. The Commission's draft Directive stated in Article 14(2) that Member States shall ensure that the limitation period does not begin to run before the day on which a continuous or repeated infringement ceases. The final wording of the Directive has omitted the reference to continuous or repeated infringements. Article 10(2) now states

[9] See paras. 73–82 of the judgment.

that the period shall not begin to run before the infringement of competition law has ceased.

However, both the judgment and the opinion of AG Geelhoed[10] in *Manfredi*, and the Directive, omit to specify the terms 'infringement', 'continuous or repeated infringement' and 'cessation of infringement'. Does the infringement take place when, for example, a cartel agreement was entered into or only when the agreement was implemented on the market (for example, the cartel prices were actually set) or does it refer to an individual transaction applying the cartel price in a one-time or an ongoing relationship with an individual customer? Should thus the cessation of the infringement be viewed in relation to each individual claimant, or should it be viewed in relation to the infringement as a whole regardless of when the legal relationship between the perpetrator and individual claimant and the transactions causing damage within such relationship have ceased? What is the meaning of 'continuous infringement'? What is the dividing line between a continuous antitrust violation and a series of separate individual antitrust violations?[11] What is clear from *Manfredi* is that setting the starting point of the limitation period to the moment of concluding the agreement is generally not appropriate in cases where the effects of the agreement might occur long afterwards (for example, in cases where after the agreement is concluded, a series of transactions causing damages are made on its basis with the claimant in a loger period of time). It is, however, uncertain how this objective trigger of Article 10(2) will be interpreted in practice.

### 2.3. Subjective trigger starting the running of the Article 10(2) limitation period

As the subjective cause triggering the start of the running of the limitation period regulated in Article 10(2), the Directive sets forth the creditor's (claimant's) awareness of the said three circumstances. Alternatively, the criterion of reasonable expectation of awareness is provided for (so-called 'discoverability criterion', present in Member States' general rules on limitation or in their case-law). The running of the limitation period can thus start the moment when the claimant could be reasonably expected to know of the competition law infringement, its perpetrator and the harm caused by it.

The standard of reasonable expectation of awareness has caused practical and theoretical concerns regarding the moment when the conditions for such legal fiction are actually fulfilled. Is it (a) the moment when a purported

[10] Moreover, the AG's opinion does not even touch upon the issues assessed by the Court, The Opinion of Advocate General Geelhoed delivered on 26.01.2006, ECLI:EU:C:2006:67.

[11] For further details on these concepts in US antitrust, see Practicing Law Institute, 2017, p. 54–55; Broder, 2012, p. 72–73; Foer and Stutz, 2012, p. 255–256.

infringement was reported on by the media; (b) the moment when the competition authority has started its formal or informal inquiry into a business practice; (c) the moment of the publication of a statement of objections; (d) the moment of the publication of a decision by the relevant authority;[12] (e) the moment of the finality of such a decision?[13]

The fact that, according to Article 10(4) of the Directive, the limitation period is suspended for the complete duration of the public enforcement procedure (or perhaps even longer if the authorities take actions already before the start of the formal proceedings) might steer us to the conclusion that the limitation period probably starts to run at the latest at the outset of the public enforcement procedure, and definitely before it ends with a final decision. Setting a suspension/interruption for the duration of the proceedings would otherwise be pointless. The important question here is, however, whether the subjective limitation period set out in Article 10(2) of the Directive will ever start to run before the moment set for a suspension or interruption of the period due to public enforcement proceedings. If not, that would mean that this limitation period starts to run only after one year from the finality of the public enforcement decision. Member States have not clarified their positions on this issue in their respective implementation legislations, leaving it to be assessed by national courts.

### 2.4. Implementation of Article 10(2) in CEE countries

Member States (CEE countries included) have followed Article 10(2) of the Directive in terms of the moment when the period starts to run and have copy-pasted it, or at least intended to copy-paste it as verbatim as possible into their national legislation. Some have retained the negative definition of the elements found in the Directive, for example Slovakia and Romania[14]; others transformed it into a positive definition, for instance Slovenia, Croatia (Butorac Malnar, 2017, p. 64) and Poland (Piszcz and Wolski, 2017, p. 218). In

[12] Such was the position of the Council in para. 27 of its General Approach to the Proposal of the Directive dated 02.12.2013, http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%20 15983%202013%20INIT (22.04.2017): 'A claimant can reasonably be expected to have this knowledge as soon as the decision of the competition authority is published'. See also Ashton and Henry, 2013, p. 115–116.

[13] Finnish and Norwegian courts have already tackled this dillemma. See the Norweigan case Bastø Fosen in which the EFTA Surveillance Authoritiy submitted its *amicus curiae* on the relevant question of limitation, and the Finnish raw woods case, presented in Franklin, Fredriksen and Barlund, 2016, p. 17–18, and Havu, 2016, p. 404. See also the Commission staff working document, Impact assessment report, Damages actions for breach of the EU antitrust rules Accompanying the proposal for a Directive…, p. 57.

[14] A critique of such style has been given by Blažo, 2017, p. 252.

Slovenia, one of the earlier drafts of the implementing legislation overlooked that point (a) of Article 10(2) requires not only the knowledge of the infringer's behaviour but also the fact that it constitutes an infringement of competition law (Vlahek and Podobnik, 2017, p. 277; Vlahek and Lutman, 2017, p. 115). In order to comply fully with the Directive, the final version of the draft has added the missing element. It is plausible, however, that in reality these two elements coincide. In Poland, a reference to the general rules of the civil code was made with regard to the starting point of the five-year limitation period, whereby the general rules (although they were amended at the time of the implementation of the Directive) mention only the knowledge or discoverability of the damage and the person obliged to repair it. In addition, the person obliged to repair the damage (for example, the parent company) does not necessarily coincide with the person committing the infringement (parent company's subsidiary). The same inconsistency can be detected in the Estonian (Pärn-Lee, 2017, p. 113) and Czech draft implementing provisions (Petr, 2017, p. 90). Hungarian implementing provisions require knowledge or discoverability of the amount of the damage sustained (not merely the fact that the infringement caused harm to the claimant) and the person obliged to repair it (Miskolczi Bodnár, 2017, p. 140). Hungarian commentators also stress that the term 'knowledge of the infringer's identity' is not clearly defined, as in cartel cases, the infringers are usually manifold. Is it to be interpreted so as to demand knowledge of any or all of the many cartelists (*Ibid.*)?[15]

## 3. Length of the limitation periods

### 3.1. Short subjective period

Article 10(3) of the Directive sets forth the length of the limitation period at a minimum of five years. The length of the period is hardly in step with latest comparative trends urging for relatively short limitation periods, set between two and six years, whereby commentators stress that subjective limitation periods, if implemented, should be set closer to the minimum of the said spectre and that creditors should in those cases be required to act expeditiously.[16]

The Directive thus sets forth what is a minimum length for a limitation period, therefore leaving the decision of potentially longer periods to the

[15] We believe this to be a relatively moot issue – knowledge of the infringer will usually arise from the knowledge of the existence of a cartel itself and therefore (all of) its members.

[16] Draft Common Frame of Reference (DCFR) and UNIDROIT Principles accordingly set out a general 3-year limitation period. Von Bar and Clive, 2009, p. 1144–1147, 1149.

Member States' legislators. A comparative analysis shows that most Member States (including the majority of CEE countries) opted for the minimum prescribed time span (five years), which is surely due to the fact that their respective juridical traditions are not familiar with longer limitation periods. The majority of the Member States, including CEE countries, have set forth a general subjective period that is shorter than five years. In Slovenia, Croatia, Estonia, the Czech Republic, Lithuania and Poland, the general subjective limitation period is three years, in Slovakia four years and in Bulgaria five years. Compared to the EU as a whole, a longer, six-year limitation period has been set out only in Ireland and the United Kingdom (save Scotland with a five-year period). Latvia is an interesting standout with a 10-year limitation period, implemented in order to align it to Latvian general limitation period (Jerneva and Druviete, 2017, p. 161). It is surprising that a five-year minimum has been set out in the Directive, as it fully corresponds neither to the traditions of the majority of the Member States, nor to proposals for a unified private law in the European legal environment. One would expect for the Commission and the legislator to provide a detailed analysis of the various limitation regimes and put forward arguments for selecting a five-year limitation period, coupled with various instances of a potentially long suspension or interruption.[17]

It it also worth mentioning that Article 10 of the adopted Directive sets out a unified approach applying to all types of antitrust damages actions, in contrast to the Commission's White Paper and later the draft Directive which set different limitation periods for stand-alone actions and for follow-on actions. In the case of the latter, mirroring the regime in force at that time before the Competition Appeal Tribunal in the UK, the limitation period was set to two years after the infringement decision becomes final (Ashton and Henry, 2013, p. 115; Vlahek and Lutman, 2017, p. 104–105). The same regime was in force in Romania prior to implementing the Directive (Mircea, 2017, p. 239; Vlahek, 2017, p. 58).

### 3.2. Long-stop period

As has already been demonstrated, the length of the long-stop period, the moment it starts running, and the level of deviation from general rules on limitation vary from Member State to Member State. Among CEE countries,

[17] Upon amending the US Clayton Act in 1955, for example, a uniform objective 4-year limitation period for bringing antitrust damages cases was decided on upon a survey conducted by the Senate Committee of Justice. The survey showed that limitation periods set in the laws of the federal states range from 1 to 20 years, that the majority of states set forth a 4-year limitation period, that the average limitation period was 4,85 years, and that limitation periods were at that time being shortened (Stewart, 2012, p. 71, 74).

Slovenia, Croatia and Poland implemented a two-tier system. Slovenia (where the general long-stop period is five years from the moment the damage is sustained) opted for a ten-year long-stop period, which starts to run when the damage is sustained and the infringement has ceased, and is suspended during public enforcement proceedings (Vlahek and Podobnik, 2017, p. 277–278). Croatia (where a general objective limitation period for bringing damages actions is also five years from the moment the damage is sustained) decided for a fifteen-year long-stop period starting to run from the moment the infringement has ceased (Butorac Malnar, 2017, p. 64). It is, however, not clear from the Croatian implementing provisions if this period, too, is interrupted as is the case of the shorter, five-year limitation period. In Poland, the general long-stop period of ten years applies also in antitrust damages cases, but it starts to run when the antitrust infringement ceases to exist.

## 4. Suspension/interruption of the limitation period due to public enforcement proceedings

### 4.1. Provisions of the Directive

In Article 10(4), the Directive requires Member States to ensure that the limitation period is suspended or interrupted (national legislators can thus freely choose between the two options) if a competition authority takes action for the purpose of the investigation or its proceedings with respect to the infringement of competition law, to which the action for damages relates. Such suspension is to end at the earliest one year after the infringement decision has become final, or after the proceedings are otherwise terminated.

In addition, paragraph 36 of the Directive's Preamble underscores that national rules on the beginning, duration, suspension or interruption of limitation periods should not unduly hamper the bringing of actions for damages. According to the drafters of the Directive, this is particularly important in view of the follow-on actions that build upon a finding of an infringement by a competition authority or a review court. In this respect, Member States should set forth a regime, enabling actions for damages after proceedings by a competition authority, with a view to enforcing national and EU competition law.

### 4.2. Concept of suspension/interruption

The statute of limitations is generally aimed at protecting debtors and certainty of their legal position, while the interruption and suspension of the limitation period are in the interest of creditors. The distinction between

suspension and interruption lies not only in their legal consequences (the limitation period is merely stayed during the suspension, while it runs anew in case of interruption), but also in the underlying reasons. Traditionally, an interruption of limitation period is caused by activities of the parties (for example, filing an action, admitting the debt), while a suspension is caused due to special (personal or social) relations between the creditor and the debtor, or by certain exogenous circumstances representing insurmountable barriers[18] regarding access to courts (for further details see Vlahek, 2017, p. 43–44). Suspension of the running of a limitation period is usually also justified when the parties attempt to solve their dispute out-of-court.

The Draft Common Frame of Reference (DCFR), representing an optimal modern European civil law regulation, lists a suspension, renewal (equal to interruption in continental legal jurisdictions) and postponement of the expiry of the period of prescription. Suspension and postponement both form part of a more general, common concept of an extension of the limitation period. In addition, certain situations where continental legal systems provide for an interruption, the DCFR regime proposes a suspension of the limitation period.[19] The trend of shifting from an interruption to a suspension is also tangible in some national limitation regimes (see Von Bar and Clive, 2009, p. 1167–1169).

The question is whether proceedings before the competition authorities fall within these traditional meanings. Is pending public enforcement an impediment requiring the suspension of the limitation period? Is an inititation of public enforcement proceedings comparable to filing an action triggering an interruption of the limitation period? Does the regime set out in the Directive imply that national courts are not sufficiently equipped to apply antitrust rules

[18] Impediments beyond control, such as war, floods, earthquakes, epidemic diseases, other natural disasters.

[19] Art. III–7:301 of the DCFR sets forth the suspension of limitation period for cases of a creditor's ignorance, while Art. III–7:302 DCFR provides that the running of the limitation period is suspended from the time when judicial proceedings to assert the right have begun, and the suspension itself lasts until a decision has been made which has the effect of res judicata, or until the case has been otherwise disposed of. Where the proceedings end within the last six months of the prescription period without a decision on the merits, the period of prescription does not expire before six months have passed after the time when the proceedings ended. Art. III–7:303 DCFR regulates the suspension in cases of impediments beyond creditor's control (where there is no reasonable expectation of potential avoidance or overcoming of such impediments) – the suspension in such cases is triggered only if the impediment arises, or subsists, within the last six months of the limitation period. The postponement of the expiry of the limitation period is provided for in cases of negotiations (Art. III–7:304 DCFR) and incapacity (Art. III–7:305 DCFR). The renewal of the limitation period by acknowledgement or by attempted execution is regulated in Arts. III–7:401 and III–7:402 DCFR.

by themselves, although due to the reform brought about by Regulation 1/2003[20] they undoubtedly have jurisdiction to apply all the provisions of Articles 101 and 102 (for details of the reform see Vlahek, 2004)? Is antitrust enforcement somewhat special in comparison to other fileds of law due to the complexity of the legal issues assessed within the element of illegality or/and due to the binding effect of competiton autrorities' decisions finding an infringement? It is clear that public antitrust enforcement proceedings do not fit well into the general definitions of the reasons for a suspension and an interruption. In the US, where the suspension of limitation of antitrust damages claims has been set out in the Clayton Act since 1914, both the case-law and theory stress that the purpose of Article 5(i) tolling rules is 'to reap the benefits of the Government suit', 'take advantage of Government antitrust proceedings', 'get a free ride on a public enforcement action' (Stewart, 2012, p. 76–77). The purpose of tolling systems in the US and in the EU is merely to aid claimants, who are better off with a public decision in their hands before turning to the court. This, however, does not mean that without competition authorities' decision, the parties would be deprived of a remedy. They may file a claim with the court irrespective of whether an infringement decision has been issued by the relevant authority or not. It would thus be an exaggeration to interpret the lack of public antitrust enforcement as an impediment 'beyond control', preventing the claimant from pursuing his or her claim. The rules on suspension and interruption of limitation periods in antitrust represent, therefore, a novel set of rules in the Member States' regimes of limitation.

### 4.3. Drafting of the provisions of the Directive

In its Green Paper from 2005,[21] the European Commission dealt with the issues of suspension and interruption quite modestly, underscoring the arguably important role the two concepts (and also longer limitation periods in general) play in ensuring efficiency of antitrust damages claims, especially in cases of follow-on suits. During its public consultations, the main thrust of the questions was focused on the issue of a suspension of limitation periods in cases of public enforcement procedures, more precisely on the trigger points for the beginning of a suspension. Two options were presented: one set the trigger at the outset of the proceedings before national competition authorities or the Commission, alternatively, the limitation period would not even start running before the

[20] Council Regulation (EC) No. 1/2003 of 16.12.2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p. 1–25.

[21] European Commission, Green Paper, Damages actions for breach of the EC antitrust rules, COM(2005) 672 final.

finality of the decision issued by the relevant authority.[22] In its reaction to the Green Paper, the European Parliament adopted a positive stance to the concept of a suspension of the limitation period.[23] The White Paper of 2008, published by the Commission seems to prove, however, that the Commission has shifted towards favouring the concept of an interruption, since it presented the latter with a two-year prolongation as its prefered option for follow-on actions.[24] This decision was based on the recognition that claimants find it sometimes difficult to calculate precisely the remaining period for filing a claim, given that the opening and closing of public enforcement proceedings by competition authorities is not always publicly known. The Commission also stressed that if a suspension was to commence at a very late stage of the limitation period, there may not be enough time left to prepare a claim.[25] This led the Commission to lengthen the period of suspension for an additional year counting from the finality of public enforcement procedures. In 2007, this view was shared by the European Parliament in its Resolution on the Green Paper of 2005.[26] It is to be pointed out, however, that the Green Paper itself contains no mentioning of a suspension period lasting beyond the finality of public enforcement decisions. It is also worth mentioning that certain European Parliament Committees favoured shorter as well as longer extensions of suspension of the limitation periods than those suggested by the Commission. The Committee for Economic and Monetary Affairs thus proposed a six-month period,[27] while the Internal Market and Consumer Protection Committee, the Legal Affairs Committee and the European Economic and Social Committee pushed for a two-year period following the finality of public enforcement procedure.[28] The Commission and/or the European legislator provide no detailed explanation of the reasons for deciding on the said rule. It might be that the eventually chosen rule (setting out an extension of the suspension period for a year after the finality of public enforcement procedures) was inspired by the concept of tolling found in the US Clayton Act of 1914, as amended in 1955.[29] The US Congress Judiciary

[22] Question M, Green Paper.

[23] Para. 25 of the European Parliament Resolution of 25.04.2007 on the Green Paper on Damages actions for breach of the EC antitrust rules (2006/2207(INI)).

[24] Impact assessment report, Damages actions for breach of the EU antitrust rules Accompanying the proposal for a Directive…, p. 77, 79.

[25] White Paper, p. 9.

[26] Para. 24 of the Resolution.

[27] Proposal dated 03.10.2013.

[28] Proposals dated 09.01.2014, 27.01.2014 and 16.10.2013.

[29] Sec. 5(i) of the Clayton Act stipulates that the running of the statute of limitations is suspended whenever any proceeding (civil, criminal or administrative FTC proceeding) is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws. The suspension is in effect for the duration of such proceedings and for one year thereafter.

Committee had this to say about the proposed one-year postponement: 'The plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint (…). [The one additional year provision] would guarantee all plaintiffs an adequate period in which to take advantage of Government antitrust proceedings'. It has to be noted, however, that the Committee recognized the potential pitfalls of such a prolongation. It especially stressed the fact that a long duration of public antitrust proceedings, taken in conjunction with a lengthy statute of limitations, may tend to prolong stale claims, unduly impair efficient business operations, and overburden court calendars. We strongly agree with this position and believe that the new European regime of limitation of antitrust damages claims and its counterparts in EU Member States are succeptible to these risks by setting out very long limitation periods, postponing the beginning of the running of these periods, setting out a suspension or even interruption of limitation, and adding an additional year to it etc.

### 4.4. Implementation of Article 10(4) in CEE countries

Some of the Member States had already provided for a suspension/ interruption during public enforcement proceedings in their legislation in

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The limitation period thus expires either (a) at the end of the one-year additional period after the finality of any public proceedings or (b) at the end of a four-year period after the cause of action accrued (Sec. 4B of the Clayton Act), depending on whichever period expires the latest. The US regime of suspension (or tolling, as it is called in the US) of the limitation period in the field of antitrust, however, does not affect the running of the period itself (which thus remains set at four years), but precludes the expiration of such period of four years in cases where the public enforcement lasts longer and thus postpones the moment of expiration for a period of one year after the finality of public proceedings. What in the US system is called suspension or tolling, might better be understood in the European setting as postponement known, for example, in the DCFR. In its original wording from 1914, the Clayton Act provided for a suspension of the limitation period; there was, however, no room for a year long postponement that found its place into the Act only after the 1955 amendments. When drafting the tolling provisions of the Clayton Act, due care was taken to avoid (i) unclear and uncertain provisions, (ii) enabling enforcement of stale claims and stalling by the claimants as well as (iii) overburdening of businesses. The provisions were in fact drafted in belief that the length of civil law damages proceedures would thus be effectively decreased. It is now claimed that one of the effects of the antitrust tolling system has been a rise in private enforcement of antitrust, first by follow-on actions and eventually also by stand-alone actions. For further details on the US tolling system see Stewart, 2012, p. 73–81; Practicing Law Institute, 2017, p. 23, 55–56, 71–72; Waters and Morse, 1996, p. 46; Foer and Stutz, 2012, p. 252–253; Rodger, 2013, p. 107.

force prior to the Directive. Among CEE countries, Slovenia, for example, set out the suspension rule already in 2008, when the new Competition Act was enacted. It did not, however, prolong the suspension for one year after the finality of the infringement proceedings (for further details see Vlahek in: Grilc, 2009, p. 513–516; Vlahek, 2017, p. 62). Hungarian law, on the other hand, set out the one-year suspension prolongation already before the implementation of the Directive (Miskolczi Bodnár, 2017, p. 139). In Bulgaria, too, the interruption of the limitation period with a new period running after the finality of the administrative decision has been part of national law before the Directive was implemented (Petrov, 2017, p. 36).

A vast majority of the Member States decided to use the concept of a suspension of the running of limitation periods, in spite of the Commission's preference for the concept of an interruption. Among the CEE countries, Slovenia, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Hungary and Romania have chosen the suspension option. In those states where suspension had already been set forth prior to the implementation of the Directive (Slovenia and Hungary), the suspension system was retained. The implementation provisions of those CEE countries that opted for a suspension are quite similar, providing for the limitation period to be suspended for the time of the public enforcement procedures and one year after its finality. None of them has chosen to set the suspension period for post-public enforcement procedure at more than one year, despite the fact that the Directive clearly provides for such an option. Given the fact that the limitation period can already be greatly extended in such legal framework, the decision of the Member States not to prolong it for more than one year is reasonable.

The concept of interruption of the limitation period was chosen by Croatia, Slovakia and Bulgaria. The relevant starting point in Croatia is the finality of the administrative decision or the moment of a different termination of such procedures. Slovakia and Bulgaria[30] have surprisingly set the starting point of the new limitation period at one year after the finality of the competition authority's decision. We believe this decision to be based on an erroneous interpretation of the fourth paragraph of Article 10(4) of the Directive – it seems that the Member States in question deemed that this provision encompasses also cases of interruption, rather than only suspension. It is less plausible to think that they have intentionally decided to protect creditors even more intensely than the Directive. Although not running contrary to the Directive, it is questionable whether such intense protection of the creditors does not go beyond what is acceptable in terms of legal certainty and the fair balance of the interests of the debtors and of the creditors. Some authors have

[30] Outside the CEE circle also Spain and Sweden.

fittingly, in our view, also criticised such a regime, cautioning that it unduly burdens the position of the infringers, and is in addition fairly unnecessary as the interruption concept already entails a 'fresh' start of the new limitation periods (see also Blažo, 2017, p. 253).

In view of the consequences the interruption system has on limitation, and thus on the creditor-debtor relationship, the percentage of Member States, including CEE states, opting for the interruption system is surprisingly high (32% overall, 27% among CEE countries) (for details of particular national regimes see Vlahek, 2017, p. 57–61). It should be underscored that the limitation period in the ambit of this concept starts to run anew only after the finality of the public enforcement procedure, which, in theory, could even mean decades after the harm was caused. In line with the explanation of the Commission in its White Paper in 2008, the Slovak legal authors stress that the interruption system is less problematic, as the period will restart after the final infringement decision. By contrast, the suspension system can be troublesome as its term shall be calculated with reference to the authorities' 'action for the purpose of the investigation or its proceedings'. It is claimed that this can be difficult to establish in Slovakia, because such information is not published by their competition authorities. In addition, such an action by the authorities may even take place before any proceedings start (Blažo, 2015, p. 270–271). Croatian and Bulgarian drafters offer no explanations for their decision. It might be that they deemed it more in line with the main goal of the Directive, that is, an effective enforcement of competition law.[31]

According to the Preamble, Member States should be able to maintain or introduce absolute limitation periods that are of general application, provided that the duration of such absolute limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation. This prerequisite would probably be met either by a shorter long-stop period to which a suspension or interruption would apply, or by a longer long-stop period that could not be suspended or interrupted. Such conclusion can be drawn also from the Commission's Green Paper of 2005 (Question M). When assessing the draft Directive, which did not mention the long-stop period, the Internal Market and Consumer Protection Committee, for example, proposed for the Commission's text to be supplemented with a paragraph stating that irrespective of the rules on length, beginning and suspension of the shorter limitation period, damages actions should be filed within ten years after the act causing the damage has taken place. Article III.–7:307 of the DCFR also implicates that the long-stop period cannot be suspended. National rules on this issue are rather vague. In Slovenia, for example, this is not explicitly set

[31] This explanation was, for example, given by the Belgian legislative proposal.

out in the law, and the theory and case-law barely address this issue. The position taken there, however, is that the rules on suspension apply also to long-stop periods (Vlahek and Lutman, 2017, p. 117). This, coupled with fear that otherwise the long-stop period might run out too soon, was the reason for including into the Slovenian implementing provisions an explicit rule that a suspension applies to both types of periods.

The implementing provisions (or commentaries thereof) of certain Member States with a two-tier limitation period system that have opted for the interruption concept (for example, Croatia and Denmark) reveal, on the other hand, that the interruption itself does not apply to the 'longer' limitation period. Regardless of the fact that the shorter five-year period restarts after the finality of an administrative decision (or other ways of terminating the proceedings) the right to claim damages will be, in the above jurisdictions, in any case barred after the expiry of the longer period, which will not be interrupted by the public enforcement procedure. In Croatia, this longer period amounts to fifteen years after the cessation of an infringement. The differentiation between the shorter and the longer period, and the effect of an interruption and a suspension on them is important, because of the consequences both designs ultimately have for the absolute length of the debtors' exposure to claims. The outcome may well be that the limitation will occur at a later stage in a suspension system than in the interruption system. As underscored, in Croatia, for example, the interruption of the limitation period pertains only for the shorter, five-year period (while the longer limitation period runs intact) – the interruption itself results in the shorter period starting anew after the finality of the public enforcement decision. This might lead us to speculate that the infringer's position in Croatia (and, indeed, in all Member States opting for an interruption instead of a suspension) is inferior to that in Slovenia and other Member States that have opted for the suspension concept. Such a conclusion is an oversimplification, as, for example, in Slovenia, the suspension affects also the longer 'objective' limitation period, which may result in the infringer's longer 'exposure' to potential claims than in Croatia. Therefore, taking into account the length of the public enforcement procedure, the time of its beginning and the starting point of the shorter limitation period, the infringer might very well be worse off in Slovenia than in Croatia. It is, however, also true that his/her position might be perceived as superior because the shorter, five-year long period could expire quicker in Slovenia than in Croatia.

The event triggering the suspension or interruption of the running of limitation periods has not been uniformly regulated in the Member States. This can be attributed to an extremely vague wording of Article 10(4) of the Directive ('if a competition authority takes action for the purpose of the

investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates'). While the regimes of the Member States seem, at first glance, to be verbatim copies of the Directive's wording, a closer analysis shows that the implementation provisions are nuanced and vary in certain important aspects. In addition, the commentators and the proposing Member States themselves seem to have a contrasting understanding and interpretations of the Directive's provision in question. An exact definition of the critical triggering event is of utmost importance in those Member States that opted for the suspension concept, as the length of the remaining limitation period depends on the decision regarding its starting point. If we slide the starting point to the left on a timeline, the suspension window will increase. One could identify, as the most problematic trigger events measures that are related to public enforcement investigation and procedure but are not properly formalised and thus not obvious or even noticeable to the parties. Do all kinds of activities of the competition authorities suffice in this context, also those taking place prior to issuing a decision starting the proceedings, for example, sending the undertakings and/or their managers or shareholders an informal request to submit information required for a market study? For example, Croatia set the 'beginning of the procedure in which the infringement will be established' as the triggering event, whereby some Croatian authors interpret it as the strictly formal beginning of the procedure, and thus not encompassing any prior investigative measures that would not be known to the parties (Butorac Malnar, 2017, p. 64). The Czech implementation proposal, on the other hand, provides that the limitation periods do not run during the formal infringement procedure as well as during the informal investigation. Furthermore, the Czech implementing proposal provides for a suspension during the disclosure of evidence procedure. Some Member States' implementing acts distinguish between the investigation and the infringement procedure, but define both as activities that trigger the suspension of the limitation period. The Latvian proposal rather imprecisely references to the complete duration of an investigation of an infringement. In Slovenia, the drafters of the implementation act have somewhat awkwardly copied the wording of the Directive, and decided on a definition that is as inexact as the original one. According to the Slovene implementation legislation, the triggering moment is 'the moment in which the authority takes measures for the purpose of an investigation or procedure relating to an infringement of competition law'. Such provision was faced with criticism in Slovenia as being ambiguous and not guaranteeing legal certainty and predictability. Drafters explained that activities taken by the competition authority prior to the opening of its proceedings, such as surveying a market, are also covered (see Vlahek, 2017, p. 67–68). It is therefore clear that in a large part of the CEE

countries, the task of clarifying the relevant trigger point for the suspension or interruption of limitation periods is, at the moment, left in the hands of national courts. The Commission has not been very helpful in this regard as it sometimes defines the relevant moment as the beginning of infringement proceedings,[32] while othertimes it refers to the moment when the authority starts investigating the infringement.[33] One can thus not overstate the need for future interpretation of this part of the Directive by the CJEU. If, in fact, non-detectable activities of the authorities are also covered in the definition, it is important that any abuses of the provision to the detriment of the defendants are prevented (Vlahek, 2017, p. 68).

Similarly important is the moment when the suspension stops and the starting point of the running of the new limitation period after its interruption. In Article 10(4), the Directive sets forth that the suspension 'shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated'. As has already been emphasized, those Member States that opted for the suspension concept have all set this period to one year. None of the countries thus felt the need to extend this period beyond one year, although the Directive allows for that. We find it important to reiterate, however, that a one-year post-public proceedings period was also enacted by some of the Member States that otherwise opted for the interruption concept, which to us remains a peculiar solution, as the interruption results in the limitation period starting anew.

The event defined as the starting point of the running of the additional one-year suspension period by the Directive is the finality of the public enforcement decision, or the termination of such procedure. The 'suspension Member States' have all set this moment by following the provision of the Directive. Although the Directive provides in the same paragraph for the concept of an interruption as an option for Member States, it says nothing about the starting point for the running of a new limitation period. The 'interruption Member States' have similarly set as the starting point for the running of a new limitation period the day when the public enforcement decision becomes final, or the termination of such procedure, or the first next day.

It should hereby be stressed that the rules on a suspension and interruption of limitation periods apply not only with respect to proceedings ending with a final decisions finding an infringement, but also in all other public

[32] European Commission, Proposal for a Directive of the European Parliament and of the Council 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, COM(2013) 404 final, 11.06.2013, p. 16, http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html (22.04.2017).

[33] http://europa.eu/rapid/press-release_MEMO-14-310_en.htm (22.04.2017).

enforcement proceedings irrespective of their outcome. This means that the limitation period was suspended or interrupted also if the authority terminated the proceedings without finding the infringement, which seems logical keeping in mind that the purpose of a suspension/interuption is to enable claimants to wait for the competition authorities to assess the alleged infringements without fear that their claims are time-barred. Despite a termination of given proceedings by the authority (in this case, the autority does not necessarily determine that the infringement did not take place (such is the case in Slovenia)), the claimants might still file damages actions against the defendant and try proving the infringement to the court in a stand-alone action.

Another relevant question is where the public enforcement procedure that triggers a suspension or interruption should have taken place. Member States, including CEE states, have uniformly defined as relevant not only their domestic competition authorities, but also the European Commission, and other Member States' competition authorities.[34]

The final issue that needs to be addressed is how the rules on suspension operate in cases of multiple infringers. Do they extend uniformly to them all, or are they applied individually according to the circumstances of each individual infringer? Let us imagine that a competition authority finds an infringement in the form of a cartel of two undertakings, but only one of them makes use of legal remedies and appeals against the authority's decision. In this case, the decision issued against the infringer that has not appealled becomes final, and so the suspension of the limitation period for claims against the non-appealing undertaking ends. At the same time, limitation is still suspended in relation to the infringer that has appealed the decision. Potential claimants thus have to be cautious if they wish to file actions against all of the infringers. On the other hand, undertakings that did not appeal against their administrative decisions, have to take into account that they might be targeted first by claimants, and that they might be held jointly and severally liable for the harm caused by the infringement (an extensive analysis of this issue is available in Akman, 2013). However, if they are immunity recipients, a special regime applies according to Article 11(4) of the Directive requiring Member States to ensure that any limitation period applicable to cases covered by Article 11(4) is reasonable and sufficient to allow injured parties to bring actions against immunity recipients. This is particularly relevant in cases where an immunity recipient is jointly and severally liable also to other injured parties (not only to its own direct or indirect purchasers or providers), that is, in cases where full compensation cannot be obtained by such injured parties from other infringers. Slovenia, for example, implemented this provision by stating that the limitation period

[34] Authorities of Norway, Liechtenstein and Iceland forming the EEA have not been mentioned.

does not run between the immunity recipient and the claimant who is not the immunity recipient's customer, between the moment the claimant filed a damages claim against other infringers and the moment he/she could not have obtained full compensation from these other infringers. Immunity recipients might thus be unsure for a long time about their status as defendants. It should be added that we find the whole regime of joint and several liability as set out in Article 11 of the Directive to be extemely vague and can see why at least some of the Member States – Slovenia for example – encountered difficulties in implementing its provisions (see Vlahek, 2016b, p. 576–580).

## III. Conclusions

We do believe that the Directive's regime of limitation is too activist and 'political' in its inclination towards the position and interest of the claimant, whom it clearly favours, while the status of the infringer-debtor is largely overlooked, as is the issue of legal certainty. We point yet again at the important differentiation between the protection of 'claimants who would otherwise be left without effective legal remedies' and the protection of 'free-riding claimants and their stale claims'. It is unfortunately not clear whether the Directive understands and provides for a clear dividing line between these two.

Although shortening and unification of limitation periods is encouraged in comparative law, the implementation of the Directive has resulted in a further differentiation of the limitation regimes in EU Member States, as well as further prolongation of the limitation periods in the field of antitrust damages claims. In most of the EU Member States, including CEE countries, the length of the subjective limitation period had to be extended beyond the majority of general limitation periods. In addition, limitation periods are being suspended or interrupted during public enforcement and ADR proceedings. Thus, limitation will occur only at a very distant point in the future, given the fact that (at least in CEE countries) public enforcement procedures can often take years.[35] Hopefully, this will improve as a result of the Proposal for a Directive to empower the

[35] Data on the length of judicial review procedures in competition law cases in EU Member States shows that in some CEE countries (Poland, Slovenia, Hungary, Slovakia, the Czech Republic) such procedures take from 800 to 1600 days on average. The collected data pertains only to first instance courts and thus does not reveal the length of a 'complete' judicial review process including the potential involvement of appelate courts. It could be therefore inferred that the judical part of the public enforcement procedure alone could take five or more years. The 2016 EU Justice Scoreboard, http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf (01.09.2017). For an analysis of the length of Slovenian antitrust damages cases see Vlahek, 2016a.

competition authorities drafted to strenghten national competition authorities.[36] Furthermore, some Member States have abandoned their general long-stop limitation periods, or are applying the rules on suspensions/interruptions also to long-stop periods, making it almost impossible for the periods to run out. One of the consequences of the implementation activities is the existence of new sets of rules on limitation that diverge substantially from the general rules already in place in the civil laws of the Member States. The Directive also failed to bring about harmonization in the special field of antitrust, as its proposed regime lacks precision and leaves many issues unsolved, thus leading to legal uncertainty due to dissimilar implementing provisions in Member States. The wording of Article 10 as well as other rules on limitation set out in the Directive, the dilemmas the drafters of national implementing legislation were faced with, and a detailed analysis of the national provisions show that some of the Directive's rules on limitation periods are vague and unclear. Furthermore, some provisions of the Directive offer broad discretion to Member States, while others are very detailed and prevent national legislators from aligning the new rules to their national civil law traditions. Clear reasoning in support of some of the Directive's provisions on limitation is also lacking. Some of the issues that would be worth addressing in detail, such as the application of the regime of limitation to other civil claims outside damages claims, are not covered (see Vlahek and Podobnik, 2017, p. 270–271, 276). Detailed rules on the application of the Directive's limitation regime to relationships existing prior to the enactment of the novel implementing legislation could also be provided. Member States, including CEE countries, have expectedly taken different paths in implementing the relevant provisions. The result of the implementation process is that, despite prudent attempts of the Member States to transpose the Directive as accurately as possible and to insert the new rules into the existing national limitation frameworks as logically as possible, the harmonization of the limitation regime in the field of antitrust has been rather unsuccessful. Moreover, novel sets of limitation regimes have been implemented in Member States that deviate to some extent from their traditional national rules and make the whole limitation system hard to comprehend.

We can also establish that CEE countries do not deviate greatly from the rest of the EU Member States – the differences in their implementing provisions are (similarly) a result of their varied general limitation regimes and – to an extent – different perception and interpretation of the Directive's aim and wording. Given the challenge they encountered with the ambigious provisions of the Directive, they have in fact done a remarkable job. It is now

[36] Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, 2017/0063 (COD).

for the courts to apply the new system, detect its pitfalls and offer solutions, and for the competition authorities to detect antitrust infringements, assess them as thoroughly and quickly as possible to ultimately adopt well-reasoned infringement decisions.

On a more general note, we detect that the Commission and the Parliament are sending an important signal through the Damages Directive and the Proposal for a Directive to empower the competition authorities. Public enforcement is to be strengthened, as it paves the way for future successful private enforcement claims; it seems at the same time that stand-alone private enforcement no longer represents an important goal for the Commission. It is obvious that the new private enforcement regime shifts its scope to national competition authorities and limits the role of Member States' courts to mainly follow-on suits. The statute of limitation in the Directive stands as a fine example of this. How else can one understand the adoption of a regime, which could result in extremely long suspensions or even interruptions of limitation periods in damages claims procedures (for further details, see Vlahek, 2017). To put it very bluntly, it seems as if the limitation regime at hand has been tailored primarily to grant enough time to public enforcement authorities to finish their procedures, so as to provide potential claimants with a legal basis for their follow-on damages claims.

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# Effect of National Decisions on Actions for Competition Damages in the CEE Countries

by

Evelin Pärn-Lee*

**CONTENTS**



## *Abstract*

One of the main objectives of the so-called Damages Directive (2014/104/EU) was to make antitrust enforcement more effective. Although in most EU countries private antitrust enforcement has been possible subject to general rules of civil law; the number of private antitrust litigations has remained relatively low. It is presumed that the complementary roles of public and private enforcement, as well as the synergy between them, will take effect if formal decisions taken during public enforcement will have binding effect with regard to follow-on private litigations. According to the Damages Directive, final national decisions on competition infringements shall have binding effect in follow-on litigations. What

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is to be understood under 'binding effect', and the potential effects thereof, has been subject to a lively debate among academics and practitioners. It has been questioned if decisions of an executive body can bind the judiciary, and if so, to what extent. What is the evidentiary value of a formal decision of a NCA regarding national courts, but also on the court of another Member State. The article deals with the main issues and arguments presented in the general debate on the binding effect of national competition law decisions, and provides a closer look on this topic with regard to specific CEE countries.

## *Résumé*

L'un des objectifs principaux de soi-disant Directive Dommages (2014/104/UE) était de rendre l'application privée du droit de la concurrence plus efficace. Bien que, dans la plupart des pays de l'UE, l'application privée du droit de la concurrence a été possible à la base des règles générales du droit civil; le nombre de litiges privés portant sur les violations du droit de la concurrence est resté relativement faible. Il est présumé que les rôles complémentaires de l'application publique et privée du droit de la concurrence, ainsi que la synergie entre eux, prendront effet si les décisions formelles prises lors de l'application publique du droit de la concurrence auront un effet contraignant en ce qui concerne les litiges privés subséquents. Conformément à la Directive Dommages, les décisions nationales définitives concernant les infractions en matière de concurrence ont un effet contraignant dans les procédures civiles ultérieures. Ce qui doit être compris sous «effet contraignant», et ses effets potentiels, a fait l'objet d'un débat animé entre les universitaires et les praticiens. On s'est demandé si les décisions d'un organe exécutif peuvent avoir un effet contraignant sur le pouvoir judiciaire et, si oui, dans quelle mesure. Quelle est la valeur probante d'une décision formelle d'une ANC concernant les tribunaux nationaux, mais aussi le tribunal d'un autre État membre. L'article analyse des principaux problèmes et arguments présentés dans le débat général sur l'effet contraignant des décisions nationales portant sur le droit de la concurrence, et examine de plus près ce sujet en ce qui concerne certains pays d'Europe centrale et orientale.

**Key words:** private antitrust enforcement; damages directive; effect of national decisions on actions for competition damages; litigations; binding effect of national decisions; irrefutability; *prima facie* evidence; presumptions; implementation; legal certainty; effectiveness.

**JEL:** K13; K15; K21; K41

## I. Introduction

The right to claim damages for harm caused through anticompetitive conduct was confirmed by the Court of Justice of the European Union (CJEU) in *Courage and Crehan*[1] already in 2001, and subsequently confirmed in several later rulings.[2] Nevertheless, the system of private antitrust enforcement in the EU is considered inefficient,[3] with a relatively low number of legal actions when compared with the United States (MacGregor and Boyle, 2014). More than half of the EU Member States have reported[4] a full transposition of Directive 2014/104/EU.[5]

The Damages Directive intends to remove the biggest impediments for potential legal actions and to promote the submission of damages claims in private litigation. In addition to essential procedural issues such as standing, collective redress and disclosure of evidence, the Damages Directive also provides for the binding effect of final decisions issued by National Competition Authorities (hereinafter, NCAs) and their review courts. This solution is intended to remove from the claimants the need to prove the competition infringement, and thus reduce the cost of litigation and increase the probability of successful follow-on case (Peyer, 2016). Regardless of the efforts made at EU level, encouraging private antitrust enforcement across the EU needs substantial law standardisation and the adjustment of procedural differences. Only when there are no major legal differences for the claimant with regard to the forum, thus no incentive to consider forum shopping, would equal legal certainty as to the right to claim compensation across the EU is guaranteed, at least in theory.

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[1] Judgment of 20.09.2001, *Courage and Crehan*, case C–453/99, ECLI:EU:C:2001:465.

[2] See for example judgment of 13.06.2006, *Manfredi*, joined cases C–295/04 to C–298/04, ECLI:EU:C:2006:461, judgment of 14.06.2011, *Pfleiderer*, case C–360/09, ECLI:EU:C:2011:389, judgment of 06.06.2913, *Donau Chemie*, case C-536/11, ECLI:EU:C:2013:366, judgment of 05.06.2014, *Kone AG, Otis GmbH, Schindler Aufzüge und Fahrtreppen GmbH, Schindler Liegenschaftsverwaltung GmbH, Thyssen Krupp Aufzüge GmbH v. ÖBB-Infrastruktur AG*, case C–557/12, ECLI:EU:C:2014:1317.

[3] As stated e.g. in European Commission, White paper on damages actions for breach of the EC antitrust rules, COM/2008/0165 final. Retrieved from: http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf (07.06.2017).

[4] Including Estonia, Lithuania, Slovakia and Slovenia. See: http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html.

[5] Directive 2014/104/EU of the European Parliament and of the Council of 26.11.2014 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, OJ L 349, 05.12.2014. In the article referred to also as the Damages Directive.

The synergy that the cooperation of private and public litigation of antitrust violations creates benefits first and foremost those who have suffered harm due to an anticompetitive behaviour. Considering the complexities of private antitrust enforcement issues, binding effect of formal national decisions should, at least in theory, eliminate some uncertainty and reduce the cost of litigation for claimants. Even though the litigation outcome of private antitrust enforcement cannot be predicted, it should facilitate decision-making on the where and when, as well as whether to litigate at all.

This article will analyse the effect of national decisions on actions for damages caused by competition law infringements in Central and Eastern European (hereinafter, CEE) countries.[6] The article is divided into four sections. Section one contains this introduction; section two provides the general discussion on this topic; a comparative view of CEE countries is presented in section three, as reported by relevant national rapporteurs (Piszcz, 2017); section four contains concluding remarks.

## II. Discussion on the main implementation challenges of Article 9 of the Damages Directive

### 1. Introductory remarks

According to Article 9(1) of the Damages Directive, Member States are requested to 'ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 of TFEU or under national competition law'. As provided in recital 34 of the Preamble of the Damages Directive, the aim is to avoid re-litigation of decisions that have become final. In addition, Article 9(2) of the Damages Directive proposes to the Member States to 'ensure that where final decision on infringement of competition law is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred'. Pursuant to recital 35 of the Preamble of the Damages Directive, it should be possible to present the findings of an infringement of Article 101 or 102 TFEU contained in a final decision of a NCA or review court originating

[6] Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia.

from another Member State as *prima facie* evidence on the fact that an infringement of competition law has occurred.

In general, the binding effect of final national decisions serves two main purposes: first, to ensure efficiency and consistency of public and private enforcement of EU competition law and, second, to relieve the plaintiffs from the burden to prove the infringement of competition law (Nazzini, 2015). However, the binding effect of final national decisions on competition law infringements in follow-on civil proceedings, as set out in Article 9 of the Damages Directive, seems to be one of its most controversial provisions (Frese, 2015). As provided by different commentators (see for example Nazzini, 2015; Merola and Armati, 2016; Panzani, 2015), it is not entirely clear if the decision of an executive body, such as a NCA, can bind national courts. Therefore also, it is uncertain if a distinction should be made between a NCA decision and a decision of its review court. Moreover, what is the scope of the 'binding effect' of final infringement decisions, and does it only bind the addressee of the final decision, or does it have wider effect and thus affect any person mentioned in the relevant finding(s)? Or, what are the evidentiary value of a final national decision and its findings of a competition law infringement in stand-alone proceedings?

## 2. Binding effect of the findings of final national decisions

Some commentators have questioned if the legal act of a NCA, which is an executive body, can be binding on the judiciary (Panziani, 2015) and, as such, if the rules of Article 9(1) do not violate the separation of powers principle and possibly also the rules on the protection of fundamental rights codified in the European Convention of Human Rights and Fundamental Freedoms[7] and the Charter of Fundamental Rights of the European Union.[8] Italy has been most critical of these issues as in the Italian legal order the decisions of their NCA represent, at best, *prima facie* evidence (Grassani, 2013; Panzani, 2015; Merola and Amati, 2016). In the United States, where private enforcement of antitrust violations is well established, the findings of an antitrust infringement established by their competition authorities is also not binding on the judiciary, and represents only *prima facie* evidence[9] rebuttable in litigation (Foer and Cuneo, 2012). Germany, on the other hand, had established the binding effect of the findings of a competition law infringement in follow-on litigation as

[7] For example Art. 6 prescribing the right to a fair trial.

[8] For example Art. 47 prescribing the right to an effective remedy and to a fair trial.

[9] Section 2 sub-clause b of US Clayton Act. Retrieved from: http://gwclc.com/Library/America/USA/The%20Clayton%20Act.pdf (07.06.2017).

law. According to sub-section 33(4) of the Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*[10]), a national court is bound by the findings on an infringement of competition law established by the European Commission or a NCA or its reviewing court of any Member State. The rule that the court cannot deviate from the final decision of a NCA exists also in the UK (Sections 18 and 20 of the UK Enterprise Act 2002, which are inserted as Section 58A into the UK Competition Act 1998). As referred to in Section 3 of this article, most of the CEE counties have generally followed the same model, except Bulgaria where the decisions of NCA have no direct binding effect (see also Piszcz, 2017).

Commission decisions are binding upon national courts, subject to principles provided in the case law of EU courts,[11] but also in primary[12] and secondary[13] EU legislation. Taking also into account the cooperation obligation of the Commission and NCAs,[14] the binding character of national decisions in follow-on litigations, as provided in Article 9(1) of the Damages Directive, is not only an essential but an appropriate consequence (see also Komninos, 2007). With respect to the protection of fundamental rights therefore, as provided by Frese with reference to the CJEU case *European Community v. Otis and Others*,[15] the protection of fundamental rights applies also to private antitrust enforcement (Frese, 2015), hence the Member States must ensure them.[16]

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[10] Retrieved from: https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl113s1750.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl113s1750.pdf%27%5D__1496842507450 (07.06.2017).

[11] See for example judgment of 28.02.1991, *Delimits v. Henninger Bräu*, case C-234/89, ECLI:EU:C:1991:91 or judgment of 14.12.2000, *Masterfoods Ltd v. HB Ice Cream Ltd*, case C-344/98, ECLI:EU:C:2000:689. In judgment of 06.11.2012, *European Community v. Otis*, case C-199/11, ECLI:EU:C:2012:684, CJEU stated in para 46 that 'Commission decisions (…) are binding on national courts'.

[12] See to that effect Art. 288 TFEU and Art. 4(3) of TEU.

[13] According to Art. 16 of Council Regulation (EC) No. 1/2003 of 16.12.2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereinafter, Regulation 1/2003) 'when national courts rule (…) which are already subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission'. This rule codifies the principle ruled by judgment of 14.12.2000, *Masterfoods Ltd v. HB Ice Cream Ltd*, case C-344/98, ECLI:EU:C:2000:689 (called also the *Masterfoods* doctrine) pursuant to which national courts must avoid giving decisions which would conflict with a decision contemplated by the Commission (para 51). If a national court rules on a conduct that is already decided with a Commission decision, then the decision of the national court cannot run counter that earlier Commission decision (para 52). Such binding effect of the decisions of the Commission is of course without prejudice to the interpretation of Community law by CJEU.

[14] As provided in Art. 11 Regulation 1/2003

[15] Judgment of 06.11.2012, *European Community v. Otis*, case C-199/11, ECLI:EU:C:2012:684.

[16] For CJEU the binding effect rule does not limit the defendants right to tribunal as per Article 47 of the Charter of Fundamental Rights of the European Union, as, first, the

The Commission has repelled accusations on lessening judicial protection and potential problems with securing fundamental rights by pointing to the fact that any final NCA decision is still subject to national judicial review.[17] Hence, it is not that an administrative authority has the final word when interpreting national competition law. With regard to EU competition law, the ultimate say on its interpretation is limited by Article 9(3) of the Damages Directive that prescribes that the binding effect requirement is 'without prejudice to the rights and obligations (…) under Article 267 TFEU'. Some commentators (such as Frese, 2015) fear that this will further incentivise a surge of new litigations on national NCA decisions. However, others consider this to be unlikely, because the binding effect of NCAs' decisions, or their acceptance as *prima facie* evidence, has, in fact, been part of the legislation of some Member States for a long time already (Peyer, 2016).

As provided in Article 9(1) of the Damages Directive 'an infringement of competition law found by a final decision (…) is deemed to be irrefutably established'. Recital 34 of the Preamble clarifies this by stating that the finding of an infringement of Article 101 or 102 TFEU in a final national decision should not be re-litigated. It also states that the effect of the finding should cover only (i) the nature of the infringement and its (ii) material, (iii) personal, (vi) temporal and (v) territorial scope. This indicates that the **irrefutability** refers rather to the evidential findings (*iuris et de iure*) of the antitrust infringement and not to the resolution, applying a narrow interpretation, or to the entire decision, applying a wide interpretation. However, it is not entirely clear what is the consequence of findings that establish an infringement of competition law, such as the nature of the infringement, but fail to establish its temporal and personal scope. In such a case, it is very likely that in a follow-on action the claimant still bears the burden of proof concerning those aspects which are not clearly stated in the findings. Or, if the claimant disagrees with some of the findings established in the final national decision, is the claimant then bound by these findings in a follow-on action or does the claimant have the right to go cherry picking and apply irrefutability with regard to some aspects, for example the nature of the infringement and its material scope,

Commission decision is subject to review by EU courts under Article 263 TFEU (judgment of 06.11.2012, *European Community v. Otis*, case C-199/11, ECLI:EU:C:2012:684, para 57), second, the defendants in fact brought actions for annulment of the Commission decisions (Case C-199/11, para 57), third, the review by EU courts is both on the law as well as on the facts, meaning that evidence is also assessed (case C-199/11, para 63).

[17] European Commission, Proposal for a Directive of the European Parliament and of the Council 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, COM (2013) 404 final. Retrieved from: http://ec.europa.eu/transparency/regdoc/rep/1/2013/EN/1-2013-404-EN-F1-1.Pdf (07.06.2017).

but waive irrefutability and choose to re-litigate the personal, temporal and territorial scope of the infringement. As there is hardly any national court practice on the matter, these issues cannot be answered with certainty.

## 3. National decisions on an infringement of competition law as prima facie evidence

The issue of providing binding effect to final decisions originating from other EU Member States was controversial as well. As a response to numerous critical comments submitted by Member States' authorities[18] and diversified commentators (for example Panzani, 2015; Nazzini, 2015; Merola and Armati, 2016), the effect of such cross-border final decisions is limited to *prima facie* evidence only (Frese, 2015). Although this choice has been regarded by some commentators as most appropriate, considering the lack of formal and substantive harmonisation of applicable rules and procedures within the NCAs across the EU, such compromise does raise its own issues. To start with, the approach chosen seems to follow an earlier standpoint of the Commission expressed in the proposal for Regulation 1/2003 that 'decisions adopted by NCA do not have legal effects outside the territory of their Member State, nor do they bind the Commission'.[19] In general, NCAs have no jurisdiction outside their own territories, neither to investigate nor to take such decisions. Even though Regulation 1/2003 has brought about a substantial level of convergence in antitrust enforcement, divergences still exists.[20]

The Damages Directive does not specify how the term *prima facie* evidence is to be furnished. The concept of *prima facie* is linked to the legal burden of the parties.[21] In general, the **burden of proof** determines at first which party must provide the facts and the relevant evidence (**evidential burden**). The

[18] See for that purposes comments made to the White Paper on Damages actions for breach of the EC antitrust rules available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments.html (07.06.2017).

[19] The territorial scope is not entirely clear from the wording of Art. 5 of Regulation 1/2003. However, in the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No. 1017/68, (EEC) No. 2988/74, (EEC) No. 4056/86 and (EEC) No. 3975/87, COM(2000) 582 final the Commission is rather clear on this issue (see comments on Art. 5).

[20] As provided by the Commission Communication Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives. COM(2014) 453. Retrieved from: http://ec.europa.eu/competition/antitrust/legislation/regulations.html (07.06.2017). According to the Commission, there are two main aspects of differences: (i) institutional position of NCAs, i.e. whether they can execute the duties in an impartial and independent manner, and (ii) national procedures and sanctions.

[21] Based on the principle of *ei incumbit probatio qui dicit, non qui negat*, i.e. the burden of proof is on the one who declares, not on one who denies.

allocation of that burden determines which of the parties to the dispute bears the risk of facts remaining unresolved or allegations unproven (**legal or material burden**).[22] The rules on the burden of proof are provided in every national legal system in the EU. However, one must take into consideration that the concept and terminology of *prima facie* evidence has its roots in common law, which also distinguishes between a legal burden[23] and an evidential burden[24] (Nazzini, 2015). According to Nazzini, EU courts systematically apply the concept of a *prima facie* case; however, they very rarely distinguish between a legal and an evidential burden in a consistent way.[25] Therefore, for Nazzini, *prima facie* evidence is evidence that, 'if contradicted and unexplained, can be accepted by the tribunal of fact as proof'. A final decision on an infringement of competition law presented to a court of another Member State is admissible as evidence which enables, but does not obligate, the court to find that the infringement prescribed in the decision is proven (Nazzini, 2015). For Merola and Armati, the *prima facie* evidence of Article 9(2) seems to fall within the category of *iuris tantum* (that is, simple evidence), which is rebuttable with evidence with the same level of probative value (Merola and Armati, 2016). Even though in cross-border cases the final decision of a NCA of another Member State has probative value, it is still up to the judge to decide in a follow-on case how much weight the judge will assign to a final decision on an infringement of competition law originating from another Member State. It may be that a judge deciding on a follow-on action wants to ensure that procedural standards applied in the other Member State comply with those of the deciding Member State. Therefore, it may happen that a judge affords less weight to a NCA decision from another Member State than that of *prima facie* evidence if the procedural standards in the other Member State are lower than that of the deciding Member State, or orders a full reinvestigation of the facts (Wright, 2016). Can a judge refuse to consider a final decision on a competition law infringement originating from another Member State as *prima facie* evidence? Probably yes, if this is objectively justified. Additionally, one has to pay attention to the Brussels Regulation 1215/2012,[26] which

[22] See for example reference 60 of AG Kokott Opinion in case C-8/08 *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*.

[23] Legal burden indicates, for example, that someone is presumed innocent unless proven otherwise. Legal burden never shifts but can be allocated by the parties.

[24] Evidentiary burden is flexible in nature, indicating that the party making a claim must provide proof thereof. Evidentiary burden can be acquired by the defendant and shift back to the claimant.

[25] Except in case C-105/04 P *Nederlandse Federative Vereninging voor de Groothandel op Elektrotechnisch Gebied v. Commissio*n. See also the opinion of AG Kokott in the same case.

[26] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12.12.2012 on jurisdiction and the recognition and enforcement of judgments in civil and

provides in its Article 45 rules for recognising and enforcing judgments, and which makes it possible to refuse to recognize a judgment if such recognition would be manifestly contrary to public policy (**order public**) or if the judgment was given in default.

The above provides that final decisions on competition law infringements taken in another Member States may be presented to national courts dealing with a damages case, but as the rules on the standard of proof are governed by national law, it is up to the judge to decide, subject to national procedural law, if and to what extent to accept them; provided of course, that the EU principles of equivalence and effectiveness are applied. It should, however, be easier to make a valid damages case if one does not have to start the case with proving the anticompetitive activity itself. Therefore, *prima facie* reduces the amount of resources that the plaintiff must use. They, however, still carry the burden of proving harm suffered as well as the causal link between the harm and the relevant infringement.

## III. Comparison of CEE countries

### 1. Introductory remarks

The subsequent comparison of how the provisions on the effect of national decisions have been implemented into national legislation refers to the following 11 EU Member States (named also Central and Eastern European countries): Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia.

### 2. Article 9(1) of the Damages Directive

In **Bulgaria,** the transposition of Article 9(1) of the Damages Directive is somewhat complicated. The Bulgarian Constitutional Court ruled already in 1998 that legal provisions set out in Article 36 of the Protection of Competition Act,[27] according to which decisions of the Bulgarian NCA are

commercial matters, OJ L 351/9, 20.12.2012.

[27] Protection of Competition Act (*Закон за защита на конкуренцията*), promulgated in State Gazette no. 102 of 28.11.2008, in force as of 02.12.2008. This is the third version of the act, which was drafted with the assistance of the Italian competition authority (*Autorità garante della concorrenza e del mercato*) and EU financial support under the PHARE programme. Bulgaria introduced competition legislation in 1991 with the adoption of the first PCA (promulgated in

binding on civil courts, contradict, in fact the constitutional principles of the **rule of law**,[28] **separation of powers**[29] and **judicial independence**.[30] In general, only those decisions of the Bulgarian NCA that have been reviewed by the Supreme Administrative Court and upheld by the latter can have binding effect on domestic civil courts.[31] Civil courts cannot re-analyse the substantive legality of a NCA decision that has already been confirmed by the Supreme Administrative Court. On the other hand, a civil court will neither establish an infringement nor award damages in a follow-on litigation which is based on a NCA decision that has been overruled by the Supreme Administrative Court. It is also reported that binding effect is limited in Bulgaria only to the persons that were parties to the initial NCA litigation (see for that Petrov, 2017). Thus, it is to be expected that the Bulgarian legal system will not be able to implement the concept of the binding effect in full.

In **Croatia**, however, the drafters of the act implementing the Damages Directive into their legal system see no problems with harmonising the concept of binding effect of domestic infringement findings in follow-on actions in full. It has been reported that, prior to the implementation of the Damages Directive, the courts had to take the decisions of the Croatian NCA into account, but were not bound by them (see for that Malnar, 2017).

In the **Czech Republic**, decisions issued by administrative authorities that establish an infringement are binding on the courts. Moreover, decisions issued by administrative authorities stating that no infringement has been committed are subject to judicial review, the consequence of which can be that the court establishes an infringement. In that respect, the legal system of the Czech Republic is considered in compliance with the rule on the binding effect set out in Article 9(1) of the Damages Directive. Even more, the legislator has chosen to prescribe clearly that the binding effect applies also to Commission decisions (see for that Petr, 2017).

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State Gazette no. 39 of 17.05.1991, in force as of 20.05.1991). It was soon revised in line with modern EU competition law doctrine, which became the basis for the development of national antitrust and merger control rules, with the adoption of another PCA in 1998 (promulgated in State Gazette no. 52 of 08.05.1998, in force as of 11.05.1998). Ten years later at the end of 2008, following Bulgaria's accession to the EU on 01.01.2007, the current third instalment of the PCA came into force, which further harmonized the procedure for antitrust enforcement and merger control in line with the changes which were introduced by Regulation 1/2003 and Regulation 139/2004.

[28] Art. 4 of the Bulgarian Constitution.

[29] Art. 8 of the Bulgarian Constitution.

[30] Art. 117(2) of the Bulgarian Constitution.

[31] Art. 104 of the Bulgarian Protection of Competition Act.

**Estonia**[32] has opted for a solution whereby the final decision of the Estonian NCA or a review court on an infringement of competition law is binding on the court that deals with the damages claim in a follow-on action.[33] What makes this solution difficult to grasp is the multiplicity of procedures applicable in Estonia to competition law infringements. Infringements related to anticompetitive arrangements (Article 101 of TFEU) are considered a criminal offence,[34] to which criminal procedural rules apply. Conduct related to an abuse of a dominant position (Article 102 of TFEU) is a misdemeanour, governed by the provisions on misdemeanour proceedings along with the rules of criminal procedure. Certain anticompetitive actions are processed according to the rules of administrative proceedings. The legal drafters explain the term 'binding' to mean that there is no obligation for the claimant to prove the infringement before a civil court, as this is considered proven. Yet it remains unclear if the whole judicial reasoning is binding on a civil court or merely the resolution of the decision, since no clarification with this regard is provided (see for that Pärn-Lee, 2017).

Already as of July 2014, the courts in **Hungary** are bound by the final decisions of the Hungarian NCA.[35] The law makes no distinction if the binding effect applies only to the operative part of the decision or also to its reasoning; it is assumed to extend to both. It is provided by law that civil court decisions should not contradict the decisions of the Hungarian NCA. However, civil courts are not bound by commitment decisions of the Hungarian NCA[36] (see for that Bodnar, 2017).

Current **Latvian** legislation does not recognise facts established in a decisions of an administrative court binding in civil court proceedings. Therefore, the decision of an administrative authority is currently not binding on civil courts. Latvian commentators have reported an abuse of a dominant position case related to *Riga Free Port*, where only the Supreme Court found that the

[32] On 05.06.2017, the law on Amending Competition Act and other acts related thereto entered into force, implementing the Damages Directive into Estonian legal system.

[33] Section $78^{12}(1)$ of the Estonian Competition Act.

[34] In general, Estonian criminal procedural law allows the court to handle a civil claim as part of the criminal matter. However, this possibility has now been specifically excluded with regard to damages claims arising from anticompetitive arrangements (Article 101 TFEU or corresponding national rule). The Estonian Code of Criminal Procedure (in Estonian *Kriminaalmenetluse seadustik*, passed on 12.02.2003, entry into force on 01.07.2004. English version available at: https://www.riigiteataja.ee/en/eli/530052017002/consolide (07.06.2017)) has been amended with Section $38^2$ whereby damage claims of victims of criminal offences related to competition shall be treated in civil proceedings.

[35] Which is considered a unique phenomenon, as a general court is not bound by the decisions of the administrative authority.

[36] There has been a case where the court established an infringement of competition law although the NCA terminated its procedure with commitments.

decision of the Latvian NCA can be referred to[37] in civil proceedings. The draft law implementing the Damages Directive provides that infringements of competition law established in a decision of the Latvian NCA do not need to be proven by the claimant. Commentators point to some problematic limitations in the decisions of the Latvian NCA. According to tort rules, when claiming damages the plaintiff has to prove (i) the illegal action or omission, (ii) the existence of losses and, (iii) the causal link between them. It is also essential to prove the fault of the infringer, that is, that the losses are the result of illegal activities of the infringer. However, decisions of the Latvian NCA reportedly do not address the issue of fault. No legal analysis of negligence or intent is provided. Further on, the issue of harm to other market participants is not considered either. This can make follow-on actions difficult, if not impossible and, consequently, claimants still need to proceed with stand-alone cases (see for that Jerneva and Druviete, 2017).

In **Lithuania**, decisions of the domestic NCA that have not been subject to judicial review are currently regarded as official written evidence with a higher evidential (*prima facie*) value.[38] Also, the Lithuanian Supreme Court has ruled that a mere infringement decision does not establish civil liability, as for this all relevant elements must be proven. This, however, is planned to change as, according to the new amended Competition Law, final decisions of the Lithuanian NCA as well as its review courts become binding on civil courts. Further on, according to Article 51(3) of the new Competition Law, the scope of the infringement decision is established.[39] Decisions of the Lithuanian NCA which indicate an infringement but fail to provide any statements or evidence are not regarded as binding. Neither are the opinions of the Lithuanian NCA addressed to the court on the issue of calculating damages (see for that Mikelenas and Zaščiurinskaitė, 2017).

**Poland** has opted to fully implement Article 9(1) of the Damages Directive, meaning that a final decision of the Polish NCA as well as relevant review court is considered binding in civil follow-on actions, but only with respect to the declaration on the infringement of competition law (see for that Piszcz and Wolski, 2017).

**Romania** is reported to be implementing the provisions of Article 9(1) almost literally, meaning that infringements established in a final decisions of the Romanian NCA as well as those delivered by any Romanian courts,

[37] In is not clear, however, if this means binding effect.

[38] According to Art. 197(2) of the Code of Civil Procedure, circumstances of *prima facie* evidence are considered fully proven, provided they are not rebutted by other evidence except for witness evidence. Witness evidence can be engaged only where the principles of fairness, justice and reasonability are at stake.

[39] Binding are foremost the nature of the infringement, its territory, duration and infringer.

will establish irrefutably that a competition law infringement has taken place. In that respect, the draft law implementing the Damages Directive does not impose any limitations on courts reviewing NCA decisions, and the binding effect is extended to any court decision establishing an infringement of competition law (see for that Mircea, 2017).

In **Slovakia**, the courts are legally bound by the decisions of an administrative authority establishing an infringement. Hence, Slovakian law is considered in compliance with Article 9(1) of the Damages Directive (see for that Blažo, 2017).

**Slovenia** has reportedly been inspired by Article 16 of Regulation 1/2003; as a result, the national legal system has been in conformity with the rules set out in Article 9(1) and 9(3) of the Damages Directive already since 2008. As a matter of fact, the final decisions of administrative authorities are binding on courts.[40] Thus national courts assessing follow-on damage claims are bound by the final decisions of the Slovenian NCA as well as the decisions of the Commission. Therefore, in relevant follow-on actions, the claimants only need to prove: (i) loss, (ii) defendant's fault and, (iii) that there is a causal relationship between the infringement and the loss sustained (see for that Vlahek and Podobnik, 2017).

### 3. Article 9(2) of the Damages Directive

As reported in **Bulgaria**, the drafters of the national legislation have chosen to disregard the concept of *prima facie* evidence and no special authority is granted to the final decisions originating from other Member States.

With regard to cross-border cases, **Croatia** has opted for a solution whereby the findings of other Member States' NCAs on infringements of EU competition law are subject to a rebuttable presumption. However, their findings on infringements of their national competition laws have no legal effect.

In cross-border action, decisions issued by NCAs of other Member States have no binding effect in the **Czech Republic**, although they can be presented in a legal action and are subject to a rebuttable presumption. It has also been said that national civil courts are reluctant to stay their proceedings while the Czech NCA investigates a potential infringement; Czech courts like to assess the legal matter on their own without waiting for the outcome of the investigation by the Czech NCA.

[40] As set forth in the judgment of the High Court of Ljubljana of 21.11.2013, *Blitz v. Kolosei*.

**Estonian** civil law is already in compliance with the requirement of Article 9(2) of the Damages Directive. Final decisions originating from other Member States on an infringement of competition law will be considered documentary evidence, subject to sub-section 272(1)[41] or 272(2)[42] of the Estonian Code of Civil Procedure,[43] as any written documents (including court decisions) can be filed with the court as evidence, provided they contain information on facts relevant for the case. Estonian law requires the judges to evaluate all evidence pursuant to the law from all perspectives, thoroughly and objectively and to decide, according to the conscience of the judge, whether or not the arguments provided by the parties in the case are proven.[44] Still, no evidence has predetermined weight for a court.[45] It is therefore to be assumed that in cross-border cases in Estonia, final decisions originating from other Member States on infringements of competition law are *iuris tantum* (that is, simple evidence), which can be rebutted by the defendant with any other evidence of the same evidentiary level.

With regard to Article 9(2), **Hungary** has opted to accept final decisions on an infringement of competition law originating from other Member States as factual evidence.

In cross-border actions, **Latvia** has opted to introduce a rebuttable presumption that the infringement had occurred, thus not referring to terminology of *prima facie* evidence.

In **Lithuania**, final decisions on an infringement of competition law originating from other Member States shall have *prima facie* effect with regard to Article 101 and 102 TFEU.

With regard to cross-border actions, **Poland** decided to treat decisions rendered in other Member States less favourably than domestic ones and, as a result, no changes are planned in its legal system.

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[41] According to sub-section 272(1) of the Estonian Code of Civil Procedure, documentary evidence is a written document or other document or similar data medium which is recorded by way of photography, video, audio, electronic or other data recording, contains information on facts relevant to the adjudication of a matter and can be submitted in a court session in a perceptible form.

[42] According to sub-section 272(2) of the Estonian Code of Civil Procedure, official and personal correspondence, decisions in other cases and opinions of persons with specific expertise submitted to the court by the participants in the proceeding are also deemed to be documents.

[43] In Estonian: *Tsiviilkohtumenetluse seadustik*, passed on 20.04.2005, entry into force on 01.01.2006. English version available at: https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/504072016003/consolide (04.03.2017).

[44] Sub-section 232(1) of the Estonian Code of Civil Procedure.

[45] Sub-section 232(2) of the Estonian Code of Civil Procedure.

In **Romania**, the provision of Article 9(2) is going to be transposed almost literally, meaning that final decisions originating from other Member States may be filed as *prima facie* evidence.

In **Slovakia**, a final decision on a competition infringement issued in another Member State is considered *prima facie* evidence, unless proven otherwise.[46] It is, however, reported that the wording of the relevant clauses is not clear enough, thus creating legal uncertainty. Based on the current wording, is it not clear what exactly is rebuttable – the piece of evidence (admissibility issue) or the facts provided in the relevant decision.

**Slovenia** has decided not to fully equate the final decisions of the Slovenian NCA and those of the NCAs of other Member States. Thus, final decisions deriving from other Member States are accepted, subject to a rebutted presumption. Interestingly also, damages actions are mostly stand-alone actions, a fact considered to be the result of the inefficiency of the Slovenian NCA, as well as the tight time limits regarding its statutes of limitations. It is also reported, however, that courts do stay their proceedings when the NCA initiates an investigation in the same matter. If the NCA decides that no infringement has taken place, the courts continue with a full assessment of the facts of the case. However, it seems that a decision on 'non-infringement' is used as evidence in favour of the defendant.

## IV. Conclusion

As provided in the previous section, most of the CEE countries[47] under review have already implemented, or are in the process of implementing Article 9(1) of the Damages Directive into their national legislation. It can be assumed, therefore, that harmonisation is possible on a rather high level, and that the infringement decisions issued by domestic NCAs or relevant courts subject to Articles 101 and 102 TFEU or national competition law will, indeed, become irrefutable.[48] The situation is, however, different with regard to Article 9(2) of the Damages Directive; the vision and understanding across the reviewed CEE countries differ significantly in this context. Most of the reviewed Member States granted final decisions on an infringement of competition law issued in another Member State some evidentiary significance. Bulgaria constitutes an exception here, which disregards the possibility to

[46] As set out in Section 4(2) of Act 350/2016.

[47] With the exeption of Bulgaria, where the binding effect of decisions issued by the domestic NCA requires confirmation by the Bulgarian Supreme Administrative Court.

[48] Art. 9(1) of the Damages Directive.

grant such final decisions evidentiary significance. It is, therefore, not clear if the decisions taken in other Member States could be presented as evidence in Bulgaria. Some Member States claim that their civil procedural rules are already in compliance with Article 9(2) and no harmonisation is needed, for example Estonia.

It seems, however, every Member State has its own approach when it comes to the relevant details and it may be that a decision of a NCA may be treated differently when presented in legal actions in multiple Member States. In some, it may well be accepted as *prima facie* evidence or even as preferred evidence. It is, however, not impossible that in other Member States it will be considered as a mere declaration of facts based on which the local judge provides its legal assessment.

Even though not perfect in every possible aspect, the Damages Directive is a big step forward towards enabling injured persons to claim damages sustained from competition law violators, as it is incentivising the victims to seek relief (Peyer, 2016). It prescribes rules, including those on the binding effect of NCAs' decisions that enable injured parties to consider the potential outcome of the case, including the expected costs and return. It is rather obvious that rules reducing potential legal costs of the claimant incentivise injured parties to take action. Also, an injured person is more likely to start legal actions if the probability of success is greater. Making evidence more easily available, and providing the irrefutability of evidence, results in cost efficiencies for the claimant (Peyer, 2016).

When we aim to increase legal certainty and reduce inconsistency in the application of Articles 101 and 102 TFEU throughout the EU, it is relevant to ensure that the findings of an infringement of Article 101 or 102 TFEU in a final decision issued by a NCA or a review court are not re-litigated in subsequent actions for damages, provided such findings cover only the nature of the infringement and its material, personal, temporal and territorial scope. A direct effect of this is an increase in the effectiveness and procedural efficiency of actions for damages. Indirectly, this will foster the functioning of the internal market for undertakings and consumers. What may, however, limit the use of the provided tool is the increasing use of commitment decisions, as argued by Dunne. Binding effect is granted to infringement decisions only, thus commitment decisions, which are meant to modify the behaviour of the involved companies, do not contain formal finding of a violation (Dunne, 2015).

In the US, private and governmental enforcement are considered complementary (Kaplan, 2001). Nevertheless, US private enforcement has lately been under critical review concerning whether the system is productive enough. Some US commentators held the system of private antitrust enforcement counterproductive, with its class action and triple damages concept (see for

example Rosenberg and Sullivan, 2005). Other commentators disagreed and appraised the systems as it seems to be the only way to compensate the victims for their losses (Crane, 2010; Davis and Lande, 2013). Even the US triple damages principle is considered justified as a real deterrence to violators. Some commentators even stated that private enforcement does more than anti-cartel programmes of governmental agencies (Davis and Lande, 2013). Although the US system strongly promotes the complementary approach and the synergy of private and public enforcement (Kaplan, 2001), it is interesting to note that in the US, there are more independently initiated cases than follow-on claims; still, the overall number of follow-on cases seems to depend on the public enforcement activity (Kauper and Snyder, 1986).

The binding effect of final decisions issued by NCAs will certainly facilitate private antitrust litigations across the EU, thus it constitutes a big step forward. The follow-on rule provides legal certainty and most probably enables the injured parties to estimate the costs as well as the outcome of a potential case. There is, however, also the risk that it will limit claimants with regard to infringements that have not been investigated by NCAs at all or with respect to the scope thereof.

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# Disclosure of Evidence in Central and Eastern European Countries in Light of the Implementation of the Damages Directive

by

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**CONTENTS**



## *Abstract*

The article looks primarily at the material comprised in the volume edited by A. Piszcz, *Implementation of the EU Damages Directive in Central and Eastern European Countries* published in 2017 and based on that compares aspects of the disclosure of evidence issue in Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia. The purpose of this article is to look into how the process for the disclosure of evidence has evolved in eleven countries of the European Union in light of Directive 2014/104/EU. The article looks at six key issues with regard to disclosure of evidence in light of Directive 2014/104/EU: general procedural issues; procedure for the submission of evidence;

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criteria for the disclosure of evidence; restrictions on the disclosure of evidence; disclosure of evidence by parties other than the defendant; and consequences of the failure to comply with a request to submit evidence. The article relies on primary data from eleven EU countries from Central and Eastern Europe.

***Résumé***

L'article se focalise principalement sur le contenu du volume publié par A. Piszcz *«Mise en œuvre de la Directive Dommages dans les pays d'Europe centrale et orientale»* publiée en 2017 et à la base de cela compare les aspects de la divulgation des preuves en Bulgarie, en Croatie, en République tchèque, en Estonie, en Hongrie, en Lettonie, en Lituanie, en Pologne, en Roumanie, en Slovaquie et en Slovénie. Le but de cet article est d'examiner comment le processus de divulgation des preuves a évolué dans onze pays de l'Union européenne à la lumière de la Directive 2014/104/UE. L'article examine six questions clés concernant la divulgation de preuves à la lumière de la Directive 2014/104/UE: les questions de procédure générale; procédure de présentation des preuves; les critères de divulgation de la preuve; restrictions à la divulgation de la preuve; la divulgation de preuves par des parties autres que le défendeur; et les conséquences du non-respect d'une demande de présentation de preuves. L'article s'appuie sur des données primaires de onze pays de l'UE d'Europe centrale et orientale.

**Key words:** private antitrust enforcement; implementation; Damages Directive; evidence.

**JEL:** K21

## I. General procedural issues

There is no uniformity as regards the choice of law that governs the collection or disclosure of evidence, denotes the process that needs to be followed, and the authority responsible for the collection of evidence. Some countries have proposed a separate act (Romania, Hungary, the Czech Republic), while others incorporated it into their laws governing civil procedure (Bulgaria, Slovakia). Some have also transposed it in multiple places, like Lithuania which has a new law meant to implement Directive 2014/104/EU[1] as well as introduced amendments of its civil procedure enabling those changes. This

[1] Directive 2014/104/EU of the European Parliament and of the Council of 26.11.2014 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, OJ L 349, 05.12.2014.

part of the article should broadly deal with two illustrative issues: the impact of objective examination *versus* adversarial model on the disclosure of evidence, and the role of expert opinions as evidence.

The injured party in competition-based damages case is faced with the challenge to obtain the evidence needed or, indeed, to substantiate sufficiently to the court the necessity for provision of such evidence, as adversarial litigation model does not envisage the application of objective examination principle. Unlike administrative procedure, where administrative courts are free to intervene and independently decide on the type of evidence that needs to be provided, even where the parties are not skilful in formulating a clear request in adversarial proceedings, the law precludes a judge from requesting any evidence on his/her own motion and give her/his own evaluation of facts and circumstances which are not raised and interpreted by the parties. In such proceedings, it is always the parties who must either present the relevant evidence or, if unable to do so, apply to the court with a request for the taking of the evidence. The Directive prescribes that 'upon request of a claimant' with 'a reasoned justification' (Article 5.1.) specifying the items 'as precisely and narrowly as possible' (Article 5.2.) the courts 'are able to order' disclosure. Member States have implemented the above wording but it remains to be seen if that will prove sufficient to make sure that the courts actually 'have the power'. According to Recital 16, a category of evidence requested should be identified by reference to common features of its constitutive elements such as nature, content of documents or other criteria. It may easily be the case where, due to the very asymmetry of information which the Directive attempts to rectify, the claimant is unable to specify the category of evidence sought to such a degree which accounts for **specifiable evidence**, and the judge does not engage in specifying the request to assist. This is a likely scenario in those countries where the specific limitations to discovery set out in the Directive are looked upon as narrowing down the courts' general competences (especially leniency or settlement documents) or dealing with **confidential information**, as specified in accordance with the respective national interpretation.

Similarly, the adversarial model envisages in principle that a judge cannot accept evidence which is not available to all parties in the dispute, whereas the Directive requires that a judge assesses whether the request is **proportionate**, also in regard to divulging **confidential information** where the courts **consider it relevant, ensuring that national courts have at their disposal effective measures to protect such information**. Thus Member States have discretion to provide arrangements for dealing with confidential information other than disclosing it to both parties.

Accordingly, in some Member States a judge will not disclose a document, if it is considered to contain business secrets and the confidentiality obligation

has not been waived by the party providing this information, appointing instead an expert to assess the damage (Hungary, Estonia). In others, courts are aided by issuing specific guidelines for dealing with confidential information (Czech Republic), stating that full information is disclosed to a limited number of persons associated with the claimant (Czech Republic, Latvia), or court appointed impartial experts who produce a report (for the purposes of the claimant) that does not contain confidential information. The courts may have a broad mandate to adopt other appropriate measures in order to protect the confidentiality of the disclosed information, such as erasing confidential information from the documents disclosed (Czech Republic). Nevertheless, critics argue that there is no measure that would prevent a competitor who is a party to an action for damages from using information obtained during a damages procedure to gain a competitive advantage, without necessarily infringing the duty of secrecy (Croatia).

This is not to say that an objective examination by courts is without these problems, or that courts are universal in applying the Directive with respect to the disclosure of evidence, the adversarial model exhibits the shortcomings of disclosure of evidence in a pronounced manner.

With regard to the role of expert witnesses, there is no uniformity either. In Latvia, a judge upon receipt of a reasoned request may decide to invite a competent institution to give an opinion on matters relevant to the case, which fall within the scope of the competence of the said authority.[2] Both Regulation 1/2003 and Latvian Competition Law (hereinafter, **Competition Law**) provide for the possibility to participate and to issue opinions by – respectively – the European Commission and the Latvian Competition Council.[3] At the same time, Latvian general jurisdiction courts are rather reluctant to invite competition authorities. Courts are generally not obliged to follow any type of evidence submitted, even in the form of an expert's opinion, although these opinions tend to be followed in practice (Jerneva and Druviete, 2017).

While opinions of the European Commission, as well as those of the Latvian Competition Council, must not be treated as binding, there seems to be a need for a clearer status of such interventions. Once, addressing a request by the claimant to invite the European Commission to issue its opinion, a Latvian judge rather emotionally denied the request, noting that a Latvian court is independent in making its judgments and neither European nor Latvian

[2] Art. 89 CPL.

[3] Point 2 of Part 1 of Art. 7 of the Competition Law. This provision gives the Latvian Competition Council the right, but does not formally oblige it, to issue opinions on the compliance of the conduct of market participants with the rules of competition laws.

authorities need to be invited to educate the judges.[4] New amendments to the Competition Law[5] (hereinafter, **Draft Competition Law**) provide that in case the court is not able to assess for itself whether access to certain evidence is crucial for the case of the claimant, it can request that the Competition Council issues an independent opinion and evaluates the relevance of specific evidence for the case. It seems, however, that the Draft Competition Law and amendments to the Latvian Civil Procedure Law (hereinafter, **Draft CPL** and collectively referred to as the **Amendments**) would be more effective if the courts were obliged to ask for such an opinion under specific circumstances (Jerneva and Druviete, 2017).

In interpreting the Estonian *travaux préparatoires* of the draft law, there are additional measures for an injured person to safeguard evidence such as, for example, the pre-trial taking of evidence. If there is suspicion that a potential opponent may start destroying evidence, the injured person may apply for pre-trial taking of evidence subject to paragraph 244 of the Code of Civil Procedure (hereinafter, **COCP**). In pre-trial taking of evidence the court, however, organises the collection of evidence only if (i) a request by the person seeking damages exists, as well as (ii) good reason to believe that evidence could be lost otherwise, or using the evidence afterwards could involve difficulties. In pre-trial taking of evidence, the court may also organise inspections, hear witnesses and request expert assessments (Pärn-Lee, 2017, p. 122).

There is no uniformity with regard to the procedure for the disclosure of evidence. This is bound to happen since each country's legal system is different and their legal history vary. Countries can also learn from best practices within the EU, as courts implement the Directive in light of their national laws. It is too early to predict the procedural outcomes at this stage.

## II. Procedure for the submission of evidence

The procedure for the submission of evidence should deal with two aspects: the existence of pre-trial procedures, and *prima facie* proof of existence. Two CEE jurisdictions have clear regulations on pre-trial proceedings. Latvian Civil Procedure Law (hereinafter, **CPL**) provides for an opportunity to organise a preparatory session in order to decide on issues related to the organisation of the proceedings. *Inter alia*, the court will hear requests to provide evidence which is not at the disposal of the claimant.

[4] Case reference available upon request.

[5] Draft law No. VSS-441, approved by the Meeting of State Secretaries on 08.09.2016.

In Estonia, the authors of the draft law have provided additional measures for an injured person to safeguard evidence, for example, pre-trial taking of evidence. If suspicion exists that a potential opponent may start destroying evidence, the injured person may apply for pre-trial taking of evidence subject to paragraph 244 of the COCP. In pre-trial taking of evidence the court, however, organises the collection of evidence only if (i) a request by the person seeking damages has been made, and (ii) good reason exists to believe that evidence could be lost, or using the evidence afterwards could involve difficulties. In pre-trial taking of evidence, the court may also organise inspections, hear witnesses and request expert assessments (Pärn-Lee, 2017, p. 122).

With regard to the second issue of *prima facie* proof of existence, the sub issues dealt with should be the claim should not be frivolous in nature, are decisions of national authorities (competition council) amount to proof or lack thereof. Though there is no general mention about frivolous claims, court practice thus far is clear in not entertaining claims of frivolous nature.

With regard to accepting decisions of national authorities as *prima facie* proof of existence, there is no consensus. This varies not simply because of the law, but also due to court practice. There is reluctance in Latvia to consider decisions of the competition council. The situation is pretty much opposite in Estonia and Lithuania. This might be an issue stemming from lack of trust between institutions. This could also be an issue of different interpretations of the law. In either case, it is not in the interest of a smooth implementation of the Directive or achieving the purposes of the Directive.

## III. Criteria for the disclosure of evidence

The Directive provides for proportionality concerning the request for the disclosure of evidence. There seems to be broad consensus on this. However, the implementation methods show slightly varying approaches.

The Draft CPL states that the request for evidence must be substantiated and proportionate. Proportionality is understood so that the request may only be submitted when the claimant has first submitted sufficient evidence to establish a *prima facie* proof of existence of the harm caused by the defendant. If the request for evidence is formulated in such a manner that it requests a category of evidentiary material, then such a category must be described in sufficient detail and precision in order for the other party and the court to be able to identify the type of evidence falling within the said category. Furthermore, it is also necessary to indicate the possible characteristics,

subject and contents, as well as time-period when the said evidence was created. The Draft Competition Law is also giving additional guidance on the process of requesting evidence contained in the case files of the Latvian Competition Council or the European Commission. The Draft Competition Law fully follows the text of the Directive in this respect. However, to change the attitude of the courts and the authority, mere reference to the right of the court to give access to sensitive documents is insufficient. A more certain language and clear legal tests should be inserted into the law to highlight the importance of access to evidence which is not at the disposal of the claimant (Jerneva and Druviete, 2017).

The Draft Competition Law provides that in case the court is not able to assess for itself whether access to certain evidence is crucial for the case of the claimant, it can request for the Competition Council to issue an independent opinion and evaluate the relevance of specific evidence for the case. It seems, however, that the Amendments would be more effective if courts were obliged to ask for such an opinion under specific circumstances – the legislature should introduce a legal test, specifying the minimum line argumentation to be put forward by the claimant. If the claimant successfully meets such criteria, the judge should be obliged to invite the authority or the author of the respective documents to present its objective observations on the substance and relevance of the evidence. Given that the involvement of the Latvian Competition Council does not increase the costs of the procedure, this solution should be used at least until general jurisdiction courts feel more confident in making the relevant evaluation by themselves (Jerneva and Druviete, 2017).

In Lithuania, the new law introduces the principle of proportionality to be followed by the court while deciding on the granting of access to evidence. The law transposes the criteria established under Article 5(3) of the Damages Directive for the evaluation of the proportionality of the access request. In addition, Article 52(7) of the new Law on Competition of Lithuania obliges the court, before deciding whether to grant access to evidence, to allow the participants to the court proceedings to express their opinion within seven days about such a request. This novelty will make it possible to balance legitimate interests of all parties to the proceedings, and to avoid 'fishing expeditions' at the earliest stage (Mikelėnas and Zaščiurinskaitė, 2017, p. 205).

With regard to proportionality, Estonian civil procedural law allows the court to refuse evidence or refuse taking the evidence if:[6]

– the evidence has been obtained by way of a criminal offence or unlawful violation of a fundamental right,

[6] Para. 238(3) COCP, Art. 5(3) a) and b).

- the evidence is not accessible and, above all, if the witness's data or the location of a document is unknown, or if the relevance of the evidence is disproportionate to the time necessary for taking the evidence or other difficulties related thereto,
- the evidence is not provided, or the request for taking the evidence is not made in a timely manner,
- the need for providing or taking evidence is not substantiated,
- the participant in the proceeding requesting the taking of evidence fails to make an advance payment demanded by the court in order to cover the costs incurred upon the taking of evidence (Pärn-Lee, 2017, p. 118–119).

Requesting disclosure of evidence from the Estonian Competition Board, which is included in its files, and asking for its views on the proportionality of disclosure is currently not regulated in Estonian legislation.[7] It is established in the draft law that the court requires the taking of evidence from the file of the Competition Board if that evidence is available in the file, and if it is impossible to take it from a party or third parties. The Competition Authority is entitled to express its views on the taking of the relevant evidence (Pärn-Lee, 2017, p. 121).

The bill for an amendment of the Protection of Competition Act (hereafter, BAPCA) (Bulgaria) does not go further than the Directive and reproduces the very same limitations, with respect to the disclosure of documents from the files of the competition authority. Requests for access to such documents are subject to a much stricter proportionality test, and leniency applications and settlement submissions enjoy absolute immunity[8] (Petrov, 2017, p. 44). The Directive sets out minimum standards for the disclosure of evidence, allowing Member States to introduce rules 'which would lead to wider disclosure'.[9] Article 5 requires the disclosure of documents in national proceedings from the opposing party or any third party, subject to a reasoned request and court control. The national court must use a proportionality test to weigh the interests in favour of, and against disclosure. The court should consider, in particular, the materials supporting the access request, the scope and cost of disclosure, and whether the evidence that is to be disclosed contains confidential information[10] (Petrov, 2017, p. 43–44).

In Croatia, the draft Act on antitrust damages provides that while deciding on disclosure requests, the court must apply the principle of proportionality, that is, it has to balance 'opposing interests in a given situation – the interests which would be favoured by the disclosure of the documents in question

[7] Art. 6(10) and (11) of the Directive.
[8] BAPCA proposal for a new Art. 118 PCA.
[9] Art. 5(8) of the Directive.
[10] Art. 5(3) of the Directive.

versus those which would be jeopardised by such disclosure' (Galič, 2015, p. 105). Pursuant to Article 6(5) of the draft Act on antitrust damages, the court should balance the interest of all parties involved and, in particular, their interest: (a) to avoid disclosure where relevant facts contained therein may be established though other available evidence; (b) to specify evidence as precisely as possible considering the circumstance of the case and to order disclosure only of evidence relevant to the case; (c) to make sure that the scope and cost of discovery is not disproportionate to the value of facts trying to be established; and (d) to safeguard the protection of business secrets (Butorac Malnar, 2017, p. 76).

However, some ambiguity arises from the requirement of proportionality of disclosure entrenched in Article 6(4) of the Directive. The Draft act specifies more rigidly that a **motion for disclosure** must be specific, that is, contain the description of the nature, subject or content of the files of the requested documents; it must relate to the damages case; the party must prove that it failed to obtain these documents by itself prior to requesting disclosure, and must ensure the protection of efficient public enforcement of competition law.[11] However, from a practical point of view, this will not be problematic; if anything, it provides a clearer guidance for the parties requesting disclosure while leaving untouched the right of the courts to observe that proportionality of disclosure is being observed (Butorac Malnar, 2017, p. 76).

In the Czech Republic, special rules apply with regard to competition authorities. Concerning information contained in the competition authority's file (but possibly also held by other parties, for instance, as a copy), the proportionality test should also take into account whether the request has been formulated specifically to cover such documents, whether the request is indeed connected to the action for damages and whether effectiveness of public procurement is not jeopardised.[12] These requirements are more or less precisely contained in the Damages Act as well.[13] In any event, the competition authority may be requested to disclose information contained in its file only if it cannot be reasonably accessed by other means[14] (Petr, 2017, p. 102).

In Poland, Articles 18 to 21 of the draft Act on Claims for Damages for Infringements of Competition Law (hereinafter, **ACD**) have a procedural nature. Thus, these parts of the ACD set requirements addressed to procedural writs (motions for disclosure of evidence), grant the party the right to be heard before the court decides to disclose evidence, and set conditions under which

[11] Art. 8(1) of the draft Act on antitrust damages.
[12] Art. 6(4) of Damages Directive.
[13] Sec. 16(1) and (2) of the Damages Act.
[14] Sec. 15(5) and 16(4) of the Damages Act.

the court dismisses a request for access to evidence, proportionality principle included[15] (Piszcz and Wolski, 2017, p. 226).

In Slovenia, the proportionality principle enshrined in the Directive is observed, as the claimant must produce the facts and evidence which enable a *prima facie* conclusion on the existence of the claim for damages when invoking his right of disclosure. As the Slovenian legal environment is not familiar with the standard of 'plausibility of the claim' used in the Directive, the drafters were forced to coin a new – similar type of standard, thus lessening the level of predictability and legal certainty.[16] It is also worth noting that Article 62a of Prevention of Restriction of Competition Act (Sl. *Zakon o preprečevanju omejevanja konkurence*, hereinafter, **ZPOmK-1**) envisages a conditional right to demand disclosure of evidence for the defendant, who must produce facts and evidence which enable a *prima facie* conclusion that the damages claim is not substantiated. Such a solution frets away from the regime set forth by the Directive. It does, however, stress the importance of proportionality and control over potential strategic abuses of the disclosure regime for fishing expeditions. These concerns are further touched upon in the third and fourth paragraph of Article 62a, respectively, where the drafters have transposed the qualitative standards regarding the proportionality test from Article 6 of the Directive. Additional rules are laid down in Articles 62a and 62d of ZPOmK-1 for disclosure of evidence and information from the file of the competition authority. The treatment of confidential data and privileged communication is regulated in Article 62a of ZPOmK-1 (Vlahek and Podobnik, 2017, p. 286).

The acceptance of the proportionality principle provides for legal certainty. Although there is a certain amount of difference in accepting the scope of the term proportionality, the broad consensus amongst the various Member States aids in the implementation of the purpose of Chapter II of the Directive, that is, the disclosure of evidence.

## IV. Restrictions on the disclosure of evidence

The restrictions on the disclosure of evidence should be divided into four issues: commercially sensitive data, possibility to restrict access to certain parts of the file, professional privileges, and inadmissible evidence.

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[15] See draft Explanatory Notes accompanying the ACD, p. 18–20.

[16] See Proposal of Act Amending and Supplementing the Prevention of Restriction of Competition Act (Sl. *Zakon o spremembah in dopolnitvah Zakona o preprečevanju omejevanja konkurence*) of 17.02.2017, p. 44.

With regard to commercially sensitive data, approaches vary. However, the general rule is that anyone with contact to such information needs to either sign a non-disclosure agreement or pay an upfront deposit. Some countries also have penalties in place for disclosure of commercially sensitive data to third parties. Although the Directive aims to provide for the disclosure of evidence, it is responsive to the protection of commercially sensitive data. Most countries have transposed this part of the Directive into their national legislations.

With regard to the restriction of access, different countries have different approaches. In Lithuania, the new rules regarding the treatment of, and access to confidential information have been introduced under Article 52(5) of the new Law on Competition. The court is entitled to order disclosure of confidential information, although certain protective measures or their combination should be used, such as: identification of the parties to the proceedings who will be entitled to work with confidential case material ('confidentiality circle') and related duties, in order to ensure the protection of confidential information; prohibition to copy and disclose such information, etc. (Mikelėnas and Zaščiurinskaitė, 2017, p. 205).

In Estonia, Article 5(3), only with regard to sub-clause (c) the draft law provides that the court may refuse evidence or to take evidence that contains a business secret or confidential information, especially concerning third parties and when, in the opinion of the court, it is not proportionate *vis-a-vis* with the evidence to prove it. (Pärn-Lee, 2017, p. 119). The measures currently available may be insufficient or even ineffective in protecting business secrets or confidential information in competition matters. To rectify this, the authors of the draft law proposed a system of confidentiality clubs/rings, which would have allowed the court to decide on access to such evidence, meaning that only the legal representatives of the parties would have had full access, complimented with a non-disclosure obligation; claimants, defendants and other parties to the procedure would not have had access to such evidence. The aim of this solution was for the infringers to not be able to hide behind the defence of business secret or confidentiality. However, the proposed measure was strongly opposed, thus the Ministry of Justice decided not to add it and to proceed with measures already available, even if they prove to be inefficient in damage claims concerning competition law infringements (Pärn-Lee, 2017, p. 120).

The Directive incorporates the recent jurisprudence of the CJEU, allowing claimants to specify 'categories' of documents, in order to facilitate the disclosure procedure.[17] This would bring a substantial improvement to the

[17] Case C-536/11 *Bundeswettbewerbsbehörde v. Donau Chemie AG*, ECLI:EU:C:2013:366 and Case C-365/12P *Commission v. EnBW Energie Baden-Württemberg AG*, ECLI:EU:C:2014:112. The latter case deals with access to documents according to Regulation 1049/2001.

position of claimants in Bulgaria, since so far the courts refused to order the disclosure of documents unless they were properly identified and the request was supported by data that such documents exist and are in the other party's possession.[18] The BAPCA rules do not go further than the Directive, and reproduce the very same limitations with respect to the disclosure of documents from the files of the competition authority. Requests for access to such documents are subject to a much stricter proportionality test, and leniency applications and settlement submissions enjoy absolute immunity[19] (Petrov, 2017, p. 44).

The Directive requires national courts to have 'effective measures' at their disposal to protect confidential information which has been disclosed. The BAPCA transposition confirms this obligation to protect confidential information, but in reality such measures do not yet exist in Bulgaria. So far, all documents collected in the course of a civil action, including via mandated disclosure, become part of the case file, which can be accessed by third parties. Therefore, additional implementing regulations and guidance for the courts would be required on when and how to implement the redaction of sensitive documents, hearings behind closed doors, restrictions on the circle of persons allowed to see specific evidence ('confidentiality rings'), etc. (Petrov, 2017, p. 44–45).

With regard to professional privilege, the Estonian civil procedural law provides that legal representatives (including notaries) should not be heard as witnesses without the permission of the person in whose interests the duty to maintain confidentiality is imposed. This restriction concerns facts, which have become known to legal representatives during the performance of their professional duties (Pärn-Lee, 2017, p. 120). The drafters claim that the obligation set forth in Article 5(6) of the Directive is covered with the above named national civil procedural rule. However, there is doubt in this context as the legal privilege principle in EU law is much wider in scope than this interpretation only, for example applying also to documents emanating from the undertaking to an external lawyer, rather than only from an external lawyers to the undertaking (Pärn-Lee, 2017, p. 120; Roth and Rose, 2008).

According to the general rules of the Croatian Civil Procedure Act[20] (hereinafter, **CPA**), the opposing party may resist a court disclosure ordered for a number of justified reasons such as: attorney-client privilege, religious confession, professional secrecy, or if there is a risk of exposing him- or herself

[18] Ruling No. 520 of 28.09.2015 on case No. 2048/2015 of the SCC, Commercial Division, 2nd Chamber.

[19] BAPCA proposal for a new Art. 118 PCA.

[20] Civil Procedure Act, Official Gazette – Narodne novine 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08, 57/11, 148/11, 25/13, 89/14.

or a close family member to criminal prosecution or significant material damage. These are justifications pertinent to witness privileges that apply *mutandi mutantis*. The Draft Act on antitrust damages maintained these rules on opposing disclosure, explicitly giving full effect of the legal professional privilege, while specifying that the interest of a defendant to avoid actions for damages or avoid compensation is not a justifiable reason for withholding evidence (Butorac Malnar, 2017, p. 74).

In the Czech Republic, confidentiality of legal professional privilege (hereinafter, **LPP**) needs to be guaranteed. The protection of LPP is not provided for in the Czech legal order, even though in antitrust proceedings, the courts require the same standard of LPP protection as under EU law. According to the Damages Act, disclosure must not conflict with the professional secrecy of independent lawyers (advocates), which is nonetheless not identical to the notion of LPP. It is obvious that complex provisions on the LPP and its protection need to be adopted in Czech law (Petr, 2017, 101). In Slovenia, the treatment of confidential data and privileged communication is regulated in Article 62a of ZPOmK-1 (Vlahek and Podobnik, 2017, p. 286).

With regard to inadmissible evidence, anything access to which is restricted by the Directive (such as leniency and settlement submissions) is inadmissible. This is accepted universally as explained below. Typically, if the confidentiality of the disclosed information is breached, the court may decide that the evidence is inadmissible. This is not enshrined in Czech law, but incorporated into other draft acts or court practice.

## V. Disclosure of evidence by parties other than defendant

There are two broad issues with regard to the disclosure of evidence by parties other than the defendant – types of documents (restrictions) and leniency/settlement. With regard to restrictions or permitting documents from third parties, there is no consensus. The procedures for accepting such documents are different as well.

The Latvian CPL prescribes that evidence, which is at the disposal of state institutions or third parties (including respondents), may be requested by the court. For the request to be made, a separate procedural document must be prepared by the claimant. In this document, the claimant must 'describe such evidence and provide their reasons for presuming that the evidence is in the possession of the person referred to'.[21] In practice, this provision is interpreted

[21] Part 2 of Art. 112 of Latvian Civil Procedure Law.

so that a sufficiently precise name and description of contents needs to be provided. This procedure serves as an effective means to protect the interests of the defendant. For example, the defendant may respond to the court that no documents that conform to the description provided by the claimant exist. Where the documents proving the case are at the disposal of the authorities, the same rules apply and claimants are generally dependent on the subjective decision of the judge to request the evidence or deny the motion.

Lithuanian law does not recognise the discovery of evidence as it is understood and applied in the common law system. Following the Code of Civil Procedure,[22] each party collects and submits to the court all available evidence that the party to the proceedings intends to refer to in the proceedings. In the event the party to the court proceedings cannot receive certain evidence related to the case on its own, it may request the court to order the disclosure of evidence related to the case and held by the other party to the proceedings or by a third party. As a general rule, the court will not order the disclosure of evidence at its own discretion (Mikelėnas and Zaščiurinskaitė, 2017, p. 204).

In Hungary, Article 53(1) of the new Law on Competition establishes prioritisation of evidence in the same manner as under Recital 29 and Article 6(10) of the Damages Directive – disclosure from a competition authority of evidence included in its file is the last resort and is available only where no party or third party is reasonably able to provide that evidence. The new Law on Competition also directly establishes almost the same rules as the Damages Directive on access and the limitation of access to the file of the national competition authority, as well as of the European Commission (Miskolczi Bodnár, 2017).

Rules of disclosure already exist under Bulgarian law (Articles 161, 176(3), 190 and 191 of the Code on Civil Procedure,[23] hereinafter, **CCP**), permitting a claimant to request the court to order the defendant or a third party to produce specific evidence (Petrov, 2017, p. 44).

In Croatia, disclosure may be obtained where the party requesting it makes it **plausible** that the opponent or a third party holds such evidence. If the party requesting disclosure is the claimant, he has to demonstrate the **plausibility** of his damages claim as well. The standard of showing **plausibility** has not been explicitly defined by the draft Act on antitrust damages. However, it is a common term in civil procedure, corresponding to the explanation given by the Directive, whereby the standard of plausibility is met by presenting 'reasonably available facts in a reasoned justification' (Butorac Malnar, 2017, p. 75–76).

[22] 28.02.2002, No. IX-743 (O.G. 2002, No. 36-1340) (with subsequent amendments).

[23] Civil Procedure Code (*Граждански процесуален кодекс*), promulgated in State Gazette No. 59 of 20.07.2007 (with subsequent amendments).

In the Czech Republic, evidence in the file of the Office for the Protection of Competition (hereinafter, **CCA**) is somewhat accessible – any third party (that is, not a party to the CCA's proceedings)[24] may be granted access to that file according to the Code of Administrative Procedure,[25] if they are able to prove a sufficient legal interest thereupon, and provided that such an access to the file will not violate rights of the parties to the CCA's proceedings or the public interest.[26] The CCA is, nonetheless, rather strict in this regard and generally does not allow third parties to inspect its files, even if these are alleged victims of an anti-competitive behaviour. The Supreme Administrative Court held in a series of recent judgments that in principle, alleged victims of (putative) anti-competitive conduct have sufficient legal interest to warrant their access to CCA's files[27] – a change in the CCA's practice is, however, yet to materialise. Even if granted access to the file, third parties (even victims of an anti-competitive conduct) cannot be granted access to leniency and settlement applications and their accompanying documents[28] (Petr, 2017, p. 97).

In Poland, to overcome the main obstacle in effective private enforcement (lack of access to evidence), Article 16(1) ACD grants the court the right to order the defendant or a third party to disclose evidence. The order can be issued at the plaintiff's request only when the plaintiff substantiated its claim, and provided that the plaintiff has committed that the requested evidence will be used only in the pending proceedings. A request for disclosure of evidence under the latter condition can be submitted to the court also by the defendant (Article 16(1) ACD *in fine*). If the evidence is included in a file of a competition authority then the court can order such evidence be disclosed only if obtaining it from the opposing party is not possible or such is excessively difficult (Article 16(2) ACD). The procedural parties, a third party as well as a competition authority can lodge a complaint concerning the court order on the disclosure of evidence (Article 23 ACD). Those parties can also demand for the court to change or repeal its order, if the circumstances that justified the order have changed (Article 24 ACD) (Piszcz and Wolski, 2017, p. 225–226).

The second issue in this context concerns leniency and settlement proceedings. According to some scholars, the Directive has an obvious bias

[24] It should be added in this regard that under the Czech Competition Act, victims of anti-competitive conduct are not participants to the proceedings before the CCA. See Section 21a of the Competition Act and the judgment of the Supreme Administrative Court of 02.10.2015, Ref. No. 4 As 150/2015.

[25] Act No. 500/2004 Coll., Code of Administrative Procedure, as amended.

[26] Code of Administrative Procedure, Sec. 38(2).

[27] See e.g. the judgments of the Supreme Administrative of 11.08.2015, Ref. No. 6 As 43/2015, of 09.04.2014, Ref. No. 9 Afs 73/2013, or of 10.04.2014, Ref. No. 7 As 20/2014.

[28] Competition Act, Sec. 21c(3) and (4).

in favour of shielding leniency and settlement submissions from any disclosure, to the detriment of the right to full and effective compensation of the victims of competition law infringements (Mircea, 2017, p. 242–243). This stance runs counter to what the European Court of Justice decided so far, in its seminal decision in *Pfleiderer*.[29] A similar view is expressed by the EU highest court in its decision in the case *Donau Chemie*.[30] In Romania, a specific addition in this context concerns the penalties proposed by the Romanian government for a failure to properly apply the protection of leniency and settlements submissions, ranging from 0.1% to 1% of the turnover of the infringer (this is a huge sanction) if the latter is a legal person, and up to approximately EUR 1,200 for individuals (this is almost insignificant) (Mircea, 2017, p. 243).

Hungarian legislation provides limited exceptions to evidence disclosure, including leniency statements, settlement submissions or legally privileged documents (Miskolczi Bodnár, 2017, p. 147). The Bulgarian BAPCA rules do not go further than the Directive and, with respect to the disclosure of documents from a file of a competition authority reproduce exactly the same limitations. Requests for access to such documents are subject to a much stricter proportionality test, and leniency applications and settlement submissions enjoy absolute immunity[31] (Petrov, 2017, p. 44).

Separate attention, following the provisions of the Directive, is given to evidence held in the case files of the authorities, but which refers to the market participant, who successfully applied for leniency. The Latvian Competition Council has, so far (even prior to the Amendments), defended the commercial interests of the participants of the leniency programme, as well as those of other parties to the cases. Specific rules have also applied with respect to access to leniency material. Access has been allowed only after the investigation was closed. However, the legislation was silent about access to the file for injured persons other than participants to the proceedings. Therefore, usual rules under the Code of Civil Procedure applied. In general, the material of the Competition Council, other than the restricted one, could be subject to a court access order upon a reasonable request of a party to the proceedings. Non-confidential versions of infringement decisions of the competition authority have been published officially and so they have been publicly available (Jerneva and Druviete, 2017).

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[29] Case C-360/09 *Pfleiderer v. Bundeskartelamt*, ECLI:EU:C:2011:389, decision of the Grand Chamber of 14.06.2011.

[30] Case C-536/11 *Bundeswettbewerbsbehörde v. Donau Chemie AG*, ECLI:EU:C:2013:366, decision of 06.06.2013.

[31] BAPCA proposal for a new Art. 118 PCA.

In Lithuania, in contrast to previous regulation, the new Law on Competition limits disclosure protection only to leniency statements of the cartelists[32] as well as settlement submissions. Leniency statements of the cartelists will not be accessible to anyone, not even to other cartelists. Analogous rules will apply with respect to settlement submissions, the latter having only been introduced in Lithuania with the adoption of the new Law on Competition. Thus, pre-existing documents submitted as annexes to a leniency statement are no longer exempt from disclosure.

These rules narrow the scope of previous legal protection, which used to apply in Lithuania with respect to all leniency material submitted by the leniency applicant qualifying for the immunity (for example, pre-existing documents attached to the leniency statement). Thus, until the implementation of the Damages Directive, the Competition Council was not entitled to disclose any of the leniency materials submitted by the immunity recipients to claimants for damages compensation (Mikelėnas and Zaščiurinskaitė, 2017, p. 206–207).

The aforementioned novelty, together with other specific rules applied to immunity recipients introduced by the new Law on Competition balances, nevertheless, the goals of public and private enforcement. On the one hand, as indicated in Recital 26 of the Damages Directive, leniency programmes are important tools for the detection and efficient prosecution of, and the imposition of penalties for, the most serious infringements of competition law. At the same time, damages claims in cartel cases generally follow infringement decisions based on a leniency application. Hence, leniency programmes are also important for the effectiveness of actions for damages in cartel cases. On the other hand, by limiting access only to leniency statements, and not to all leniency materials, the law broadens the possibilities for the victims of cartels to claim damages compensation.

In Croatia, given that the Directive regulates disclosure exemptions via a maximum harmonisation rule, those have been implemented fully and precisely. Accordingly, documents that may never be disclosed include settlement submissions and leniency statements. Here it is important to note that Croatian competition law does not envisage a settlement procedure in public enforcement. Therefore, this provision is meant to safeguard settlement procedures before the Commission or any other NCA according to their national competition law[33] (Butorac Malnar, 2017, p. 78).

In Slovakia, these provision which at least partially deal with the protection of evidence used by the Antimonopoly Office of the Slovak Republic

[32] Following the Law on Competition, leniency applications may also be submitted by a party to a resale price maintenance agreement. However, access restriction to its leniency statement should not apply as they do in case of leniency statements submitted by cartelist.

[33] Art. 3(26) of the draft Act on antitrust damages.

(hereinafter, **AMO**), the integrity of its investigations as well as effectiveness of measures meant to enforce competition law via public (administrative) law remained separated from Act No. 136/2001 Coll. on Protection of Economic Competition and Amending Act of the Slovak National Council No. 347/1990 Coll. On Organization of Ministries and Other Central Bodies of State Administration of the Slovak Republic as Amended (hereinafter, **APEC**), even though the APEC contains detailed provisions on the protection of leniency applications, disclosure of evidence etc.[34] Hence, there is a strict distinction between the protection of leniency applications and files of the AMO for public law purposes (APEC) and for civil claims (Act 350/2016) (Blažo, p. 257–258).

The Czech Damages Act[35] neatly absorbs the non-disclosure of leniency statements (excluding pre-existing information) and settlement submissions,[36] including the procedure whereby the court may ascertain, if need be with the help of the CCA, whether the requested information is indeed a leniency statement or settlement submission.[37] In addition, information prepared specifically for the purposes of the proceedings conducted by the competition authority, information prepared by the competition authority and sent to the parties, as well as settlement submissions that have been withdrawn, may all be disclosed only after the proceedings of the competition authority's have been closed.[38] The Damages Act transposes these provisions, however, with several modifications unaccounted for in the explanatory memorandum. Firstly, whereas the Directive protects information **prepared** specifically for the purpose of the proceedings (excluding pre-existing information), the Czech Act protects information **submitted** in the proceedings. Secondly, the Directive protects information prepared and **sent** by a competition authority, whereas according to the Act, sending is not required. Finally, such information is protected by the Damages Act only as long as the competition authority's decision closing the investigation has not entered into force yet. Presumably therefore, should the case have been concluded before a formal investigation was actually initiated, and thus without a decision, such information may never be disclosed.[39] The protection afforded by the Czech Damages Act is,

[34] APEC, § 40, § 41.

[35] Damages Act, Sec. 15(1) and Sec. 2(2) (a) and (b).

[36] Art. 6(6) and Art. 2(16), (17) and (18).

[37] Damages Act, Sec. 15(2) and (3).

[38] Damages Directive, Art. 6(5).

[39] The same provision is nonetheless contained in Sec. 15(4) of the Damages Act whereby such information may be disclosed also when preliminary investigation is concluded without opening a formal investigation.

therefore, significantly wider than that of the Damages Directive (Petr, 2017, p. 101–102).

Following the Damages Directive, the Polish ACD in Article 17 includes provisions protecting efficient public enforcement of competition law. Accordingly, it is not allowed to disclose leniency statements and settlement submissions, a part from that part of the document that does not constitute the leniency statement or settlement submission – this part of the document can be disclosed. Furthermore, information created specifically for the purposes of the proceedings of the competition authority, as well as settlement submissions that have been withdrawn, can be disclosed only after the proceedings have been completed (Article 17(2) ACD) (Piszcz and Wolski, 2017, p. 226).

The purpose behind the non-disclosure of leniency and settlement documents is separate for the public and private competition law domain. The issue that arises out of this is 'not the separation itself, but how courts interpret it'. Countries with an advanced capacity to deal with competition matters make this distinction clear. However, countries where competition law functions only to a limited extent, either disclose too much or fail to disclose anything, hurting one of the parties. The Directive and cross assimilation of best court practices should, in the future, aid in making a clear distinction between public and private competition law proceedings, thus safeguarding the interest of the respective parties.

## VI. Consequences of a failure to comply with a request to submit evidence

This part of the articles should focus on two large issues: pecuniary penalties available to courts, and the ability of the courts to presume the establishment of facts due to non-compliance by parties to submit evidence.

Article 8 of Directive 2014/104/EU states that:

1. Member States shall ensure that national courts are able effectively to impose penalties on parties, third parties and their legal representatives in the event of any of the following: (a) their failure or refusal to comply with the disclosure order of any national court; (b) their destruction of relevant evidence; (c) their failure or refusal to comply with the obligations imposed by a national court order protecting confidential information; (d) their breach of the limits on the use of evidence provided for in this Chapter.
2. Member States shall ensure that the penalties that can be imposed by national courts are effective, proportionate and dissuasive. The penalties

> available to national courts shall include, with regard to the behaviour of a party to proceedings for an action for damages, the possibility to draw adverse inferences, such as presuming the relevant issue to be proven or dismissing claims and defences in whole or in part, and the possibility to order the payment of costs.

There are two keys aspects to this issue. First, there should be 'non-compliance 'and, second, the measures or penalties available are effective, proportionate and dissuasive. However, this is not implemented universally across the eleven CEE jurisdictions. The pecuniary aspect of a penalty can be divided into countries with ineffective measures, countries with mixed measures, and countries with effective measures. Drawing adverse inferences, such as presuming the relevant issue to be proven or dismissing claims and defences in whole or in part, should be explained separately. Estonia and Slovakia have pecuniary measures that are currently ineffective.

In Latvia, for example, when a party fails to comply with the order of the court to submit specific documents, the court may impose a fine of up to EUR 14,000 for natural persons and EUR 140,000 for legal entities. Other Member States decided in favour of fines, expressed as a percentage of the turnover of the undertaking concerned. In Slovakia, the possible pecuniary sanction for refusing to provide a document is also quite low (up to EUR 500 and EUR 2,000 for repeat offenders); in Estonia it is up to EUR 3,200. These amounts are insufficient to motivate the offender to assist the claimant in proving his case. For example, in Latvian competition damages litigation practice there has been at least one case where the defendant ignored the order to submit evidence for the duration of at least two years (*PKL Flote* case). It is clear that low fines are neither effective nor proportionate nor dissuasive, as required by the Damages Directive, in cases of high damages claims. These measures may, therefore, not be preventive enough, considering the economic dimension of the potential damages claim from a competition law infringement; in fact, it may even be more worthwhile to pay the fine than providing the requested evidence.

Romania is a country with mixed measures. One specific addition in this context can be found in the penalties proposed by the Romanian government for failure to properly apply the protection of leniency and settlements submissions, ranging from 0.1% to 1% of the turnover of the infringer (this is a huge sanction), if the latter is a legal person, and up to approximately EUR 1,200 for individuals (this is almost insignificant) (Mircea, 2017, p. 243).

The Lithuanian approach with regard to pecuniary penalty has evolved. The previous law and Code of Civil Procedure were both silent on how the court should treat situations when the defendant or other party does not comply with the court's order to provide evidence, even though, in practice, the courts

applied the *contra spoliatorem* principle in exceptional cases. In addition, the new Law has introduced a significant (up to EUR 10,000) penalty for the destruction of evidence as well as for failure to comply with the confidentiality order (Mikelėnas and Zaščiurinskaitė, 2017, p. 207). An evolution of fines is also noticeable in Bulgaria. Prior to the Directive, Bulgarian law (Article 161, 176(3), 190 and 191 CCP) allowed for a claimant to request the court to order the defendant, or a third party, to produce specific evidence. Refusal to comply is sanctioned with fines for contempt of court in the amount of up to BGN 1,200 (approx. EUR 600). This amount is clearly insignificant where the value of the claim is substantial, such as in antitrust damages cases. Thus, the new limits for fines introduced with the BAPCA specifically for obstruction of justice in relation to claims under the PCA (up to BGN 500,000 – approx. EUR 250,000) will have an important disciplinary effect (Petrov, 2017, p. 44).

Hungarian legislation introducing fines tries to ensure that courts are able to disclose relevant evidence – hence, Section 88/Q(1) of MCA follows Article 8(1) of the Directive. The list of prohibited acts and omissions is the same as in the Directive, but the maximum amount of the fine is set at only HUF 50,000,000[40] (EUR 160,000). Court practice should answer whether this will prove to be an 'effective method' in the meaning of Article 8(1) of the Directive (Miskolczi Bodnár, 2017, p. 147). In Croatia, the Draft Act on antitrust damages sanctions non-compliance with a court disclosure order in the following manner: (a) facts that should have been determined by the evidence will be considered established,[41] and (b) the party opposing discovery (or who had destroyed or tried to destroy evidence) may be heavily fined – the fine for undertakings ranges between HRK 10,000 up to maximum of 1% of their total turnover in the last year for which financial statements have been completed; fines for responsible persons or individuals range between HRK 500 to HRK 50,000[42] (Butorac Malnar, 2017, p. 74).

In Slovenia, Article 8 of the Directive will be transposed via Articles 62e and 62f of ZPOmK-1. Article 62e governs situations where a party (expressly or tacitly) does not abide by a court's final decision on evidence disclosure by hiding or destroying the relevant evidence. In such cases, sanctions pursuant to the law on civil procedure regarding non-compliance with a court decision to submit documents are to be applied. If the person refusing to fulfil a court's final decision on evidence disclosure is not a party to the dispute, the court will execute such a decision *ex officio* pursuant to the rules on enforcement proceedings. Article 62f of ZPOmK-1 vests the court with the prerogative to issue fines of up to EUR 5,000 for natural persons or up to EUR 50,000 for

[40] Sec. 88/Q(1) and (2) of MCA.

[41] Art. 6(8) of the draft Act on antitrust damages.

[42] Art. 10(2) of the draft Act on antitrust damages.

legal persons, sole entrepreneurs, attorneys and candidate attorneys, when such persons refuse to fulfil or act contrary to a court's measure regarding the protection of confidential information (Vlahek and Podobnik, 2017, p. 287).

The Czech Republic probably has the most comprehensive system in terms of penalties. When the obligation to disclose evidence is not fulfilled, the court may impose a fine of up to CZK 10,000,000 (EUR 400,000) or 1 % of the undertaking's annual turnover.[43] The same fine may be imposed on those who make the fulfilment of such a duty impossible or more complicated;[44] this presumably applies to cases of destruction of relevant evidence.[45] For breaching the duty to protect the confidentiality of the disclosed information, a fine of up to CZK 1,000,000 (EUR 40,000) may be imposed.[46] Such fines may be imposed repeatedly,[47] within the period of five years since the obligation was breached.[48] All companies making up an economic entity are jointly and severely liable for the fine,[49] which is the first case of collective liability for fines in the Czech legal order. Finally, the court may decide that the one who has failed to disclose the evidence or has breached its confidentiality should bear the costs of the proceedings[50] (Petr, 2017, p. 103).

With regard to the 'aspect of drawing adverse inferences, such as presuming the relevant issue to be proven or dismissing claims and defences in whole or in part', it seems most countries are in concurrence with the Directive. In Latvian, the claimant may refer to the rules of the CPL, which allow the claimant in this case to presume that the facts, which needed to be proven by the non-submitted evidence, are true and accurate. This solution is not without defect as it can only be used where there is other, indirect evidence of the relevant facts. In Lithuania, both the previous Competition law and the Code of Civil Procedure have been silent on how the court should treat a situation when the defendant or other party does not comply with the court's order to provide evidence, even though, in practice, the courts applied the *contra spoliatorem* principle in exceptional cases. However, the new Competition law directly establishes the *contra spoliatorem* principle, that is, presumption that the relevant issues are proven or dismissing claims and defence, for failure or refusal to comply with a disclosure order as well as for the destruction of evidence (Mikelėnas and Zaščiurinskaitė, 2017, p. 207). According to Estonian

[43] Damages Act, Sec. 20(1) and (2).
[44] Damages Act, Sec. 20(1)(b).
[45] Damages Directive, Art. 8(1)(a).
[46] Damages Act, Sec. 21(1).
[47] Damages Act, Sec. 23(2).
[48] Damages Act, Sec. 22(1).
[49] Damages Act, Sec. 22(3).
[50] Damages Act, Sec. 32.

civil procedural rules, if a party must fulfil an obligation to submit a document to the court, or the court is convinced after hearing the opposing party that the party has not looked for the document carefully, the court may approve the transcript of the document submitted to the court by the person providing the evidence, and if no transcript of the document has been presented, the court may deem the statements concerning the nature and content of the non-submitted document made by the person who requested the evidence to be proven[51] (Pärn-Lee, 2017, p. 121).

Romanian draft law for the implementation of the Directive is, with respect of the disclosure of evidence, basically a translation of the corresponding parts of the Directive. The relevant provisions have the same numbering as those of the Directive, that is, from Article 5 to Article 8. Hungarian legislation introduced an important change whereby if the obligated party fails to provide the requested evidence, the court is entitled to accept the fact – for the support of which the evidence was requested – as true.[52] The preventive effect of this rule is much more serious than a potential fine; only limited exceptions apply to evidence disclosure, including the leniency statement, the settlement submission or legally privileged documents (Miskolczi Bodnár, 2017, p. 147). In Bulgaria, where a party resists a disclosure order, the judge is empowered to draw prejudicial consequences against it.[53] However, this sanction is important only where the evidence confirms or refutes the existence of a specific-fact that is crucial for the position of one of the parties (Petrov, 2017, p. 44).

The Slovakian Civil Disputes Code copied also all non-pecuniary alternatives of the sanctions: presuming the relevant issue to be proven, dismissing claims and defences in whole or in part. These non-pecuniary sanctions can be employed only if pecuniary sanction appears to be ineffective (Blažo, 2017, p. 258). In the Czech Republic, in addition to pecuniary penalties, if the obligation to disclose information is breached or made impossible, there is a legal fiction that what was to be proven by that evidence is in fact deemed to have been proven.[54] Conversely, if the confidentiality of the disclosed information is breached, the court may decide that the evidence is inadmissible[55] (Petr, 2017, 103).

Thus with regard to penalties, pretty much all countries are in agreement as far as the concept of *omnia praesumuntur contra spoliatore.* However, there are gaps when it comes to the effectiveness of the respective measures in terms of pecuniary penalties. This does not bode well for the future – the effective

[51] Para. 283(2) COCP.
[52] Art. 88/Q(5) MCA.
[53] Art. 161CCP.
[54] Damages Act, Sec. 28(1).
[55] Damages Act, Sec. 28(2).

application of the Directive will be ensured only if those erring countries make the necessary amendments to their national legislations.

## VII. Conclusion

The transposition of the Directive into the national laws of CEE countries is varied. Some countries have absorbed the bulk of the rules of the Directive. This has led to improvements with regard to disclosure of evidence. However, there are jurisdictions that must iron out defunct and disruptive practices. The Directive envisages a balance between public and private actions with regard to competition law. This does not mean that the implementation of the goals of the Directive is automatic. Countries without great exposure to competition matters need to address those inequities between public and private matters, as well as between balancing the interests of disgruntled claimants and protecting the commercially sensitive data of the defendants. There is a need for cohesion for the successful implementation of the Directive with respect to the disclosure of evidence in competition matters.

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# Compensatory Collective Redress: Will It Be Part of Private Enforcement of Competition Law in CEE Countries?

by

Anna Piszcz*

**CONTENTS**



## *Abstract*

The article aims to compare and evaluate solutions with regard to compensatory collective redress existing in CEE countries. The author will attempt to illuminate obstacles and challenges to using collective redress as an avenue for antitrust enforcement in CEE countries, as well as possible advantages of the scrutinised legal frameworks. Besides focusing on national provisions, the article will draw on provisions of the Damages Directive and the Commission's Recommendation on collective redress mechanisms. It will open up the field for *de lege ferenda* proposals also.

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***Résumé***

L'article vise à comparer et évaluer les solutions en matière de recours collectifs en indemnisation existant dans les pays d'Europe centrale et orientale («PECO»). L'auteur a pour le but de mettre en lumière les obstacles et les défis liés à l'utilisation des recours collectifs comme moyen d'application privée du droit de la concurrence dans les PECO, ainsi que les avantages éventuels des cadres juridiques examinés. L'article va se concentrer non seulement sur les dispositions nationales, mais aussi va s'inspirer des dispositions de la Directive Dommages et de la Recommandation de la Commission portant sur les mécanismes de recours collectifs. Cela ouvrira également le terrain pour des propositions de lege ferenda.

**Key words:** compensatory collective redress; private enforcement; competition law; opt-in model; opt-out model; mixed model; group actions; representative actions.

**JEL:** K21

## I. Introductory remarks

The Damages Directive[1] does not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU, albeit they are free to do so. Recital 13 sentence 2 of the Preamble to the Directive declares: 'This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU'. This seems to contradict the emphasis put by the European Commission on collective redress in the Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (hereinafter, Commission's Recommendation).[2] In its Preamble, Recital 7 lists competition and consumer protection alongside environmental protection, protection of personal data, financial services legislation and investor protection as areas where supplementary private enforcement of rights granted under EU law in the form of collective redress is of value. It is worth noting that the earlier quoted provision of the Directive was already present in the draft Directive circulated at the same time as the publication

[1] Directive 2014/104/EU of the European Parliament and of the Council of 26.11.2014 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, OJ L 349, 05.12.2014, p. 1.

[2] 2013/396/EU, OJ L 201, 26.07.2013, p. 60.

of the Commission's Recommendation. It seems that the Commission drove a wedge between collective redress and private enforcement of competition law, with some Member States likely to oppose the voluntary introduction of legal frameworks for compensatory collective redress as part of private enforcement of competition law.

The system of private enforcement of competition law is made up of a variety of remedies, including injunctive relief (where the plaintiff requests the court to order the infringer to stop the violation and/or remove its effects), compensatory relief (damages), declaratory relief (the declaration of invalidity of an agreement, decision of an association of undertakings or practice) and other remedies (S. Peyer mentions separately also interim remedies; see Peyer, 2012, p. 350). There seems to be more than only injunctive collective redress and compensatory collective redress referred to in the Commission's Recommendation. However, since the scope of the Damages Directive includes claims for damages, this article refers only to compensatory relief and, thus, only to compensatory collective redress, as part of private enforcement of competition law.

This paper will focus on possible obstacles and challenges to using collective redress as an avenue for antitrust enforcement in CEE countries, as well as on possible advantages of the scrutinised legal frameworks. In addition to the presentation of both the drawbacks and the strong points of the relevant legal provisions, references to the Commission's Recommendation on collective redress and the Damages Directive will be made. The decision-makers' attitudes towards collective redress, in particular during the process of the implementation of the Directive, will be shown. The paper will debate the question of what changes might be advisable in collective redress in order for it to function in the field of antitrust enforcement.

## II. CEE countries – the state of play

A developed legal basis for compensatory collective private enforcement of competition law exists in three Central and Eastern European (CEE) Member States of the EU, namely Bulgaria (from 01.03.2008), Poland (from 19.07.2010) and Lithuania (from 01.01.2015); however, none of them has a record of successful collective actions for antitrust damages (Petrov, 2017, p. 49–51; Piszcz and Wolski, 2017, p. 229; Mikelėnas and Zaščiurinskaitė, 2017, p. 199). In Romania, a legal basis for collective actions of those who claim to have suffered harm does not exist; only consumer associations are entitled to bring representative actions on behalf of consumers. So far, however not a single

such action has been brought by such associations before Romanian courts (Mircea, 2017, p. 244–245). Croatia and Hungary have introduced collective redress mechanisms but they cannot be used to pursue claims for damages in competition law cases (Butorac Malnar, 2017, p. 58; Miskolczi Bodnár, 2017, p. 150–152). In Slovenia, representative actions filed by organizations for the protection of consumers are not particularly relevant for collective private antitrust enforcement (Vlahek and Podobnik, 2017, p. 284–285; Vlahek, 2016, p. 380–381, Vlahek, 2016a, p. 565). In Slovakia, the legal standing of consumer associations in representative actions has been narrowed down (accidentally?), so that they are now unable to pursue claims for damages in competition law cases (Blažo, 2017, p. 248–249).

It needs adding that the legal basis for compensatory collective private enforcement of competition law is going to be introduced in Slovenia (Vlahek and Podobnik, 2017, p. 289–290). Moreover, the Polish legal framework has been amended as of 1 June 2017, although not on the occasion of the implementation of the Damages Directive. When studied in the context of the Commission's Recommendation, the amendments seem to have been introduced in order to remove the drawbacks of the pre-existing legal framework identified in practice, rather than to implement the Commission's Recommendation. However, at some point in the legislative works, the Polish drafters noted that the amendments are justified in the light of the Commission's Recommendation.[3]

In other CEE countries, no clear signs that something fundamental in collective redress legislation (with regard to collective private enforcement of competition law) is going to be changed can be seen. In Estonia, a national debate on whether or not collective actions should be regulated has not provided a clear answer but, instead, revealed controversy on whether collective actions would be compliant with the Estonian constitution (Pärn-Lee, 2017, p. 123).

Academics based in universities in CEE countries believe that collective redress mechanisms are needed in order to stimulate claimants with relatively small claims, for example consumers and small undertakings, and/or that the lack thereof is going to undermine the efficiency of antitrust damages (Butorac Malnar, 2017, p. 82; Mircea, 2017, p. 245; Pärn-Lee, 2017, p. 123; Blažo, 2017, p. 260; Petr, 2017, p. 107).

CEE countries face the dilemma between having a system of private antitrust enforcement with collective redress and a system without it. If one takes into account that collective redress may be based on the opt-in principle or on the

[3] Explanatory Notes to the draft Amending Act. In Polish available at: http://orka.sejm.gov.pl/Druki8ka.nsf/0/B9D80E83748EE247C125809D004C3CB5/%24File/1185-uzasadnienie.docx. All Internet references in this article were last visited on 27.06.2017.

opt-out principle, procedural schemes for collective redress can be separated into two basic categories: the opt-in model and the opt-out model. In opt-in systems, any person that wants to participate in a collective action needs to affirmatively express her/his consent to be a party to the collective proceedings. The Commission's Recommendation advocates for an opt-in mechanism for compensatory collective redress (para. 21 sentence 1). In opt-out systems, a person shall participate in a collective action unless s/he effectively expresses the intention of not being represented by the group claimant. In practice, a mixed system (bi-model/hybrid system) can also be distinguished. CEE countries may, therefore, be considered even closer to facing a 'trilemma' than a dilemma (whether to introduce the model recommended by the Commission, to go with a different model, or not to introduce collective private enforcement of competition law at all). Opt-in systems of collective redress are present in Poland, Lithuania and also Romania with its limited collective redress mechanism (Piszcz, 2014, p. 373; Mikelėnas and Zaščiurinskaitė, 2017, p. 198–199; Stoica, Ion and Bercaru, 2015, p. 334). The Bulgarian system is also classified as an opt-in system (Petrov, 2017, p. 49), even though it may be considered closer to a mixed system.

This relative homogeneity may be found interesting against the background of the entire EU, where several countries adopted models different from the opt-in model. According to a comparative study of 2016 by M. Gac, Portugal, the Netherlands and England have the opt-out mechanism, while Denmark proposed a mixed system (Gac, 2016, p. 153). Outside of EU but still in Europe, Norway has a mixed system (for more see Ervo, 2016, p. 187–188).

Even more interestingly, the system which is going to be introduced in Slovenia is designed as a mixed system in which both opt-in or opt-out schemes shall be available to the courts (Vlahek and Podobnik, 2017, p. 290).

A collective redress mechanism is a procedural mechanism that traditionally has belonged to legal and court cultures completely different to CEE cultures. When it was introduced in Bulgaria in 2008, Poland in 2010 and Lithuania in 2015, with it came several important procedural phenomena, such as ensuring that the initiation of collective actions is well publicised, standardisation of claims or contingency fees.

## III. Terminological preliminaries

Both the Damages Directive and the Commission's Recommendation use the phrase 'collective redress mechanisms'. As for CEE countries, first, some tend to use different terminology to describe their procedural schemes for

collective redress mechanisms. Second, the American phrase 'class action' has never taken hold of these countries.

In Bulgaria, the Civil Procedure Code adopts the terminology of a '*колективен иск*' (collective claim), as does Slovenia in its draft Act on Collective Actions where the phrase '*kolektivna tožba*' (collective action) is used.

Interestingly, and in contrast to the above, the procedural scheme for collective redress present in Poland is called a '*postępowanie grupowe*' (group proceedings), even though this Polish genre includes also proceedings conducted as a result of representative actions. The above terminology refers to an attribute of the claimant in question, that is, being a group. The collective action can be brought jointly by those who claim to have suffered harm. The criteria of a group are set out in statutory provisions. Hence, it may be clearly stated whether or not those who claim to have suffered harm are a group.

Similarly, Lithuania uses the terminology of a '*grupinis ieškinys*' (group action) for its collective redress actions. However, this term does not relate to some representative actions. The latter are governed by legal provisions other than chapter 24-1 of the Civil Procedure Code (see below) and may be brought by consumer protection institutions or public consumer organisations; however, these entities cannot claim damages.

In the context of the present paper, group actions and representative actions shall be included under the umbrella term of 'collective actions'. A collective action means, where appearing in this article, the same as that interpreted from Section 3(a) of the Commission's Recommendation. Accordingly, 'collective redress' is a legal mechanism that ensures a possibility to claim a remedy collectively by two or more natural or legal persons or by an entity entitled to bring a representative action. Naturally, a 'collective action' means an action which is brought collectively by two or more natural or legal persons or by an entity entitled to bring a representative action. Furthermore, the genre of 'compensatory collective redress' (an expression introduced into Section 3(a)(ii) of the Commission's Recommendation) includes legal mechanisms that ensure a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a 'mass harm' situation, or by an entity entitled to bring a representative action. Collective redress should be considered broader than the term 'collective action' so as to include alternative methods of dispute resolution as well as recourse to the civil courts.

## IV. Compensatory collective redress in Bulgaria

Bulgaria was the first country in Central and Eastern Europe to have a developed collective action procedure. Provisions on collective redress were included in the new Civil Procedure Code (chapter thirty three titled: 'Procedure on collective claims'),[4] which came into force on 1 March 2008. Collective protection is afforded by a range of remedies. Compensatory collective redress is only one of them; it is provided for in Article 379(3) of the Code (additionally, Article 385).

Bulgarian law does not have a provision for a specialist court or tribunal to deal only with private enforcement of competition law, including its collective private enforcement. Collective claims may be brought before the regional (provincial) court (*окръжен съд*) as a court of first instance (Article 380(1) of the Code). There are 30 regional courts in Bulgaria. Regarding court registration fees, general rules for court fees apply – meaning that 4% of the value for which an award is sought must be paid upon the claim submission, which is considered a high initial requirement (Petrov, 2017, p. 50).

The rules impose two preconditions upon taking collective proceedings. First, there needs to be more than one potential claimant. There must be a group of persons to be represented (either by a member of the group or by an organisation responsible for the protection of injured persons or for the protection against a given type of infringements), even if the group is as small as two since, according to Article 379 of the Code, collective actions are brought 'on behalf of all injured **persons**'.[5] There are no other threshold requirements with respect to standing. Second, the represented group of persons must be harmed by one and the same infringement and, due to the nature of the violation, the circle of such persons cannot be determined accurately but it is identifiable. Either institutional actors or private applicants may seek remedies (Article 379 of the Code).

The deficiencies of Bulgarian collective proceedings can be found already in their first stages. Due to the lack of clarity on the actual number of injured persons, it is often impossible to calculate precisely the claim value, which results in prolonged deliberations on preliminary issues (Petrov, 2017, p. 50). In the first stages of the proceedings, the court examines also the ability of the plaintiff(s) to protect the collective interest of the group represented 'genuinely and in good faith', and to bear the burdens in connection with the case, including the costs (Article 381(1) of the Code). This part of the

[4] See Articles 379–388 of the Code. Available in English at: https://www.lexadin.nl/wlg/legis/nofr/eur/lxwebul.htm.

[5] All emphases added by the author.

proceedings may be seen as the certification of the 'competency' of the plaintiff or the prequalification, since the admissibility of a collective action is dependent on the decision of the court and there is a risk of a refusal of certification by an appealable decision (see also Piszcz, 2014, p. 363). After the admission of the collective action, the court hears the parties at a public session, investigating the circumstances that determine the group of injured persons, and an appropriate way to publicise the action (Article 382(1) of the Code). In an appealable interlocutory decision, the court determines: a way to publicise the action; the number of announcements to be made as well as through which media and for how long shall the relevant information be made public; and when injured persons may express their intention of joining the group or the intention of not being represented by the group claimant (Article 382(2)–(3) of the Code). Ensuring publicity is considered to be a 'substantial, if not insurmountable, barriers for litigation', since courts normally make it quite expensive (Petrov, 2017, p. 50). For example, courts may select announcements to be made in TV, radio or major national printed media as a way to publicise the action and to require dozens of spots and/or publications therein (*ibid*.).

It is also worth adding that the Code does not permit pre-trial discovery of documents from third parties.

Fee arrangements where lawyers' fees are a percentage of the awarded amount are generally allowed. There is no regulation of third party funding of collective proceedings; however, the courts will seek to establish that the funding method will not hamper the independence of the claimant before declaring the collective action admissible. Hence, a certain degree of protection against abuse may be afforded by the judicial enforcement of the rules on the independence of the claimant (Daly, 2017, p. 33).

Controversially and uniquely, in individual private antitrust enforcement cases, Bulgarian courts have recognised the right of claimants to initiate only follow-on actions for damages, at the same time considering stand-alone actions inadmissible (Petrov, 2017, p. 32–34). If only collective private antitrust enforcement action were filed in Bulgarian courts, it is likely that the courts would resolve the question in the same way.

A recent study by A. Petrov reveals that there is no record of successful collective actions for damages (Petrov, 2017, p. 50). This means that collective actions have so far been filed with the aim to obtain an injunction for the discontinuation of alleged practices. After looking at publicly available decisions on collective redress cases, the author points out that almost all of those cases were initiated by the Commission on Consumer Protection (public authority), or representative consumer organizations in cases of unfair commercial practices. Although studies find that collective redress exists in

Bulgaria (K. Daly mentions at least 17 cases completed with final rulings; see Daly, 2017, p. 17; Georgiev and Hinov, 2011, p. 47; see also K.J. Cseres, 2015, p. 52), it is indicated that Bulgarian claimants are unlikely to initiate or join class actions (Petrov, 2017, p. 50).

## V. Compensatory collective redress in Lithuania

The Lithuanian national framework for group actions entered into force on 1 January 2015 and refers to damages claims as one of the admissible types of group claims. However, it is argued in legal literature that rules of the Lithuanian civil procedure codes – both the new one of 2002[6] and the former one of 1964 – provided, already beforehand, for a 'hypothetical' possibility to raise a group action in order to protect the public interest (Juška, 2016, p. 375; Juška, 2015, p. 1; Rodger, 2014, p. 176; see also Mizaras, 2012). Even so, it needs to be taken into account that there were no further provisions specifying the type of claims, legal standing, requirements for pursuing claims and the procedure. Due to this gap, the rules were ineffective as they were unable to produce any practical results.

Group actions are now regulated in Chapter 24-1 (Articles $441^1$–$441^{17}$) of the Civil Procedure Code. In general, there is no provision for any specialist court or tribunal to deal only with group actions, and according to Article $441^1(4)$, such proceedings fall within the competence of general (civil) courts, more precisely regional courts (*apygardos teismai*).[7] However, while this provision constitutes *lex generalis*, Article 51(2)(1) of the Lithuanian Competition Act[8] constitutes *lex specialis* here, stating an exception to the general rule. The latter stipulates that competition law proceedings concerning damages claims can only be raised before the Vilnius Regional Court,[9] regardless of whether these are individual or group proceedings.

Article $441^3(2)(1)$ of the Code states that a group must comprise at least 20 natural or legal persons. The group is represented by a group representative, previously identified as a member of the group or an association/trade union, if the group action is associated with a legal relationship directly related to their goals and activities, and at least 10 members of the group are members

[6] Available in Lithuanian at: http://www.infolex.lt/portal/start_ta.asp?act=doc&fr=pop&doc=77554.

[7] There are five regional courts in Lithuania.

[8] Available in Lithuanian at: https://www.e-tar.lt/portal/lt/legalAct/ad961110dd8911e69ae9f38427b46dd7.

[9] See also Article 28(4) of the Civil Procedure Code.

of this association/trade union (Article $441^4$(1)–(2)). However, associations (e.g. consumer associations) are very limited in terms of their ability to finance litigation because of their very small budgets (Juška, 2016, p. 384–385).

The Code provides for compulsory representation by an attorney in group action cases (Article $441^4$(3)).

The group action must be based on an identical or similar factual background, and must seek to protect, with the same remedies, the same or similar interests of the group members (Article $441^1$(2)). Furthermore, group redress is designed to be applied only where the group action is a more economical, more effective and more appropriate way to resolve a particular dispute than unitary pieces of litigation (Article $441^3$(1)(2)of the Code). Before group proceedings, a pre-court dispute resolution procedure must take place (Article $441^2$).

Article 87(1) of the Code states that if the claimed amount does not exceed EUR 30,000, the court registration fee is set for 3% of the claimed amount (but not less than EUR 20). Where the claimed amount is between EUR 30,000 and EUR 100,000, the court registration fee is set for EUR 900 plus 2% of the claimed amount exceeding EUR 30,000. If the claimed amount exceeds EUR 100,000, the court registration fee is calculated by adding EUR 2,300 to 1% of the claimed amount exceeding EUR 100,000. The court registration fee is capped at EUR 15,000.

If the court allows the group action, it sets a time limit of 60 to 90 days to enlarge the group. Unlike the obligatory announcements concerning an action determined by Bulgarian courts (which came under fire from legal literature), based on the analysis of Article $441^8$(2) of the Code, it can be found that courts in Lithuania are not competent to make a decision on announcements. It is the group representative who can decide voluntarily on informing potential group members about the action. The group representative may encourage additional group members to join the group through mass media and other means.

Pre-trial or other discovery vis-á-vis defendants and/or third parties, in the form and scope known in common law countries, are not foreseen in Lithuanian rules governing group proceedings.

There are no special provisions on litigation funding in Lithuania. If a case is won, costs are recovered from the unsuccessful party to the level authorised by law. Interestingly, contingency fees are permissible in group actions. However, contingency fees have so far had no impact in Lithuania (Juška, 2016, p. 394). Contingency fees are permissible also in individual actions for the breach of competition law, and there have been up to 10 individual private enforcement cases (both standalone and follow-on cases, no cartel-related private enforcement cases) since 2003 (Mikelėnas and Zaščiurinskaitė, 2017, p. 180). Nevertheless, no private antitrust action has been brought under

a contingency-fee agreement (Juška, 2016, p. 386). Moreover, researchers say that there is no practice regarding group antitrust actions in Lithuania so far (Mikelėnas and Zaščiurinskaitė, 2017, p. 199; Juška, 2016, p. 385). Legal literature also states that the only one such case brought on behalf of around 7,000 heat consumers was rejected due to the group plaintiff's failure to comply with pre-court dispute-resolution procedures (*Ukmergės rajono savivaldybė* v. *UAB "Energijos taupymo centras"* bei *UAB "Miesto energija"*, decision of the Court of Appeals of Lithuania of 10 July 2015, case No E2-816-157/2015;[10] see Juška, 2016, p. 385). Injured persons do not seem interested in taking steps to pursue their claims in group proceedings in Lithuania.

## VI. Compensatory collective redress in Poland

In Poland, collective redress is governed by the Act on the Pursuit of Claims in Group Proceedings of 17 December 2009.[11] The draft of this Act met with harsh criticism during the public consultation process in 2008. Among others, the feedback submitted by the National Council of the Judiciary of Poland was that the proposed provisions were 'underdeveloped' and the language was inconsistent with the Civil Procedure Code.[12]

After over seven years of experience with the use of group actions in Poland, the general belief seems to be that group actions contribute to the resolution of disputes in Poland. The latest official data[13] shows that altogether 225 group actions were filed in 2010–2016 in Polish courts; none of them, however, has been reported as an antitrust case. In 2011–2016, there were 34 group actions per annum on average. While the number of group actions has been steadily increasing for some time over recent years, it has been gradually decreasing in the past two years. Even though the Act came into effect on 19 July 2010, there were 21 group actions in 2010 alone (less than half a year), 38 in 2011 and 39 group actions in 2012. After a decrease to the lowest level measured in 2013 (22 actions), the 2014 rise to 42 actions was unprecedented. Finally, there were 33 such actions in 2015 and 30 in 2016. However, as the Ministry of Development commented in 2016, 'after around six years of the functioning

[10] The case included a claim for unjust enrichment and the award of EUR 3,758,456.9. The decision is available in Lithuanian at: http://eteismai.lt/byla/243816257406610/e2-816-157/2015.

[11] Available in Polish at: http://isap.sejm.gov.pl/DetailsServlet?id=WDU20100070044.

[12] Available in Polish at: http://qxdzgfn.krs.gov.pl/pl/dzialalnosc/posiedzenia-rady/posiedzenia-w-2008-r/c,288,09-11-wrzesnia-2008/p,1/1605,opinia-krajowej-rady-sadownictwa-z-dnia-10-wrzesnia-2008-r.

[13] Available in Polish at: https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/.

of collective redress, one can clearly see practical problems causing that the mechanism cannot be effectively used in accordance with its intended purpose. The best proof of this is the fact that so far none of "big" group cases has been concluded with a final decision, even though some of them were filed in 2010'.[14] In 42 cases, the group action was rejected for formal reasons.

As part of the so-called 'Package for creditors', the Ministry proposed to introduce amendments meant to improve the legal framework for group proceedings. The Act Amending Certain Act to Facilitate the Recovery of Debts proposed by the Government was adopted on 7 April 2017 and entered into force on 1 June 2017.

When adopting the legal framework for the collective redress mechanisms in 2009, the Polish legislature opted for an opt-in system. In the 'Package for creditors', published by the Ministry of Development, it was suggested that a discussion is required on the introduction of an opt-out system. Finally however, this proposal was abandoned.

Regional courts as courts of first instance (and not the lower district courts) have competence in cases which proceed as group actions in Poland (Article 3(1) of the Act on the Pursuit of Claims in Group Proceedings).[15] After the recent changes in Polish law related to the implementation of the Damages Directive, the same courts have competence in individual actions for antitrust damages irrespective of the amount of claim. However, group cases are judged by a panel of three judges (Article 3(2) of the Act).

It is crucial for the application of the mechanism to define its scope in a broad manner. Before the 2017 amendments, the availability of this mechanism for businesses was restricted. As a result, there were only seven business-to-business actions filed in the courts (3.1% of the total number of group actions) in 2010–2016. In the case of businesses, unjust enrichment claims and contractual claims were added to Article 1(2) of the Act by the 2017 amendments.

Those injured persons who are looking to come together in a group need to keep in mind that a group must comprise of at least 10 members with claims of the same kind and with the same or similar factual basis thereof (Article 1(1) of the Act). One of the objectives of the 2017 amendments was to stabilize group proceedings; therefore, in the case of group proceedings initiated after their entry into force, proceedings launched as group proceedings shall be continued in this form irrespective of changes to the group, including the reduction of the group below the level of 10 members due to, for example the death of any of its members (added Article 10a of the Act). The characteristics of the group shall not be re-examined after the certification.

[14] 'Package for creditors', p. 1. Available in Polish at: https://www.mr.gov.pl/media/21040/Pakiet_wierzycielski.pdf.

[15] There are 45 regional courts in Poland.

A group is required to have a group representative. Unless a representative is an advocate or a legal advisor, he or she needs to be represented by such a professional lawyer. Article 4(2) of the Act states that a member of the group may act as its representative. This provision entitles also regional (municipal) consumer ombudsmen to pursue group actions on behalf of the group. Four years after the Commission's Recommendations, and in spite of the 2017 amendments of the Polish Act, a collective action cannot be filed by an organisation (such as an association that protects consumers), unless the latter is a member of the group. This limitation will need to be revoked to enable the development proposed by the Commission's Recommendation (see also Piszcz, 2015, p. 74).

Beneficially for potential members of a group, the group plaintiff is able to aim for all types of remedies, including declaratory relief, injunctive and/or compensatory redress. The Ministry's analysis proved that, so far, declaratory relief has been the most popular type of remedy claimed in group proceedings. Plaintiffs required courts to make a declaration that the defendant was liable for the infringement. And what might it mean in practice? Group members could, first, settle with the defendant. Second, after the judgment had become final, they could file individual actions aiming at further remedies. Acting individually before courts, just after acting together as a group in group proceedings, multiplies court proceedings instead of reducing them. Before the 2017 amendments, however, provisions on compensatory redress in group proceedings were vague, and it was quite risky to submit claims for compensation. In particular, the concept of the standardization of claims was a weakness of the Act that had to be addressed. In cases concerning monetary relief, the amounts of individual claims, which make up the overall group litigation, needed to be standardised 'taking into account the common circumstances of the case' (Article 2(1) of the Act). Article 2(2) of the Act stipulates that the standardisation can be made in subgroups of at least two members of the overall group. The explicit reference to 'common circumstances of the case' made courts require plaintiff to show more standardization criteria than only the amount of claims of group members. It was argued that standardisation should be a consequence of one kind of harm, or facts common for subgroup members resulting in the similarity of harm.[16] This, in fact, resulted in the need to take them on a case-by-case basis, which was contrary to the nature of group proceedings. It was therefore essential to improve the relevant provisions so that, when group proceedings are initiated, plaintiffs have real means to get compensation in those proceedings, rather than only in subsequent individual

[16] See decision of the Court of Appeals in Cracow of 7 December 2011, I ACz 1235/11, in Polish available at: http://classaction-pl-tests.kkg.pl/pl/case_law/28-postanowienie-sadu-apelacyjnego-w-krakowie-wydzial-i-cywilny-z-dnia-7-grudnia-2011-r/.

proceedings. The 2017 amendments include, first, the clarification that the standardization of claims means an equalisation of the amounts of claims of group members or subgroup members, but, secondly, also the improvement of the rules regarding declaratory relief.

Different regional courts have reached different levels of efficiency in group proceedings, and in some of them the waiting time for the appointment of the first public hearing is a few months, whereas in others – a dozen or so. However, in most regional courts, the certification phase used to take at least 1.0–1.5 years after the action was filed. It needs adding that the requirement of holding a public hearing and the appealability of a certification decision contribute to the prolixity of this stage of group proceedings. Deciding on the certification of group proceedings in chambers, introduced by the 2017 amendments (Article 10(1) of the Act), is a move of the Polish legislature meant to reduce the duration of group proceedings. There was also room for improvements so that parties could benefit from more effective appeal procedures; the 2017 amendments have been focused thereon as well.

There were no amendments made to court registration fees regarding group proceedings; whereas the court registration fee for individual proceedings is (as a rule) 5% of the claim value, the court registration fee for group proceedings is 2% of the value of the case, not less than PLN 30 (approx. EUR 7) and not more than PLN 100,000 (approx. EUR 23,250). There is no legal aid to assist group members (Article 24(2) of the Act). In the case of non-pecuniary claims, the court registration fee is PLN 600 (approx. EUR 140). If the value of the case cannot be determined initially, a temporary court registration fee is set between PLN 100 (approx. EUR 23) and PLN 10,000 (approx. EUR 2,330).

A deposit of up to 20% of the claim value represents another burden for the group plaintiff who may be required by the court to secure the costs of the proceedings upon the defendant's request. However, the request process normally delays the first stage of the proceedings by up to one year (Tulibacka, 2016, p. 15). Moreover, before the 2017 amendments, courts had too much discretion over a deposit. After the amendments, the court may order the group plaintiff to pay a deposit only if the defendant renders plausible that the claim is unfounded and that in the case of its dismissal, the reimbursement of the costs of the group proceedings shall be impossible or seriously impeded (Article 8(1) of the Act).

When reforming group proceedings, the legislature took into account also provisions on a way to publicise group actions (Article 11 of the Act). In the case of actions filed before the 2017 amendments, unless all potential group members joined the class already, an announcement published in a popular nationwide newspaper was obligatory; only in particular cases the court could have ordered an announcement to be published in local press. After the

amendments, a way to publicise a group action should be chosen with a view to its expediency. In particular, the information may be published on the websites of the competent court, on the websites of the parties or their lawyers, as well as in nationwide or local press.

There are clearly no specific rules on funding in the Act. The 'loser pays' principle is applicable to group proceedings; however, costs are only reimbursed in accordance with tariffs (regulations of the Minister of Justice). It needs to be added that rules on lawyers' ethics, applicable in civil proceedings in general, do not permit agreements whereby lawyers' fees are based exclusively on a percentage of the amount recovered. However, in the case of group proceedings, contingency fees of up to 20% of the awarded amount are available under no-win no-fee agreements, according to Article 5 of the Act (see also Juška, 2016, p. 387–389). However, contingency fees have had a difficult start in Polish group proceedings. It is clear that, in practice, emphasis used to be on group actions for declaratory relief, where contingency fees, naturally, cannot be applied as there is no 'awarded amount'. But even in the case of claims for compensatory redress, lawyers prefer up-front fees. After a period of around seven years of group proceedings in Poland, only a few examples of the application of contingency fees can be found. The very nature of Polish group proceedings is a barrier to an effective use of contingency fees – those proceedings are too risky and long-lasting to make arrangements on success fees dependent on the adjudicated amount of the claim. Taking into account mandatory tariffs for the reimbursement of legal costs, and the fact that group action cases can attract huge total lawyers' up-front fees, it may be added that lawyers' fees come mostly from group members and not from the defendant. However, it can be said that provisions on contingency fees do not appear to be an effective method to address the above concerns.

## VII. Compensatory collective redress in Slovenia (draft legislation)

The Slovenian Government has adopted the text of the draft Act on Collective Actions (*Zakon o kolektivnih tožbah*) on 15 June 2017, claiming that collective redress mechanisms shall enhance access to justice, guarantee the rights of individuals infringed in mass harm situations, deter potential infringers from unlawful behaviours, and relieve the burden on courts caused by too many individual actions filed in mass harm situations.[17]

[17] See http://www.vlada.si/en/media_room/government_press_releases/press_release/article/government_discusses_the_crisis_management_system_and_the_introduction_of_the_possibility_of_collective_action_59992/. The draft Act is available in Slovene at: https://crushus-s6.crushus.

The draft Act concerns collective actions and collective settlements. Article 2 of the draft Act lists a number of claims that may be brought under the Act, which include claims in competition law cases (Article 2(2)(3)). The draft Act provides for the availability of both compensatory and injunctive remedies.

It is proposed that only one of the Slovenian courts will have exclusive jurisdiction to assess collective actions and collective settlements, namely the Regional Court (*okrožno sodišce*) in Ljubljana (Article 6 of the draft Act).[18]

According to Article 4 of the draft Act, legal standing is given, first, to non-profit legal persons of civil law whose main operational goals are connected with rights being protected in collective proceedings. Secondly, legal standing is given to the state attorney. The court assesses and determines the eligibility (representativeness) of a representative (Article 5 of the draft Act).

Further conditions for bringing a collective action include the requirement that the same claims are being made on behalf of an identifiable group of persons concerning the same, similar or related matters of fact or law, regarding the same mass harm situation. There is also the requirement that legal and factual issues common for the whole group predominate over issues that relate only to individual members of the group. Furthermore, the court shall be more likely to consider an action suitable for collective proceedings where individual actions may be considered less effective than collective redress. To this end, the court shall take into account a range of factors listed in Article 28(5) of the draft Act covering different aspects of the case, such as, for example costs and benefits of the collective proceedings, the size of the group and whether its members have brought any individual actions.

One should also be aware of the crucial role of the court, namely the determination of whether the certified action should move forward as an opt-out action or an opt-in action (Article 29(2)(4) and Article 30 of the draft Act). However, if at least one of the claims is related to the compensation for non-pecuniary damages, or if at least 10% of the members of the group claim payments of more than EUR 2,000, only the opt-in scheme may be used (Article 30(2)). The same applies to cross-border cases (Article 30(3)).

Where the calculation of individual damages is not possible, the court shall aggregate damages (Article 40). In such cases, pursuant to Article 43, the

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com/www.vlada.si/delo_vlade/gradiva_v_obravnavi/gradivo_v_obravnavi/?tx_govpapers_pi1%5Bsingle%5D=%2FMANDAT14%2FVLADNAGRADIVA.NSF%2F18a6b9887c33a0bdc12570e50034eb54%2F47b75b5194beaddcc125813d0041d04e%3FOpenDocument&cHash=d1a788f512b4b4bdb681b0d42ff3dfb5.

[18] There are 11 regional courts in Slovenia.

court shall appoint a manager of the collective damages responsible for the distribution of damages to injured parties. This role is attributed to a notary public with a seat in the district of the Regional Court of Ljubljana (unless the court considers it justified to appoint a notary public who has a seat outside the district of the Regional Court of Ljubljana).

When certifying the collective action, the court should also consider whether to order a deposit to be paid by the plaintiff in order to secure the defendant's costs of the proceedings and/or whether to order any additional means of dissemination of information about the action, for example, by way of creating an appropriate website (Article 29(3) of the draft Act).

To sum up this part of the considerations, it is worth emphasising the scale of the challenge facing courts in collective cases. A noticeable degree of discretion given to the court can be observed under the Slovenian draft law, compared with other analysed national legal frameworks.

The draft Act also contains a set of provisions which deal with funding and costs of collective proceedings. First, Article 58 contains rules on the estimation of the claim value, which are more beneficial for plaintiffs than general rules. Second, conditions for third party funding of collective redress are provided for (Article 59). Third, identically to other analysed national legal frameworks, the Slovenian draft Act provides for the 'loser pays' principle (Article 60). Fourth, pursuant to Article 61 of the draft Act, lawyers may be incentivised by success fees of up to 30% of the amount won (in some cases, of up to 15%).

The Slovenian proposal has been shaped to positively address a number of points from the Commission's Recommendation. Importantly, the draft Act does not see only the court system as the best vehicle for achieving justice, but it also regulates issues related to collective settlements (referred to in paragraphs 25–28 of the Commission's Recommendation).

It is now for the Slovenian legislature to say (or not) 'we are happy' with the proposed level of improvements in access to justice. Admittedly, the range of solutions under the same Act (courts' choice between opt-in and opt-out mechanisms), makes the Slovenian 'experimental model' quite unique in Central and Eastern Europe; the remaining CEE countries do not have anything like this. If it is adopted by the Slovenian legislature, it will remain to be seen whether the mixed system will be effective and, if so, whether it will inspire other countries in the region to cause an 'upheaval' of the systems existing in those countries.

## VIII. Questions to be addressed by CEE countries

The findings from Bulgaria, Poland and Lithuania show the complete dominance of individual actions over collective actions in private enforcement of competition law, even though private antitrust enforcement is not very developed in these countries. With only a few CEE countries having (or almost having) developed a legal framework for compensatory collective redress at all, and almost no practice in the field of collective competition law enforcement, the task of creating compensatory collective redress mechanisms as part of private enforcement of competition law in CEE countries does not look as though it has begun to take root. By and large, the key question to be addressed by those seven remaining CEE countries is whether to introduce legal provisions on collective redress mechanisms (including compensatory) for antitrust claims, or to introduce a generic collective action procedure for all civil claims, or to protect the status quo in which they do not have them at all. Next month (August 2017), however, the Commission will close a 12-week public consultation launched on 22 May 2017 with the aim of collecting evidence on the operation of collective redress arrangements in EU Member States; afterwards, it will prepare a report.[19] Furthermore, Member States are obliged to communicate to the Commission on an annual basis their statistics on the number of out-of-court and judicial collective redress procedures as well as information about the parties, the subject matter and outcome of the cases; for the first time, they were supposed to do so by 26 July 2016 at the latest. Based on practical experiences reported by the Member States and the participants of the public consultation process, the Commission shall assess the implementation of its Recommendation which, actually, should have been done by 26 July 2017 (see Section 41 sentence 1 of the Commission's Recommendation). This (somewhat belated) assessment is part of a wider debate over whether further measures to consolidate and strengthen the horizontal approach, reflected in the Commission's Recommendation, should be proposed.

Will the Commission adopt a landmark legislative proposal? It is possible that the Commission's Recommendation will be converted into a proposal for a directive. There may be several reasons for this, including the fact that the Commission's Recommendation was not followed by some of the Member States at all. Second, the Commission's Recommendation makes it clear that in order to balance the risks inherent in collective redress mechanisms, certain safeguards against possible abuses are required. Yet according to the report by K. Daly which covers 10 EU Members States including Bulgaria and Poland,

[19] http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59539.

these safeguards are being applied by the chosen Member States 'highly unevenly – if at all' (Daly, 2017, p. 66). Almost a year after the Commission's Recommendation, the European Economic and Social Committee (hereinafter, EESC) called on the Commission to propose a directive as quickly as possible; in the opinion of the EESC, only a directive would ensure a solid core of harmonisation, while at the same time giving the Member States enough leeway for accommodating the particularities of their national legal systems.[20]

It may be that the strategies for the future of some CEE countries are only to wait for the next move of the Commission and neither to introduce collective redress systems nor to improve existing ones unless there is a binding EU instrument thereon. So, many question marks surround, in fact, future EU legislation, namely whether it will introduce a binding measure and, therewith, incentives and reasonable safeguards or, to the contrary, mainly obstacles to the development of effective collective redress mechanisms. If the Recommendation is to be followed by the adoption of EU legislation binding on the Member States, this binding legislation should not deviate considerably from the Recommendation without good reasons. Otherwise, some Member States would not be enthusiastic about the new initiative 'rolling back' their earlier efforts, after being involved in the transposition of the principles contained in the Recommendation to their national laws. In particular, the task of balancing in the draft legislation of the different already existing systems (opt-in, opt-out and mixed) will be challenging but rewarding.

As it has been submitted above, in CEE countries where the legal framework for collective actions has emerged, irrespective of whether they remain a significant addition – at least in terms of numbers – to individual actions (Poland) or not (Bulgaria, Lithuania), their use in private enforcement of competition law has been facing insurmountable problems for years. Therefore, the next question is whether the 'law in books' on generic collective redress mechanisms, introduced in a given CEE country, is going to change the practice and give rise to 'law in action' with regard to claims for antitrust damages (see also Cseres, 2015, p. 57). The problems seem to lie, however, not as much in the collective redress mechanisms themselves, as also in barriers to private enforcement of competition law, irrespective of whether competition law is enforced collectively or individually. The above is supported by the fact that even individual actions for damages are not frequent in many EU Member States, including the CEE countries described in this paper, even though public enforcement of competition law exists therein. This status quo prompted the

[20] Point 3.3 of the opinion of the EESC on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards a European Horizontal Framework for Collective Redress, COM(2013) 401 final, OJ C 170, 05.06.2014, p. 68.

EU legislature to adopt the Damages Directive, which is projected to have a substantial impact on private enforcement of EU (but in fact also national) competition law after its transposition into national laws. The Directive does not have a key role to play in ensuring that collective redress mechanisms exist in the field of collective competition law enforcement (see Recital 13 sentence 2 of the Preamble to the Directive). Consequently, as comparative research showed, none of the CEE countries has conducted legislative works on a legal framework for collective redress (its introduction or amendments) while working on the implementation of the Directive, save that Slovenia drafted its Act on Collective Actions taking into account the implementing works.

However, it is at the very 'intersection' of the legal framework for private antitrust enforcement and the legal framework for collective redress where certain efficiencies can be generated that affect the exercising of the functions of competition law enforcement. While the basic function of public enforcement of competition law is deterrence from its infringements, the main focus of private enforcement is on compensation complemented by other functions, including (as the case may be) inter alia restitution and/or deterrence.[21] May the Damages Directive alone (after its transposition to national laws) be identified as a potential vehicle to achieve a better exercise of the compensatory function of private enforcement of competition law? Certainly, the Directive contains solutions that are capable of facilitating it.

A great example here is that the effect of national competition authorities' final infringement decisions on subsequent actions for antitrust damages will be regulated in Member States (Article 9 of the Directive), which shall facilitate follow-on actions for damages. To a considerable extent, this corresponds to paragraph 33 of the Commission's Recommendation.[22]

While pre-trial discovery is not permitted in collective procedures described in this paper, after the implementation of the Directive, proper procedures

[21] However, M. Strand suggests that where public enforcement serves to deter sufficiently from infringements, it is not necessary to design private enforcement mechanisms so that they safeguard the interest of deterrence (Strand, 2017, p. 418–419). However, thriving private enforcement of competition law would play a crucial role and be particularly welcome as able to deter from infringements where public sanctions are too weak to provide a deterrent.

[22] 'The Member States should ensure that in fields of law where a public authority is empowered to adopt a decision finding that there has been a violation of Union law, collective redress actions should, as a general rule, only start after any proceedings of the public authority, which were launched before commencement of the private action, have been concluded definitively. If the proceedings of the public authority are launched after the commencement of the collective redress action, the court should avoid giving a decision which would conflict with a decision contemplated by the public authority. To that end, the court may stay the collective redress action until the proceedings of the public authority have been concluded'.

shall be put in place to allow for evidential disclosure in antitrust cases in both individual and collective proceedings (Article 5–8 of the Directive). At the same time, rules of the Directive do not run counter to Recital 15 sentence 3 of the Preamble to the Commission's Recommendation. The latter recommends avoiding – as a general rule – elements such as intrusive pre-trial discovery procedures, which are foreign to the legal traditions of most Member States.

Limitation periods for claims for antitrust damages will be more reasonable and will make it easier for injured parties to bring actions (Article 10 of the Directive). The rules of the Directive thereon are coherent with paragraphs 27 and 34 of the Commission's Recommendation.[23]

The position of plaintiffs claiming antitrust damages shall also be improved due to pro-plaintiff presumptions, courts' powers to estimate the amount of harm, as well as the share of the overcharge which was passed on, and/or alterations to the burden of proof (Article 12–17).

It seems that, as a result, after the implementation of the Directive facilitating private enforcement of competition law, CEE countries will face an at least slowly increasing number of individual private actions for antitrust damages. With better legal tools in place, it is likely that there will be stronger action against infringements from injured persons. However, the key to success is not only to equip courts,[24] authorities and parties with powers provided for in the Directive. There are, doubtless, many mass harm situations, where harm is dispersed onto a very large number of victims (typically consumers), individual claims are very small and, consequently, individual actions are likely to be rare. There may be a correlation in the use of compensatory collective redress mechanisms and a better exercise of the functions of private enforcement of competition law, including also deterrence, and this may constitute one of the reasons for the introduction of collective redress mechanisms. Appropriate collective procedures should be available to injured parties. However, while there are no 'carrots' for consumers to be incentivised

[23] '27. Any limitation period applicable to the claims should be suspended during the period from the moment the parties agree to attempt to resolve the dispute by means of an alternative dispute resolution procedure until at least the moment at which one or both parties expressly withdraw from that alternative dispute resolution procedure.

(…) 34. The Member States should ensure that in the case of follow-on actions, the persons who claim to have been harmed are not prevented from seeking compensation due to the expiry of limitation or prescription periods before the definitive conclusion of the proceedings by the public authority'.

[24] Antitrust actions should be brought before designated courts; ideally for collective private enforcement of competition law, these should be the same courts as those competent to adjudicate collective cases, as they, hopefully, shall have experience in the particular challenges of both sets of specific rules. See the example of Poland where both sets of rules are now applied only by regional courts.

to bring private antitrust claims, it may turn out that even the introduction of legal provisions on collective redress does not lead to its emergence in practice. Existing legal mechanisms do not always provide effective access to justice, which constitutes a part of the right to fair trial. How to make injured parties to engage in compensatory collective redress? This question leads to another: what would be the best procedural scheme for compensatory collective redress? Opt-in, opt-out or a mixed one?

The claimant party should be formed on the basis of the opt-in principle, says paragraph 21 of the Commission's Recommendation. It advocates that the use of an opt-out mechanism should be duly justified by reasons of sound administration of justice. In academe, among others, L. Ervo writes critically about the opt-in principle as a rule, and the opt-out principle as an exception (Ervo, 2016, p. 186 et seq.). She argues that 'the sound administration of justice seems to require opt-out even if the Commission sees the procedural situation the other way around. (…) the very fundamental principles of law and order as well as public peace, are strong arguments for opt-out. It is only by opting out that the conflict will be resolved as a whole and without any uncertainties in the future. It is in that way and that way alone that public peace, and law and order can be achieved' (*ibid.*, p. 197). S.O. Pais writes that opt-out group actions seem to be most useful where individual claims are difficult to prove or when the value of such claims is too low to motivate consumers to participate in proceedings (Pais and Piszcz, 2014, p. 214). K. Daly disagrees, particularly as the opt-out principle 'robs group members of their legal autonomy, because individuals can become participants in litigation that they do not support – or that they outright oppose' (Daly, 2017, p. 39). He adds that in opt-in proceedings, the groups tend to include only claimants who are personally and actively interested in pursuing their rights; he is concerned about opt-out cases involving groups of mostly apathetic claimants (*ibid.*). Unlike him, L. Ervo rightly observes that this means protecting wrongdoers rather than an effective tool to realise substantive law correctly and when needed (Ervo, 2016, p. 198).

While several of the researched CEE countries use the opt-in principle recommended by the Commission as part of their compensatory collective redress systems, the prospect of Slovenia remains some way off. However, as noted above, the existence of a legal framework for compensatory collective redress based on the opt-in principle has not given rise to collective actions for antitrust damages in the researched CEE countries. Its introduction may, then, do little to increase its application in practice. Opt-in systems existing in CEE countries are characterised by low rates of take-up right and procedural delays. The Slovenian idea of a mixed system seems to be a truly crucial and important part of the development of private antitrust enforcement, as

it combines reasons of sound administration of justice and safeguards against possible abuses. Unless courts abuse their discretionary powers with regard to the choice of a system, the proposed solution shall not lead to inadvertent outcomes. Instead, it may boost the application of collective redress, also in antitrust cases. We now have to wait for the adoption of the proposed legal provisions and a 'pilot run' of the mixed scheme, which may constitute an inspiration for other CEE countries.

Insights from these considerations can form the basis for another question regarding the legal standing to bring a collective redress action. The Commission's Recommendation is designed to cover aspects of both group actions and representative actions.[25] It may well be that a broad legal standing would be beneficial to access to justice. Collective claims for damages should be capable of being brought by a wide range of parties. First, national legal frameworks should provide for group actions (which is not going to be the case in Slovenia). The threshold requirement of standing should not be imposed by legislation. Polish and Lithuanian solutions requiring – respectively – at least 10 or 20 members of a group seem to run counter to the Commission's Recommendation referring literally to '**two or more** natural or legal persons'.[26] On the other hand, however, the recognition of only two persons as a group by legislation may be counterproductive, as collective redress mechanisms do not seem designed for groups comprising two members. Unless the EU changes its approach ('two or more natural or legal persons'), the adequacy of a group in terms of the number of its members should depend on a court decision (see Bulgarian and Slovenian solutions). It should be observed, however, that systems where the size of the group based on a quantitative normative evaluation is not the only condition for the certification of a group are likely lacking legal certainty for claimants. Implementing safeguards against speculative or unmeritorious claims is an issue that some believe can be resolved by a requirement that the court considers that a collective redress

[25] E. Silvestri says, however, that in the Commission's Recommendation 'standing to sue is granted only to "representative entities" identified in advance by Member States or to public authorities' (see Silvestri, 2013, p. 49). Obviously, the 'body' of the Commission's Recommendation with respect to legal standing contains – in Chapter III ('Principles common to injunctive and compensatory collective redress') – only the subchapter 'Standing to bring a representative action'. But at the same time, recital 17 of the Preamble to the Commission's Recommendation gives an insight into the broader range of available collective actions: 'Legal standing to bring a collective action in the Member States depends on the type of collective redress mechanism. In certain types of collective actions such as group actions (…), the issue of standing is more straightforward than in the context of representative actions, where accordingly the issue of legal standing should be clarified'. See also para. 10 sentence 2.

[26] Para. 3(a), (b) and (d).

action is the best way of bringing the case and a strong process of judicial certification (Nikpay and Taylor, 2014, p. 285).[27]

Second, national legal frameworks should also provide for representative actions: by organisations (not available in Poland) and, in addition rather than as an alternative, by public authorities (for example, state attorneys in Slovenia). Even though the latter type of collective actions may be considered to have somewhat of a regulatory nature, such 'private–public' diversification is important in order to minimise the risk that where there are opportunities for compensatory collective redress, they are not missed by the passivity of the empowered bodies. Paragraph 4 of the Recommendation recognises the minimum conditions of eligibility of representative entities. They were welcomed by the EESC which, however, considered it excessive and unacceptable for these conditions to include sufficient financial and personnel resources as well as legal expertise. Such requirements would raise the question of what standards will actually be used to decide on this matter in individual cases, rather than be able to prevent improper litigation.

Last but not least, the costs and funding of collective litigation have certainly an effect on the discussed phenomenon. The above research indicating features of national legal frameworks focuses on both: solutions that seem to have the potential to encourage collective actions (although perceived as risky from the perspective of potential abusive litigation), and potentially limiting ones. In the case of the former, the issue of contingency fees must be referred to. Experience from non-antitrust collective proceedings conducted in Poland shatters the illusion of the seemingly compelling attractiveness of contingency fees (resulting in abusive collective litigation). In spite of their availability, they have been rarely agreed upon between lawyers and injured parties. In the case of the second type of solutions, examples from Bulgaria may demonstrate the importance of the level of court registration fees, as well as the existence of cheap flexible ways of publicising information about collective actions. Furthermore, provisions on a deposit to secure the defendant's procedural costs must be reasonable. In collective proceedings, procedural cost savings

[27] Echoing this, it should be noted that also the condition requiring a group representative to be represented by a professional lawyer (see Lithuanian and Polish solutions) may be considered a kind of safeguard (as one of the requirements related to standing). As to more safeguards, the researched CEE countries have the 'loser pays principle' seen in much of Europe and none of them recognises punitive damages. Having relatively stringent certification standards, they (except for Poland) gain no competitive advantage compared to other EU Member States. While Slovenia has prepared its draft legislation providing for a mixed system of collective redress, the fact remains that opt-in mechanisms are favoured in the region. Yet, as this article notes, contingency fees face an uncertain future not only due to the criticism from the Commission's Recommendation but also because they are not applied in practice.

should be achieved, and not the opposite. The conducted research leads to the conclusion that, out of those scrutinised, only Slovenian provisions (if adopted) regulate funding of collective redress in a comprehensive way. In Slovenia, moreover, funding shall be regulated in compliance with the Commission's Recommendation. In Lithuania and Poland, legislatures eventually ignored the Commission's Recommendation and allow for self-financed actions as well as actions funded by third parties without scrutiny by the court. They will need to tackle funding issues if the EU keeps emphasising them in its next piece of legislation; however, it remains to be seen what results (in any) the regulation of funding will produce for the application of collective redress mechanisms.

## IX. Is there strength in numbers? Conclusion

Is there strength in numbers? There may well be in the case of private enforcement of competition law, if only the legal framework in place includes a balanced, proportionate and effective scheme for compensatory collective redress. The realisation must not be ignored that infringements of competition law may result in harm suffered by large numbers of individuals, including indirect purchasers (or suppliers). They need to be provided with actual opportunities of access to justice. The debate on the implementation of the Damages Directive is largely over. However, the expected assessment being prepared recently by the Commission (will it reassert its position taken in 2013?) shall stoke up the debate about developments of collective redress mechanisms in the Member States.

What can be said about the researched CEE developments in general? The scrutiny of their legal frameworks leads to the conclusion that as a region, CEE has progressed substantially over the last decade in the field of 'law in books' on compensatory collective redress. Initially, only Bulgaria had a developed legal framework for compensatory collective redress that could be applied also to antitrust actions. Subsequent pieces of legislation on collective redress adopted in the region (Poland and Lithuania) focused also on compensatory redress, although they differed widely in details both from each other as well as from what was to come later in Slovenian draft legislation.

Most of the main elements for effective compensatory collective redress are already in place in the researched CEE countries. Both consumers and businesses are able to recover damages. Claims for damages can be pursued both on a stand-alone basis (save that Bulgarian courts have not admitted them in individual antitrust proceedings) as well as in follow-on cases brought

after public enforcement decisions. The 'loser pays' principle is applicable with regard to collective proceedings. After the implementation of the Damages Directive, rules will be in place on the disclosure of evidence that shall not threaten to leave claimants without access to evidence.

There is a need, however, to introduce generic (and not sectorial) collective redress systems where they are absent or add the right to pursue antitrust claims to existing systems (Croatia, Hungary) and improve the already shaped systems of collective redress, as there was almost no practice before with regard to collective private enforcement of competition law. In essence, the problem of an opt-in, opt-out or mixed scheme of compensatory collective redress should be rethought. It is instructive that Slovenia opted for a mixed system during its recent legislative works. Provisions on legal standing should be changed so that collective actions could be initiated by a wider range of parties. Solutions on litigation costs and funding should be improved. Last but not least, there is a need for more 'consensual' approach, which Slovenia may be praised for. In CEE countries, low rates of settlements remain problematic. Certainly, encouraging collective settlements of cases without going to the courts is something CEE countries should be doing more of.

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# C A S E C O M M E N T S

# Proving the Grounds for Compensation – Reflections on Private Enforcement in the Polish Cement Cartel Case.

Case Comment to the Judgment of the Court of Appeals in Cracow of 10 January 2014 (Ref. No I ACa 1322/13)

by

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**CONTENTS**



**Key words:** private enforcement of competition law; antitrust damage claims; quantification of harm; passing-on of overcharges; burden of proof; binding decision; final decision of a competition authority.

**JEL:** K13; K21; K41; K42

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## I. Introduction and the background of the case

Despite the fact that the right to full compensation of harm caused by the breach of Articles 101 and 102 TFEU was confirmed in European Union jurisprudence many years ago,[1] and that actions for damages for competition law infringements were admissible in Poland also before the transposition of Directive 2014/104/EU (hereinafter, the **Damages Directive**),[2] the number of reported court cases regarding private enforcement of competition law is very low.[3] The commented judgment of the Court of Appeals in Cracow (*Sąd Apelacyjny w Krakowie*) of 10 January 2014[4] is one of the very few judgments of Polish courts regarding actions for damages for an infringement of competition law.[5]

The action for damages in this case is an example of a follow-on action, as it was preceded by a decision of the Polish national competition authority, that is, the President of the Office of Competition and Consumer Protection (*Prezes Urzędu Ochrony Konkurencji i Konsumentów*, hereinafter, the **UOKiK President**), adopted on 8 December 2009.[6] The UOKiK President recognized therein a practice on the domestic market for the production and sale of gray cement as restricting competition, constituting an infringement of both national and EU competition rules. According to the UOKiK President, this anticompetitive agreement was in force no later than since 1998 and lasted until 2006, that is, before the Damages Directive was adopted. Interestingly,

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[1] See judgment of 20.09.2001, *Courage and Crehan*, case C–453/99, ECLI:EU:C:2001:465, para. 26; judgment of 13.06.2006, *Manfredi*, joined cases C–295/04 to C–298/04, ECLI:EU:C:2006:461, para. 60; judgment of 14.06.2011, *Pfleiderer*, case C–360/09, ECLI:EU:C:2011:389, para. 36 and judgment of 06.11.2012, *European Community v. Otis NV and others*, case C–199/11, ECLI:EU:C:2012:684.

[2] Directive 2014/104/EU of the European Parliament and of the Council of 26.11.2014 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, OJ L 349, 05.12.2014.

[3] Judgments of Polish courts on private competition law enforcement between 1993 and 2012 were reviewed by A. Jurkowska-Gomułka (see Jurkowska-Gomułka, 2013).

[4] Judgment of the Court of Appeals in Cracow of 10.01.2014, Ref. No I ACa 1322/13. Retrieved from: http://orzeczenia.krakow.sa.gov.pl/content/$N/152000000000503_I_ACa_001322_2013_Uz_2014-01-10_001 (18.09.2017). Not available in English.

[5] It should be noted, however, that due to the fact that private enforcement of competition law cases do not have any special denotation in Polish courts (they are not entered into separate repertory), there are no comprehensive statistics of the number of such cases.

[6] Decision No DOK-7/2009. Retrieved from: https://decyzje.uokik.gov.pl/bp/dec_prez.nsf/43104c28a7a1be23c1257eac006d8dd4/e3ec800578c62cffc1257ec6007b8da2/$FILE/decyzja_dok_7_2009.pdf (18.09.2017). Not available in English.

during the antitrust proceedings before the UOKiK President, the defendant, Lafarge Cement S.A. (seated in Małogoszcz, Poland), did not contest its participation in the agreement, quite the contrary, it was the immunity recipient. It is also worth noting that the total share of the participants of the cartel in the domestic market for the production and sale of gray cement was estimated by the UOKiK President at almost 100%.[7] The administrative decision was appealed to the Court of Competition and Consumers Protection (*Sąd Ochrony Konkurencji i Konsumentów*, hereinafter **SOKiK**) but not by the defendant, who took advantage of the leniency programme and thus had no legal interest in appealing the decision. SOKiK issued a judgment on 13 December 2013[8] which confirmed the findings of the UOKiK President as to the participation of the parties in the anticompetitive agreement.[9] This judgment was later appealed to the Court of Appeals in Warsaw.[10] The latter court, having constitutional doubts, referred a 'preliminary' question to the Polish Constitutional Tribunal (*Trybunał Konstytucyjny*). The Tribunal considered the question unfounded and decided to discontinue its proceedings on 5 April 2017.[11] Accordingly, the UOKiK President's decision of 8 December 2009 has not become final even up to this point.

## II. Facts of the case

In 2012 the claimant has filed a lawsuit seeking compensation (PLN 1,440,770.70 plus statutory interest from the date of filing the statement of claims) for purchasing cement at excessive prices. The claimant reasoned that the requested amount was a result of the harm it suffered by buying overpriced cement in the years 2001–2002. The action for damages in this case was brought against the cement producer Lafarge Cement S.A. who – in

[7] Point 405 of the UOKiK President decision No DOK-7/2009.

[8] Judgment of SOKiK of 13.12.2013, Ref. No XVII AmA 173/10. Retrieved from: http://orzeczenia.warszawa.so.gov.pl/content/$N/154505000005127_XVII_AmA_000173_2010_Uz_2014-12-13_001 (18.09.2017). Not available in English.

[9] By this judgment, SOKiK decided to change the decision of the UOKiK President but only to a very limited extent: the date when one of the parties ceased the practice concerned has been changed and the amount of penalties imposed on the parties have been decreased. SOKiK judgment has confirmed that the entrepreneurs concerned were parties to the anticompetitive agreement.

[10] The case is still pending before the Court of Appeals in Warsaw (Ref. No. VI ACa 1117/14).

[11] Decision of the Constitutional Tribunal of 24.03.2017, Ref. No. P 17/16. Retrieved from: http://trybunal.gov.pl/postepowanie-i-orzeczenia/postanowienia/art/9667-ochrona-konkurencji-i-konsumentow-ustalenie-wysokosci-kary-pienieznej/ (18.09.2017). Not available in English.

accordance with the UOKiK President decision of 8 December 2009 – was one of the members of the cartel, though the claimant was buying cement from a different entrepreneur. The claimant argued that as a result of the cement cartel, which was functioning in the years 1998–2006, cement prices were unjustifiably increased and, due to the division of the sales market made by the cartel participants, the claimant was deprived of the possibility to choose from which cement producer it was buying the goods. Therefore, taking into consideration the fact that the defendant was an active member of the cement cartel in 1998–2006, the claimant held that the defendant was liable for the damages suffered by the claimant.

The defendant requested the dismissal of the claim. It asserted a statute of limitation and denied that the claimant summoned him to a settlement trial involving the claim covered by the lawsuit in these proceedings. Moreover, the defendant argued that the claimant had not purchased the cement covered by the invoices attached to the lawsuit from the defendant. Lafarge Cement S.A. denied also that it committed acts that resulted in the infringement of competition law which had an impact on the economic situation of the claimant.

The Regional Court in Kielce (*Sąd Rejonowy w Kielcach*, hereinafter, the **First Instance Court**) dismissed the claim in a judgment of 12 June 2013[12] on the basis of the following arguments. First, in the opinion of the court, only a final infringement decision of the UOKiK President would determine whether a competition restricting agreement actually took place. Second, the claimant has not proved that he was deprived of choice and was not able to buy cheaper cement from a different producer. Third, the claimant should have proved he had bought cement from the seller (different entrepreneur than the defendant), had overpaid it, and that the defendant was liable for the claimant's harm arising from these facts. The First Instance Court noted that the claimant has not shown that there was a causal relationship between the defendant's behaviour and the claimant's harm, as well as that the defendant was at fault and liable for this. According to the First Instance Court, the claimant proved neither his harm nor the amount of it. Though the claimant referred to Article 322 of the Polish Civil Procedure Code (hereinafter, the **Civil Procedure Code**),[13] which may be applied only if it is impossible or too difficult to prove the amount of harm, the court stated that the very fact of harm has to be proved first, and this had not been done in this case. For the same reason, the First Instance Court dismissed the claimant's application for

[12] Judgment of the Regional Court in Kielce of 12.06.2013, Ref. No. VII GC 325/12. Not published.

[13] Act of 17.11.1964–Code of Civil Procedure (Journal of Laws 1964, No. 43, item 296 as amended).

a witness expert opinion on the amount of its harm. Fourth, in the view of the court, the limitation period has already lapsed regarding part of the claim.

The judgment of the First Instance Court was appealed by the claimant to the Court of Appeals in Cracow (hereinafter, the **Court of Appeals**). In the commented judgment, the Court of Appeals ruled in favour of the defendant. First of all, the Court of Appeals stated that the claimant had not proved that the anticompetitive agreement was concluded and that the defendant was a party to such agreement. In the Court of Appeals' opinion, the UOKiK President decision of 8 December 2009 could not have been deemed as sufficient evidence of this fact, because at the time of the Court of Appeals' judgment this decision was not yet final. Second, the Court of Appeals indicated that the claimant had not presented evidence to prove its harm nor the amount of it. The invoices documenting the purchase of cement by the claimant in two periods, before the cartel and for the period of 2001–2002, were insufficient. The Court of Appeals explained that the claimant should have presented also invoices documenting his own re-sale prices for the compared periods. Only then the witness expert could have issued an opinion on the amount of harm suffered by the claimant. Lack of documents showing re-sale prices applied by the claimant in those periods constituted – in the Court of Appeals' opinion – an obstacle for evidence from an expert witness opinion.

## III. Reasoning of the Court of Appeals and the discussion

### 1. Conditions required to establish whether a competition authority's decision is final

The first and most important point is establishing whether courts are bound by a decision of UOKiK President and when that decision becomes final.

Regarding the issue of a court being bound by a UOKiK President decision, there was no consistency in the Polish case-law for years. For example, the Polish Supreme Court (*Sąd Najwyższy*, hereinafter, the **Supreme Court**) stated in 2004 that decisions finding an infringement have binding effect on civil courts.[14] Later, the same issue was tackled differently by the judiciary. Nevertheless, the prevailing approach, which was confirmed by the jurisprudence of the Supreme Court,[15] is that civil courts are independent in

[14] Judgment of the Supreme Court of 28.04.2004, Ref. No. III CK 521/02. Not published. See also judgment of the Supreme Court of 04.03.2008, Ref. No. IV CSK 441/07. Not published.

[15] Judgment of the Supreme Court of 02.03.2006, Ref. No. I CSK 83/05, retrieved from: http://sn.pl/sites/orzecznictwo/Orzeczenia2/I%20CSK%2083-05-1.pdf (18.09.2017), not available

determining the existence and nature of an anticompetitive agreement when there is no final decision of the competition authority. Therefore, courts are not bound by the competition authority decision and act alone in deciding how to apply competition law in a specific case pending before that court, unless there is a final decision of the competition authority decision (Jurkowska-Gomułka, 2010, p. 45). A similar approach was taken by the court in the commented judgment.

The next matter is determining at what point an administrative decision becomes final. A decision issued by the Polish competition authority is final when it is irrevocable, that is, when no ordinary remedies are available under the law, where all those remedies were exhausted or where the time limit for those remedies has expired (Jaśkowska, 2016, p. 1105).[16] The relevant 'ordinary' legal remedy is an appeal to SOKiK or, next, to the Court of Appeals preventing a decision from becoming final. In other words, antitrust decisions are final when the time limit for an appeal lapsed or the Court of Appeals upheld the antitrust decision.

In the reviewed judgment, the Court of Appeals assessing the damages case focused mainly on the lack of a binding antitrust decision, reasoning that only a final ruling of the Court of Appeals in the matter of the UOKiK decision will determine whether: 1) there was an anticompetitive agreement, 2) defendant participated in the agreement, 3) the agreement restricted competition on the domestic market for the production and sale of gray cement in 2001–2002.

First, it has to be noted that SOKiK, which reviewed the contested antitrust decision first, did not undermine the existence of the anticompetitive practice. Moreover, it acknowledged the role of Lafarge Cement S.A. (the defendant in the damages case) in the cartel. It remains unclear why the court responsible for hearing the action for damages questioned the defendant's participation in the cartel, when in its own judgment it emphasizes that during the antitrust proceedings the defendant did not contest his participation in the anticompetitive agreement. Interestingly, the fact that the defendant was the immunity recipient was also not considered as a basis to establish the existence of the agreement.

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in English; judgment of the Supreme Court of 14.03.2006, Ref. No. I CSK 83/05, not published; resolution of the Supreme Court of 23.07.2008, Ref. No. III CZP 52/08, retrieved from: http://www.sn.pl/sites/orzecznictwo/Orzeczenia1/III%20CZP%2052-08.pdf (18.09.2017), not available in English.

[16] See judgment of the Provincial Administrative Court in Warsaw (*Wojewódzki Sąd Administracyjny w Warszawie*) of 24.02.2010, Ref. No. VII SA/Wa 2137/09. Not available in English. From 01.06.2017, the Polish Administrative Procedure Code defines final decisions as decisions which cannot be challenged before the court (Art. 16 § 3).

A different issue that raises concerns is the uncertainty regarding the reasons for ruling on the damages claim while the appeal proceedings concerning the antitrust decision of the UOKiK President were still pending. The Supreme Court notes that it would be troublesome if civil courts and the Polish competition authority would reach different conclusions while deciding whether there has been an infringement of competition law.[17] Jurkowska and Sieradzka share this view stating that civil proceedings should be suspended if antitrust proceedings relating to the same infringement are pending. This would ensure coherence between public and private enforcement (Jurkowska, 2010, p. 44; Sieradzka, 2008). The court in the commented damages judgment should have considered suspending its own proceedings until the challenged antitrust decision becomes final. According to Article 177 § 1(3) of the Civil Procedure Code, optional grounds for suspending the proceedings include dependence on the outcome of separate ongoing proceedings. Although these grounds are not mandatory, they should be at least considered by the court, which did not apply them in this case. Neither a justification nor sound arguments for not suspending the damages proceedings were provided.

Article 9 of the Damages Directive introduced an improvement in this matter stating that final infringement decisions should be deemed to be irrefutably established in actions for damages brought in the Member State of the national competition authority or review court relating to that infringement. The effect of the finding should, however, cover only the nature of the infringement and its material, personal, temporal and territorial scope, as determined by the competition authority or review court in the exercise of its jurisdiction (recital 34 of the Preamble to the Damages Directive). Despite the fact that the Damages Directive applies only to breaches of EU competition law, corresponding provisions of national law were introduced into Polish law also.[18] Other CEE Member States have adopted the same model and gave a broader scope to their implementing provisions – they introduced into their national legislation provisions applying to other situations than only infringements of competition law affecting trade between Member States. By doing so, they avoided introducing double standards regarding two different types of infringements (Piszcz, 2017, p. 298).

Another outstanding question is whether an infringement decision becomes final regarding a leniency applicant who did not appeal it. In the relevant antitrust case, the leniency procedure was initiated by two undertakings,

[17] Resolution of the Supreme Court of 23.07.2008, Ref. No. III CZP 52/08. Retrieved from: http://www.sn.pl/sites/orzecznictwo/Orzeczenia1/III%20CZP%2052-08.pdf (18.09.2017). Not available in English.

[18] Art. 30 of the Act of 21.04.2017 on claims for damages for infringements of competition law (Journal of Laws 2017, item 1132), hereinafter, **ACD**.

which decided to cooperate with the competition authority. The antitrust decision concluded that as many as seven undertakings were in fact involved in the cartel (fixing prices and sales conditions as well as geographic market sharing). The UOKiK President imposed maximum fines on five members of the cartel, excluding only one leniency applicant – Lafarge Cement S.A. and reducing the fine to 5% of the revenue for the other – Górażdże Cement S.A. Lafarge Cement S.A. was also the only undertaking which did not challenge the decision.

Given these facts, an important question arises: how does it affect the leniency applicant? What happens if not all of the parties to the antitrust proceedings challenge the infringement decision? Thought must be given to situations where the decision of the competition authority finding an infringement may become final for the leniency applicant before it becomes final for other infringers, which did not apply for leniency or have not received immunity. This would result in at least two implications. First, a leniency applicant immediately becomes the target of compensation claims. Second, it gives raise to the assumption that an agreement, which by definition is concluded by many entities, is attributed to only one undertaking, which is undoubtedly unreasonable (Piszcz, 2016, p. 108).

Following this reasoning, it is pertinent to introduce provisions for undertakings which were exempt from fines (that is, immunity recipients) imposed by a competition authority, to be protected from being the target of damages claims. In fact, the Damages Directive states that an immunity recipient is jointly and severally liable only to 'its direct or indirect purchasers or providers' and that other infringers may recover a contribution from him 'where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law' (Article 11(4)). However, when the commented damages judgment was given it was months before the Directive was signed into law, let alone before the transposition period ended.

The Court of Appeals in the commented judgment did not consider issues covered by the mentioned article of the Damages Directive, but it found that the decision is not final regarding the immunity recipient who did not appeal it and was only an interested party in the antitrust appeal proceedings before the court reviewing the contested decision of the UOKiK President. This approach appears to be consistent with Polish doctrine, which refers to substantive joint participation described in Article 72 § 1(1) of the Civil Procedure Code, stating that more than one person may act in one case as claimants or defendants, provided that the matters at issue are rights or obligations common to them or which are based on the same factual and legal grounds (substantial joint participation). Manowska explains further that an appeal brought by joint

participants is equally effective against non-acting participants (Manowska, 2015, p. 233). This is a key feature of uniform joint participation of claimants in civil law proceedings. It occurs when it arises, from the nature of an arguable legal relationship or from the provision of statute that the judgment is going to affect indivisibly all joint participants. Moreover, in that case Article 378 § 2 of the Civil Procedure Code, which gives the court of second instance the option to consider the appeal also for the benefit of those joint participants who have not challenged the first instance judgment, does not apply because an appeal is automatically effective against all joint participants. The judgment obtains the force of *res iudicata* against all joint participants, even those who were not mentioned in that ruling (Manowska, 2015, p. 234). Accordingly, applying this reasoning to the commented judgment means that appealing against a UOKiK President decision equals substantive joint participation, that is, appeal brought by one cartel member is effective against other members also. Therefore, the immunity recipient is treated as if he challenged the decision also, even though the appeal was brought by other members of the cement cartel. The Court of Appeals in this case most probably followed this argumentation, because it stated that it is beyond doubt that the relevant decision of the Polish competition authority is not final, therefore it is not binding on the court.

On the European level, however, we come across a different approach, which can be seen in the *Galp Energía España*[19] case. The General Court stated therein in paragraph 90 that 'decision adopted in a competition matter with respect to several undertakings, although drafted and published in the form of a single decision, must be seen as a set of individual decisions finding that each of the addressees is guilty of the infringement or infringements of which they are accused and imposing on them, where appropriate, a fine. It can be annulled only with respect to those addressees which have successfully brought an action before the European Union judicature, and remains binding on those addressees which have not applied for its annulment'. Accordingly, this case, as well as same approaches presented by the CJEU in older cases,[20] expresses the opposite view to that of the Polish doctrine regarding parties being bound by a final decision of a competition authority.

[19] Judgment of 16.09.2013, Case T-462/07 *Galp Energía España and Others v. Commission*, ECLI:EU:T:2013:459.

[20] Judgment of 15.10.2002, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v. Commission*, ECLI:EU:C:2002:582, para. 100. Judgment of 14.09.1999, Case C-310/97 P *Commission v. AssiDomän Kraft Products and Others*,ECLI:EU:C:1999:407, para. 49.

## 2. Conditions of liability for damages and the burden of proof of passing-on of overcharges

As noted above, in the commented case the claimant has not purchased cement from the defendant but rather from another entity that – according to the UOKiK President decision – was together with the defendant a participant of the cement cartel. In effect, the claimant and the defendant were not bound by any contractual relationship. The claim for damages in this case was based on Article 415 of the Polish Civil Code (hereinafter, the **Civil Code**)[21] which states that a person who has inflicted harm to another person by its own fault shall be obliged to redress it. In order to successfully claim damages on this legal basis, the claimant should have proved: (1) the event giving rise to the harm, (2) the harm, including the amount of if, (3) causal link between the event and the harm and (4) the defendant's fault.

The Court of Appeals indicated that the claimant had not proved, amongst other premises, the amount of the harm suffered as a result of the unlawful action of the defendant. The Court of Appeals stated that due to the nature of the claimant's business activity, the claimant should have presented during the trial not only invoices documenting the purchase of cement by the claimant, but also copies of invoices documenting the re-sell of the cement to the claimant's clients – each set of them for both periods, for the time before and during the cartel. In the Court of Appeals' opinion, only then the expert witness could have been able to quantify the harm suffered by the claimant, as well as to examine the unjustified increase of cement prices and the causal link. By such conclusion, the Court of Appeals has touched upon the issue of the **passing-on of overcharges**. The Court of Appeals suggested that it was not ruled out that the claimant compensated the higher prices of cement purchased while the cartel was functioning by increasing its own re-sale prices. As a result of such practice, actual harm might have been suffered by the claimant's clients, rather than by the claimant himself. The reasoning behind the judgment indirectly suggest that the Court of Appeals has recognized that the burden of proof of the fact that the claimant had not, in fact, passed on the overcharges was on the claimant. The Court of Appeals' conclusion in this case was, however, contrary to general rules governing the burden of proof in civil law cases.

In accordance with Article 6 of the Civil Code, the burden of proof of a fact is placed on the person who derives legal effects from this fact. This rule is supported and supplemented by Article 232 of the Civil Procedure Code whereby the parties shall present evidence to prove the facts from which they derive legal effects. In the jurisprudence of Polish courts, it is underlined that

[21] Act of 23.04.1964–Civil Code (Journal of Laws 1964, No. 16, item 93 as amended).

the following rules apply to the distribution of the burden of proof: 1) facts from which the claim is derived shall be demonstrated – as a rule – by the claimant; the claimant shall also prove the facts which constitute its response to the defendant's allegations; 2) facts justifying the defendant's allegations against the claimant's claim shall be demonstrated by the defendant; 3) facts damaging or abrasive shall be demonstrated by the opponent of that party who makes the claim – as a rule – the defendant.[22]

As to the **burden of proof of the passing-on of overcharges**, in the light of the above, it should be concluded that the initiative to invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law, as well as to prove the scope of the passing-on, is placed on the entity from whom the victim claims the damages arising from the cartel in accordance with the burden of proof rule (Article 6 of the Civil Code) and the evidence initiative rule (Article 232 of the Civil Procedure Code) (Wolski, 2016, p. 58). Undoubtedly, the entity who derives legal effects from the fact that the person who claims to be injured as a result of a cartel has in actuality reduced or eliminated the negative effects of the price increase by passing on the overcharges onto its clients is the alleged perpetrator of the harm. Moreover, also the scope of the passing-on constitutes a fact from which the alleged perpetrator of the harm derives legal effects as the scope of the overcharges that were passed on by the victim directly determines the actual harm suffered by it. Therefore, the conclusion made by the Court of Appeals according to which the burden of proof of the passing-on of overcharges was on the claimant cannot be considered correct.

It should be added that the documents that could have proved the claimant had (or had not) passed overcharges on were in fact in the possession of the claimant. Nevertheless, the defendant was not deprived of the procedural tools necessary to induce the claimant to deliver them. In accordance with Article 248 § 1 of the Civil Procedure Code, everyone is obliged to submit to a court disclosure order within a specific time, and hand over the document in his possession and evidence of a fact relevant to the resolution of the case, unless the document contains state secrets. In order to prove that the claimant had passed overcharges on, the defendant could have requested that the court issues an order on the basis of Article 248 § 1 of the Civil Procedure Code obliging the claimant to deliver, within a specific time, the requested documents (for example, copies of invoices documenting the resell of cement to the claimant's clients before and during the cartel). Admittedly, Articles 248

[22] See: judgment of the Supreme Court of 16.04.2003, II CKN 1409/00, Orzecznictwo Sądu Najwyższego, Izba Cywilna 2004, item 113; judgment of the Supreme Court of 13.10.2004, III CK 41/04, LEX No 182092. Not available in English.

§ 1 and 2 of the Civil Procedure Code provide for situations when failing to present evidence upon a court order may be justified, but the exposure to the risk of dismissing the claim is not one of them (Article 248 § 2 of the Civil Procedure Code). Failure to present by a party to the proceedings of the requested documents would result in the consequences described in Article 233 § 2 of the Civil Procedure Code. Namely the court would have to assess at its discretion the reliability and validity of a party's refusal to present evidence or a party's interference with the taking of evidence despite a court order, following extensive deliberations on the available material.[23] It means that not obeying a court order regarding the presentation of certain documents could have resulted in an assumption that the facts covered by those documents were in favour of the defendant, and so this was why the claimant had not presented them despite a court disclosure order. In the given case, however, no such order has been submitted nor did the claimant present the evidence of its own initiative. The lack of initiative of the claimant was indeed understandable because – as it was stipulated above – in accordance with the general burden of proof rules, the burden of proof regarding the passing-on of overcharges was on the defendant. In the end, despite the fact that the evidence collected in the proceeding was not sufficient to state whether the overcharges were passed on or not, the Court of Appeals has – with a violation of Article 6 of the Civil Code and Article 232 of the Civil Procedure Code – concluded that the passing-on of overcharges might have taken place.

Incidentally, the commented judgment was decided before the Damages Directive was adopted and transposed into Polish law. Nevertheless, the above interpretation of Article 6 of the Civil Code and Article 232 of the Civil Procedure Code (as to the burden of proof of the passing-on of overcharges) is in line with the obligation imposed on Member States by Article 13 of the Damages Directive. It is also worth noting that the ACD, which transposed the Damages Directive into Polish law, has not introduced any special rules as to the burden of proof of the passing-on of overcharges, except for the introduction of the presumption that the overcharges were passed on to an indirect purchaser, if a competition law infringement has resulted in an overcharge for the direct purchaser and the indirect purchaser has acquired the products or services to which the infringement relates, or products or services derived from such products or services, or containing such products or services (Article 4(1) of the ACD). This presumption may only be relied upon by an indirect purchaser who claims the redress of his own damages

[23] See e.g.: judgment of the Supreme Court of 26.01.1967, II CR 269/66, LEX No. 6108, judgment of the Supreme Court of 14.02.1996, II CRN 197/95, LEX No. 24748, judgment of the Supreme Court of 21.12.2004, I CK 473/04, LEX No. 194138, judgment of the Supreme Court of 20.01.2010, III CSK 119/09, LEX No. 852564.

arising from the passing-on of the overcharge upon this indirect purchaser (Article 4(2) of ACD). Therefore, the remarks as to the burden of proof of the passing-on of overcharges made in this case comment are still applicable.

## 3. Premises of the estimation of harm

In the commented judgment, the Court of Appeals has refused to apply Article 322 of the Civil Procedure Code which empowers the court – under certain circumstances – to estimate the amount of a damages claim. In accordance with this rule, if, in a case for the redress of *inter alia* damages, the court decides that it is impossible or excessively difficult to substantiate the amount of a claim, the court may award an estimated amount established by taking into consideration all the circumstances of a case.

It was indicated in the reasoning behind the judgment, that the court was empowered to estimate the amount of the claim only when the scope of the harm was proved but the available evidence did make it possible to establish the actual amount of the damages. Such conclusion has been explained by the statement that Article 322 of the Civil Procedure Code does not constitute an exemption from the adversary proceedings rule. The Court of Appeals also stated that the estimation of the amount of a claim, on the basis of Article 322 of the Civil Procedure Code, may be made, provided that the following conditions are fulfilled: 1) the principle of liability is established, 2) the harm and the scope of it are proved and 3) despite the fact that all available evidence was offered in the proceedings, the precise substantiation of the amount of the claim is impossible or excessively difficult.

This interpretation is in line with Polish jurisprudence. It was underlined in the judgment of the Supreme Court dated 26 January 1976[24] that the court is empowered to apply Article 322 of the Civil Procedure Code only when it was proved with all available evidence that the precise substantiation of the amount of a claim is impossible or excessively difficult. It is not sufficient for the claimant to only indicate this fact. The claimant should be active during the proceedings and show by using all available evidence that the premises of the court estimating the amount of the harm have been fulfilled. The burden of proof as to the fact that it is impossible or excessively difficult to prove the precise amount of a claim is on the claimant.[25] Therefore, the application of

[24] Judgment of the Supreme Court of 26.01.1976, I CR 954/75, LEX No. 7795. Not available in English.

[25] Judgment of the Supreme Court of 02.10.2015, II CSK 662/14, LEX No. 1943212, judgment of the Court of Appeals in Szczecin (*Sąd Apelacyjny w Szczecinie*) of 15.07.2015, I ACa 277/15, Lex No. 1938388. Not available in English.

Article 322 of the Civil Procedure Code cannot be triggered by the inaction of a party who does not make use of its own right to adduce evidence; otherwise, the estimation of the amount of a claim by the court would result in realising a party from the obligation to present evidence, which should be offered in accordance with the burden of proof rule.[26] It is not appropriate to use this institution where the claimant simply failed to prove its claim by appropriate means of evidence.[27] The lack of initiative of a party, regarding the facts that should be proved by it, cannot be replaced by the court acting on the basis of Article 322 of the Civil Procedure Code.[28] It has also been underlined in jurisprudence that the application of Article 322 of the Civil Procedure Code is justified only when all remaining premises of liability have been dully established.[29] Such interpretation is supported by the wording of Article 322 of the Civil Procedure Code, which regards only the actual amount of a claim, and does not mention the other premises of liability. Due to the exceptional character of this rule, it is not allowed to make an expansive interpretation of this rule.[30]

In the light of above, the interpretation of Article 322 of the Civil Procedure Code presented by the Court of Appeals in the commented damages judgment is in line with the wording of this legal provision as well as consistent with the jurisprudence of Polish courts. Therefore, the premises of a court using its power to estimate the amount of a claim were indicated correctly (Kohutek, 2016). Nevertheless, the decision of the Court of Appeals to refuse the application of this rule in this particular case may raise doubts.

First, as it was demonstrated in the commented judgment, during the proceedings, in order to prove the claim and its amount, the claimant presented *inter alia* invoices documenting the purchase of cement in the period before and during the cartel, as well as applied for evidence from an expert witness opinion as to the amount of the harm. It also indicated Article 322 of the Civil Procedure Code, which empowers the court to estimate the amount of a claim. The First Instance Court decided to reject the claimant's motion for evidence from an expert witness opinion, due to the fact that in the court's

[26] Judgment of the Court of Appeals in Cracow (*Sąd Apelacyjny w Krakowie*) of 10.02.2017, I ACa 1330/16, LEX No. 2289445. Not available in English.

[27] Judgment of the Court of Appeals in Gdańsk (*Sąd Apelacyjny w Gdańsku*) of 21.06.2016, V Aca 917/15, LEX No. 2308694. Not available in English.

[28] Judgment of the Supreme Court of 05.07.2013, IV CSK 17/13, LEX No. 1396449, judgment of the Court of Appeals in Łódź (*Sąd Apelacyjny w Łodzi*) of 17.12.2015, I ACa 839/15, LEX No. 1979475. Not available in English.

[29] Judgment of the Court of Appeals in Gdańsk (*Sąd Apelacyjny w Gdańsku*) of 28.10.2015, I Aca 259/16, LEX No. 2287499, judgment of the Court of Appeals in Warsaw (*Sąd Apelacyjny w Warszawie*) of 19.10.2016, VI Aca 931/15, LEX No. 2174849. Not available in English.

[30] Judgment of the Court of Appeals in Poznań (*Sąd Apelacyjny w Poznaniu*) of 27.09.2011, I ACa 680/11, LEX No. 1133345. Not available in English.

opinion the claimant had not presented any evidence to prove the harm, and the calculations in the lawsuit were not supported by any documents that would make it possible to verify those calculations. Such decision of the First Instance Court can be questioned, especially since the evidence collected in the proceedings indicated a high probability that as a result of the cartel (which the defendant participated in), the claimant could have suffered harm. Moreover, taking especially into consideration the nature of the claim, the expert witness opinion could have been crucial in proving the amount of the harm.

Second, the rejection of the claimant's motion for evidence from an expert witness opinion has led to a situation where not all of the available pieces of evidence, that were covered by the motions for evidence, offered in the proceedings in order to prove the precise amount of the claim, were carried out. The court's decision as to evidence from an expert witness opinion constituted, therefore, an obstacle in the application of Article 322 of the Civil Procedure Code.

## IV. Conclusion

The commented judgment concerned several complex legal issues relating to private enforcement of competition law, which are particularly difficult to prove for an entity injured by the competition law infringer. While the Court of Appeals addressed a number of issues regarding private enforcement, the reasoning behind the judgment provide small degree of guidance for potential claimants seeking redress relating to competition law infringements. The approach taken by the Court of Appeals raises serious doubts in many areas.

While the Court of Appeals was right to state that the UOKiK President decision of 8 December 2009 has not yet become final, since its judicial appeal proceedings have not ended so far, a following question surfaces: has this fact constituted sufficient grounds for stating that the claimant did not prove that the defendant was a party to the anticompetitive agreement? Taking into consideration all the facts of the case, especially the defendant's attitude in the antitrust proceedings, the positive answer given to this question by the Court of Appeals in the damages case seems to be controversial. In light of the defendant's role in the proceedings conducted by the UOKiK President, a more appropriate decision would have been to suspend the damages proceedings until the UOKiK President decision actually becomes final. Unfortunately, the reasoning behind the judgment give neither clear indication as to whether the court has considered suspending the damages proceedings nor an explanation why the proceedings have not been suspended.

The approach of the Court of Appeals to the issue of the burden of proof of the passing-on of overcharges cannot be shared. Due to the fact that the entity who derives legal effects from the fact that the person who claims to be injured as a result of a cartel has, in fact, reduced or eliminated the negative effects of the price increase by the passing-on of the overcharges is the perpetrator of the harm. The burden of proof as to the passing-on of the overcharges and its scope is placed on the perpetrator, not on the injured party.

Finally, the Court of Appeals' interpretation of Article 322 of the Civil Procedure Code, which stipulates the conditions under which a court may estimate the amount of a claim, generally deserves approval as it is in line with both the wording of this rule and jurisprudence. However, the application of this rule in the commented case may raise serious doubts. It should not be forgotten what the sources of the obstacles in the application of Article 322 of the Civil Procedure Code were: the main obstacle was created by the First Instance Court by its decision to reject the claimant's motion for evidence from an expert witness opinion.

As it was indicated at the beginning, private enforcement of competition law in Poland has not developed yet. Guidance regarding actions for damages arising from competition law infringements, on the basis of legislation in force before the Damages Directive was transposed into Polish law, would be very important. This would be desirable not only because there is little jurisprudence in this kind of cases overall, but also due to the fact that in accordance with the transitional provisions of the ACD, the application of the rules of the ACD (which are more favourable for the potential claimants) to actions for damages for infringements that took place before the ACD came into force is very limited. Unfortunately, the reported judgment gives very little indication as to the interpretation and application of rules applicable in actions for damages arising from competition law infringements. Furthermore, the approach taken by the Court of Appeals in the commented case may discourage injured parties from claiming damages arising from competition law infringements in court proceedings.

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# Compensation of Damages in Standalone Cases: Lessons to Be Learned from a Case Against a State-owned Telecommunication Company.

Case Comment to the Judgment of the Lithuanian Court of Appeal of 3 March 2017 (Case No. e2A-27-464/2017)

by

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**CONTENTS**



**Key words:** damages, private enforcement; abuse; competition law; sector-specific regulation; refusal to supply; essential facilities; competition law.

**JEL:** K13; K21; K23; K41; K42

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## I. Introduction

Private enforcement in Lithuania is still at the early development stage, as only a few infringement decisions of the national competition authority – the Competition Council of the Republic of Lithuania – have been followed on by private antitrust claims. Nevertheless, it might be observed that victims of competition law infringements tend to initiate standalone claims for compensation of damages in Lithuania. However, not all of those cases are successful.

On 3 March 2017, the Court of Appeal of Lithuania rejected a damages claim for EUR 2.9 million brought by a company that claimed to have been refused infrastructure access (an essential facility) by the dominant state-owned telecommunication company; infrastructure access was necessary for the provision of its own services. The case is interesting and worth mentioning due to the complexity and interrelation of competition law[1] and the regulation of electronic communications (such as the interrelation of dominance in competition law and significant market power under the regulatory framework). The case is also noteworthy becaouse of the lack of involvement by the Competition Council and the Communication Regulatory Authority as well as their position in the dispute. Of relevance is also a change made to the laws related to the dispute and further consequences of the dispute.

This paper discusses the implications of the judgment of the Court of Appeal for further private enforcement in Lithuania, especially for the standalone cases. It first explores the background and essence of the dispute, actions taken by the parties to the dispute as well as the decision of the Competition Council (Part II and Part III). Discussed later on is the outcome and argumentation of the courts judgments as well as the significance of the judgment of the Court of Appeal and finally, lessons to be learned for future litigants and national courts (Part IV and Part V).

## II. Essence of the dispute

In 2012, a consortium of three companies – UAB SATV network (hereinafter, SATV network), UAB Toptronas and UAB Bitė Lietuva –

[1] Even though the case related to the alleged violation of national competition law (Article 7 of the Law on Competition of the Republic of Lithuania) this case and interpretation of the court might be useful for the cases related to the EU competition law as Article 7 of the Law on Competition is equivalent national provision to Article 102 of the Treaty on the Functioning of the European Union (hereinafter, TFEU).

participated in public procurement organized by the Lithuanian public broadcaster – Lithuanian National Radio and Television (hereainafter, LRT) – regarding the provision of broadcast transmission services for LRT TV programmes. The consortium has won the public procurement and concluded a services agreement with LGT for the period of 10 years. By way of the services agreement, a member of the consortium – SATV network – has been obliged to install a digital terrestrial TV network and from April 2013 to commence the provision of broadcast transmission services for LRT TV programmes.

As SATV network did not possess the infrastructure required for the provision of the transmission services, it applied for access to such infrastructure to the Lithuanian Radio and Television Centre (hereinafter, Telecentre). Telecentre is a state-owned joint-stock company engaged in the provision of radio and television programme transmission, TV broadcast transmission, data transmission as well as Internet and telephony services throughout Lithuania. As SATV network and Telecentre had not reached an agreement regarding the terms for the access to the infrastructure (mainly the prices), and due to delays in their negotiations, SATV network failed to installed the required digital terrestrial TV network and has not commenced the provision of services to LRT within the terms agreed by the parties under the services agreement. Therefore, in December 2013, LRT informed SATV network of the termination of the services agreement.

SATV network consequently has lodged a private enforcement claim before Vilnius Regional Court for the compensation of damages amounting to EUR 2.9 million, as well as a 6% annual procedural interest to be calculated from the awarded amount. The damages were calculated in the form of lost profit for the period of the whole expected validity of the services agreement (that is, 10 years).

## III. Decision of the Competition Council of Lithuania

Before the termination of the services agreement with LRT in 2013 SATV network applied to the Lithuanian Competition Council regarding the initiation of an investigation against Telecentre for the refusal to grant access to its infrastructure which would constitute an abuse of its dominant position and a violation of Article 7 of the Law on Competition (equivalent to Article 102 TFEU). SATV network claimed that due to Telecentre's refusal to grant infrastructure access, SATV network could not commence the provision of the transmission services to LRT.

By Resolution No 1S-151 of 29 October 2013, the Competition Council commenced an investigation of the alleged abuse of dominance by Telecentre. However, on 10 March 2015, the Competition Council adopted Resolution No 1S-25/2015[2] whereby the Competition Council terminated the investigation due to the following reasons.

In July 2014, the Law on Lithuanian National Radio and Television (hereinafter, the Law) was amended whereby Telecentre was granted exclusive rights to provide the above-indicated transmission services to LRT due to national security interests.[3] It is noteworthy that the amendments were adopted irrespective of their criticism by the Lithuanian Competition Council[4] and the European Law Department under the Ministry of Justice.[5] Both bodies were concerned that the granting of exclusive rights to Telecentre by way of the amendments to the Law might have been in breach of EU law.

Considering the fact that the Law granted exclusive rights to Telecentre to provide transmission services, the Competition Council recognised that further investigation of Telecentre's refusal to grant access to its infrastructure for the provision of services exclusively assigned to Telecentre by the Law, would not comply with the priorities of the Competition Council, as further investigation would not contribute to effective competition and consumers' protection. Paradoxically therefore, the Competition Council terminated the investigation due to a Law which the Competition Council has itself criticized as possibly being in breach of competition rules. Nevertheless, the Competition Council emphasized in its Resolution No 1S-25/2015 that the decision to terminate

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[2] Resolution No. 1S-25/2015 of the Competition Council dated 10.03.2015. Retrieved from: http://kt.gov.lt/lt/dokumentai/del-akcines-bendroves-lietuvos-radijo-ir-televizijos-centro-veiksmu-atitikties-lietuvos-respublikos-konkurencijos-istatymo-7-straipsnio-reikalavimams-tyrimo-nutraukimo (16.08.2017).

[3] As it was indicated in the Explanatory Note to the draft Law, such an amendment has been inspired by the fact that the private service provider [that is, the claimant] had failed to perform its contractual obligatons towards LRT and, consequently, a digital terrestrial TV network has not been installed. Therefore, considering national security interests, Telecentre should be granted such rights as the company of strategical importance to national security under the laws. See Explanatory Note to the draft Law amending Article 5 of the Law on Lithuanian National Radio and Television No. XI-1574 dated 14.03.2014. Retrieved from: https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/42471a22ab5611e39054dc0fb3cb01ae?jfwid=p60bc0lv (16.08.2017).

[4] Letter No. (2.30-25) 6V-399 of the Lithuanian Competition Council dated 03.03.2014. Retrieved from: https://lrv.lt/uploads/main/Posed_medz/2014/140312/19.pdf (16.08.2017), p. 11–12.

[5] Letter of the European Law Department under the Ministry of Justice of the Republic of Lithuania dated 27.03.2014. Retrieved from: https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/f14f3730b5b711e3b2cee015b961c954?jfwid=p60bc0lv0 (16.08.2017).

the investigation does not mean that the actions of the undertaking being investigated could not have infringed the Law on Competition.

SATV network has logded a claim before Vilnius Regional Administrative Court disputing the Resolution NO 1S-25/2015 of the Competition Council. However, the claim has not been accepted because it had certain formal defects and consequently, due to the failure to correct these defects within the legelly prescribed time limits.[6]

As a result, the damages claim lodged by SATV network before the Vilnius Regional Court should be regarded as a standalone claim whereby SATV network, as the claimant, was obliged to prove the violation of competition rules as well as other elements of the civil liability of Telecentre (except for fault, which is presumed following Article 6.248 of the Civil Code of the Republic of Lithuania).[7] It is noteworthy that the claimant has based its position regarding Telecentre's dominance in the relevant market and its abuse of that dominance *inter alia* on the decisions of the Communications Regulatory Authority of the Republic of Lithuania (hereinafter, CRA), as further discussed in Part IV and Part V.

## IV. Judgment of the court of first instance

Vilnius Regional Court as the court of first instance by its judgment dated 25 January 2016 dismissed the claim of SATV network. The court based its judgment on the following grounds: (i) the infrastructure of Telecentre necessary for the performance of the services agreement with LRT has been substitutable and Telecentre did not hold a dominant position here; (ii) CRA Dispute Commision by its decision dated 30 October 2013 recognised that Telecentre has not refused access and was ready to grant access to its infrastructure to the claimant; (iii) Telecentre had no economic interest in refusing to grant access, as Telecentre would in any event receive income either directly from LRT (if the public procurement had been won by Telecentre) or indirectly – from the claimant (if the claimant and other consortium members provided the services to LRT using Telecentre's infrastructure); (iv) the fact that prices offered by Telecentre for access to its infrastructure were higher than expected by the claimant could not be regarded as a refusal

[6] Even though it has been appealed by SATV network; Supreme Administrative Court of Lithuania by its ruling dated 10.08.2015 in administrative case No eAS-1050-520/2015 dismissed the claim of SATV network.

[7] Judgment of the Supreme Court of Lithuania dated 17.05.2010 in the civil case No. 3K-3-207/2010.

to grant access; (v) the claimant has not proven its financial ability to perform the services agreement with LRT, also the claimant did not prove its lost profit.

The motives of the Vilnius Regional Court regarding Telecentre's lack of dominance on one hand, and the aknowlegdment by the court that the claimant could provide the services only using Telecentre's infrastructure on the other hand, were quite contradictory. The court of first instance ignored other evidence substantiating Telecentre's dominance in the relevant market (for example, decision No. 1V-622 of the CRA dated 28 May 2015 whereby Telecentre has been recognised as having significant market power on the market for the provision of services of TV broadcast transmission via terrestrial networks) as well as other evidence proving the civil liability of Telecentre. Hence, the claimant appealed the judgment of the Vilnius Regional Court before the Court of Appeal of Lithuania.

## V. Judgment of the appellate court: significance and lessons to be learned

By judgment dated 3 March 2017 (civil case No. e2A-27-264/2017) the Court of Appeal upheld the judgment of the court of first instance, i.e. dismissed the damages claim of SATV network. However, this judgment of the Court of Appeal is important for further development of the private enforcement in Lithuania for the following reasons as the case shall not be heard before the Supreme Court of Lithuania.[8]

Firstly, the Court of Appeal recognized that decisions of the CRA establishing the existence of significant market power on the relevant market of the undertaking (following the Law on Electronic Communication of the Republic of Lithuania[9]) may be regarded as *prima facie* evidence of the definition of the relevant market in terms of competition law and of dominance of that undertaking, at least in certain circumstances. Namely, the Court of Appeal disagreed with the position of the court of first instance and recognised that Telecentre held a dominant position on the relevant market based on the decision No. 1V-622 of the CRA dated 28 May 2015 whereby Telecentre has been recognised as having significant market power on the

[8] The judgment was further appealed to the Supreme Court but the latter refused to accept the cassation claim due to lack of grounds for cassation.

[9] The Law implemented Directive 2002/19/EC of the European Parliament and of the Council of 07.03.2002 on access to, and interconnection of, electronic communications networks and associated facilities.

relevant market.[10] This decision of the CRA was reviewed and confirmed by the Supreme Administrative Court of Lithuania by its ruling dated 7 January 2017 (administrative case No. A-2054-492/2016).

The Court of Appeal emphasized that even though the purposes and scope of the application of the Law on Competition and Law on Electronic Communication are different, the definition of significant market power under the Law on Electronic Communication may be regarded as similar to the definition of dominance under the Law on Competition, and so it may be used in competition cases as well. This judgment is in line with the recent jurisprudence of the Supreme Administrative Court of Lithuania.[11] It also confirms, at least indirectly, that competition law and regulation may, and should coexist. Hence, even though the aforementioned decisions of the CRA would not have had binding effect in the same way as infringement decisions of the Competition Council (following the Damages Directive[12] and Law on Competition of the Republic of Lithuania), the *prima facie* evidential value of the CRA's decisions will also be crucial for claimants, especially in standalone private antitrust cases against undertakings active in such regulated sectors as electronic communications, energy, etc.

Secondly, even though the Court of Appeal was also reluctant to perform a more effect-based evaluation of the behaviour of Telecentre, and consequently found no abuse of dominance by Telecentre, the argumentation of the Court of Appeal was more explicit compared to the judgment of the court of first instance. It might be discussed if the findings of the appellate court are correct and substantiated, especially where the court itself recognised that 'there might be elements of the abuse' of Telecentre dominance by bundling its services to the claimant and refusing to separate them. However, the court did not perform a further analysis and did not use any effect-based argumentation. However, certain lessons might be learned from the judgment for future litigants and national courts as well.

The Court of Appeal based its findings mainly on the decision of the CRA Dispute Commission, dated 30 October 2013, whereby the Commission has not found that Telecentre discriminated the claimant by applying different price conditions compared to its other clients. Even though the claimant appealled the decision of the Commission, it has later withdrawn the appeal,

[10] Telecentre held 94.4% of the relevant market.

[11] Judgment of the Supreme Administrative Court of Lithuania dated 07.01.2017 in the administrative case No. A-2054-492/2016.

[12] Directive 2014/104/EU of the European Parliament and of the Council of 26.11.2014 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 Text with EEA relevance//OJ L 349, 5.12.2014, p. 1–19.

a fact pointed out by the Court of Appeal in its judgment dated 3 March 2017. The court emphasized that the claimant has not submitted evidence substantiating the discrimination of the claimant as compared to companies being in analogous conditions (the amount of costs, scope of services, type of infrastructure used, etc.). It might be discussed whether the findings of the court would have changed if an economic expert was appointed in the case in order to evaluate the price conditions, or if the Competition Council was involved in the case as *amicus curia*. Sufficient access to evidence is also crucial in such a standalone private enforcement case.

Thirdly, the Court of Appeal recognized that the claimant itself did not act as *bonus fater familias* before the signing of the services agreement with LRT during the negotiations with Telecentre, which has been recognized by the court as the main reason for the termination of the services agreement. Consequently, no causal link between the behavior of Telecentre and the damages suffered due to the termination of the services agreement has been found by the court. It is quite difficult to evaluate from the judgment to what extent the claimant could have acted differently during the public procurement procedures and during the negotiations, especially considering the bargaining power of Telecentre, in order to act as *bonus fater familias*. However, it might be discussed if a more-balanced approach to the evaluation of the behavior of both the claimant and the defendant could have been taken by the court.

Fourthly, the court reiterated the criteria established by the case-law of the Supreme Court of Lithuania[13] for the evaluation of lost profit as damages, i.e. (i) could the income have been foreseen in advance; (ii) could the income have been expected during normal activity; (iii) has the income not been received due to illegal actions of the defendant. Lost profit could be awarded only if it is proven to be real, rather than hypotethical.[14] The Court rejected the quantification of damages presented by the claimant, which used the prices of another client of Telecentre for a different scope of services. Also, the Court of Appeal regarded that the claimant has not proven its economic ability to perform the services agreement with LRT. Also taken into account by the court in assessing the existence of damages were the fact that the claimant was established just before the commencement of the public procurement (as a vehicle to participate in the procurement and to implement the project), and that the claimant went into insolvency procedure after the services agreement was cancelled. It might be discussed whether, considering the circumstances, the above-indicated approach and argumentation used by the court would

[13] Judgment of the Supreme Court dated 25.11.2016 in the civil case No. 3K-3-480-687/2016.

[14] Judgment of the Supreme Court dated 22.05.2015 in the civil case No. 3K-3-306-916/2015.

comply with the principles of effectiveness and full compensation of damages under the Damages Directive. However, it is also a good reminder that the quantification of harm is a complicated economic-based exercise both for the parties and the court where the role of economic experts is crucial (for the choice of a proper method for the quantification of harm, for substantiation of the relevant factors while quantifying the damages, for a substantiated quantification of harm, etc.).

The outcome of the case might have been different if the Competition Council had not terminated its investigation against Telecentre (or at least, if the case material of the Competition Council's investigaton could have been used in the civil case – it does not appear to be used in this case) due to the granting of exclusive rights to Telecentre by the amended Law, and if it had established that Telecentre commited an abuse, at least to certain extent. The investigation and findings of the Competition Council, which has broad powers to pursue the investigation, could have also helped to evaluate whether the behaviour of Telecentre during its negotiations with the claimant had not, in fact, led to the amendment of the Law, the adoption of which the Competition Council opposed. The outcome of the case migh have also been different if the legality of the Law granting the exclusive rights in question had been reviewed by the Constitutional Court of Lithuania (with respect to the compliance of the Law with Articles 29 and 46 of the Constitution of the Republic of Lithuania), by the European Commission, or by the Court of Justice of the European Union (with respect to the compliance of the Law with Articles 106[15] and/or 107–108 TFEU).

## VI. Conclusions

This case is one of the examples how competition law might have worked in protecting the legitimate interests of competition law victims when regulatory authorities did not find, or were not eager to investigate and find a violation. Importantly, competition law could and should coexist in regulated sectors, in order to ensure better competition protection in such economic fields. The possibility to rely on findings of a national regulatory authority when substantiating complex elements of the abuse (such as definition of the relevant market, dominance in the relevant market and others), as acknowledged by the appellate court, is crucial for litigants in standalone cases. This case

[15] See Case C-320/91 *Corbeau*, ECLI:EU:C:1993:198, para. 14; Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio*, ECLI:EU:C:2008:376, para. 44.

also shows what factors and circumstances are important for a successful private enforcement case, and what could have been done differently in order to make a success story out of standalone cases. It is expected that the additional instruments provided by the Law on Competition implementing the Damages Directive (such as better access to evidence, clearer rules for the quantification of harm, role of national courts in quantifying the harm and, in general, duty to follow the principles of effectiveness and full compensation under the Damages Directive), will help tackle existing obstacles for a better development of private antitrust enforcement in Lithuania.

# CONFERENCE REPORTS

## 2nd International Conference on the Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective. Supraśl, 29–30 June 2017

The second International Conference entitled 'Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective' was held in Supraśl (Poland) on 29–30 June 2017. It was organized jointly by the Faculty of Law of the University of Białystok (Department of Public Economic 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 (hereinafter, the Damages Directive). This year's edition of the Conference was a continuation of an idea initiated by its predecessor, an international conference under the same name that took place in Supraśl on 2–4 July 2015, which focused on expectations and postulates concerning the transposition of the Damages Directive into national laws. The 2nd Conference has gathered numerous competition law researchers primarily from countries of Central and Eastern Europe (CEE).

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 speech was also delivered by Professor Tadeusz Skoczny (CARS, University of Warsaw, CRANE) who emphasised that this is the second meeting of this cycle and pointed towards future project development perspectives.

Subsequently, Katarzyna Lis-Zarrias (judge, Ministry of Justice) delivered the keynote speech on the main aspects of the implementation of the Damages Directive in Poland. Particular attention has been given to the difficulties connected with the transposition of the provisions of the Damages Directive into the Polish legal order. This has largely been caused by the fact that the EU legislator used many imprecise provisions and concepts. Another problem derived from the fact that the Damages Directive mainly refers to private law, while the issue of competition law enforcement is a matter of public law. The speaker shared her experience gained from working on the act implementing the Damages Directive into Polish law and referred to potential difficulties that may arise while enforcing the legislation.

The keynote addresses were followed by the first session of the Conference which focused on the basic issues of the implementation of the Damages Directive in CEE countries. This session was chaired by Judge Katarzyna Lis-Zarrias.

Dr Michal Petr (Palacky University in Olomouc, the Czech Republic) presented the first paper on the scope of the implementation of the Damages Directive in CEE Member States. The speaker shared his insight on the process of transposing the Damages Directive as he was directly involved in the preparation of the implementing legislation in the Czech Republic. He emphasized that the problem of the scope is crucial and complex, as it is limited only to competition law. The Directive covers anticompetitive practices with an EU dimension and only damages claims, excluding other forms of private enforcement. In the speaker's opinion there was a compelling reason to implement the Damages Directive in a broader way than it was written. However, only few countries decided to broaden the scope to their regulations, the majority mostly focused on the minimum requirements set by the Damages Directive.

The next paper was presented by Dr Ondrej Blažo (Comenius University in Bratislava, Slovakia) and referred to institutional challenges of the implementation of the Damages Directive. The speaker emphasized the need for cooperation between the competition authorities and the judiciary. He underlined that one of the main requirements of the Damages Directive is to turn private antitrust enforcement via national courts into a more effective tool. He discussed different approaches employed by CEE countries to private enforcement, grouping them in specific judicial models – centralization, specialization and decentralization. Dr Blažo noted that in the majority of the CEE countries private enforcement of competition law was considered as a special competence of the court. The speaker concluded that at this stage it was an uneasy task to find an optimal model and further practice and consideration is required to settle this problem. However, he pointed to specialization and centralization as potentially good solutions.

Małgorzata Modzelewska de Raad (Advocate at Modzelewska & Paśnik Law Firm, Warsaw, Poland) gave the last speech of the first session. It was dedicated to consensual dispute resolution in private enforcement cases. She argued that a large proportion of follow-on cases that are currently dealt with by the courts can be effectively solved using a consensual way. The speaker noted the main benefits of an amicable way to settle damage claims – their full confidentiality might be a feature especially appealing to infringers. Retaining control over proceedings is also something that the parties should consider attractive. Arbitration is an appealing way to resolve the case in a more effective and satisfactory way compared to traditional litigation, particularly in terms of the execution of the judgments.

The second day of the Conference was divided into two sessions. The first one was moderated by Professor Anna Piszcz; it was dedicated to substantive challenges of the implementation of the Damages Directive in CEE countries.

The first paper was presented by Dr Dominik Wolski (Katowice School of Economics, Poland) who focused on the issue of the 'type of liability' in private antitrust enforcement in selected CEE countries in the light of the implementation of the Damages Directive. Dr Wolski noted that the main aim of the Damages Directive

was to increase the efficiency and popularity of private enforcement of competition law. He indicated that Member States could provide other conditions for compensation under national law, provided that the principles of effectiveness and equivalence were met (motive 11 of the Damages Directive). As a result, the Damages Directive was implemented differently in individual Member States. Further on, Dr Wolski presented the main rules on liability in competition law damages claims in Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia. The analysis of the solutions adopted in those Member States has led him to the conclusion that the implementation process of the Damages Directive has not significantly affected pre-existing types of liability. In the majority of the analyzed legal orders, the liability for harm cause by competition law infringements is based on fault, and national laws usually introduce a rebuttable presumption of fault. Croatia and Slovakia are the exemptions – in those countries strict liability has been introduced.

Dr Róbert Szuchy (Károli Gáspár University of Reformed Church, Budapest, Hungary) delivered a paper – prepared jointly with Professor Péter Miskolczi Bodnár (Károli Gáspár University of Reformed Church, Budapest, Hungary) – on the transposition of the principle of joint and several liability into national laws of CEE Countries. In his presentation, Dr Szuchy highlighted the advantages of the introduction into national legislation of the concept of joint and several liability for harm arising from competition law infringements. While discussing the exceptions to this rule, regarding an infringer who is an immunity recipient and an infringer who is a small or medium enterprise (SME), he emphasized that despite the fact that the introduced solutions are similar, the reasons behind introducing them differ significantly. Subsequently, he briefly presented the solutions adopted in individual CEE countries regarding joint and several liability of co-infringers and the exceptions to this rule. In conclusion, Dr Szuchy indicated that the exception to joint and several liability granted to SMEs should be extended also to micro enterprises.

The next paper – prepared jointly with Professor Valentinas Mikelėnas (Vilnius University, Lithuania) – was presented by Advocate Rasa Zaščiurinskaitė (TGS Baltic Law Firm, Vilnius, Lithuania). It was dedicated to the quantification of harm. At the beginning, Advocate Zaščiurinskaitė emphasized that the quantification of harm constitutes one of the most serious obstacles to the development of private competition law enforcement in the Member States. She indicated that, before the implementation of the Damages Directive, some of the CEE countries have already had solutions required by the Directive such as: the presumption of harm (Hungary and Latvia) or the power of the national judiciary to estimate the amount of damage (Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia and Lithuania). Advocate Zaščiurinskaitė pointed out that while transposing the Damages Directive, some CEE countries decided to implement the same rules as those set out in the Damages Directive, while others introduced additional solutions that were not provided for in the Damages Directive. She indicated that the new solutions regarding the quantification of harm are expected to strengthen private enforcement of competition law. However, the impact of the transposition of the Damages Directive into national laws is so far not visible in this context.

Dr Raimundas Moisejevas (Mykolas Romeris University, Vilnius & Vilgerts Law Firm, Lithuania) presented subsequently a paper analysing the issue of the implementation by CEE countries of the Damages Directive's rules regarding the passing-on of overcharges. At the beginning, he emphasized that passing-on may be used in civil law cases as a 'sword' (used as basis for the claim) or as a 'shield' (used as a defence). Dr Moisejevas underlined that there is very little court practice on the passing-on of overcharges. It seems, however, that causation is extremely problematic in the area of the passing-on of overcharges.

The last paper in the second session was delivered jointly by Professor Ana Vlahek and Professor Klemen Podobnik (University of Ljubljana, Slovenia). It was dedicated to the provisions of the Damages Directive on limitation periods and their implementation in CEE countries. The speakers indicated that in most Member States, including CEE countries, the implementation of the Damages Directive required the introduction of longer limitation periods in comparison to the general limitation periods. They emphasised that as a result of the implementation of the Damages Directive, a harmonisation of limitation periods in Member States has not been achieved.

The second session was concluded with a discussion of the substantive challenges of the implementation of the Damages Directive in the CEE countries.

The third session of the Conference was moderated by Dr Maciej Bernatt (University of Warsaw). It was dedicated to the procedural challenges of the implementation of the Damages Directive in the CEE countries.

The first paper was presented by Evelin Pärn-Lee (PhD candidate, Tallinn Technical University, Estonia) who discussed issues connected to the effect of national decisions on actions for competition law damages in CEE countries. She emphasised that the system of private competition law enforcement in the European Union is ineffective, and the number of cases in comparison to United States is relatively low. Subsequently, she presented the rules on the effect of decisions issued by competition authorities and their reviewing courts on actions for competition law damages. She emphasised the areas that constituted the main implementation challenges: the binding effect of the final decisions of a national competition authority and problems connected with the interpretation of the concept of *prima facie* evidence. She indicated that within the scope of the transposition of Article 9(1) of the Damages Directive, regarding the binding effect of final decision rendered by national competition authorities or the reviewing courts, most CEE countries decided on full implementation. As a result, it can be expected that the harmonisation level will be high. The situation is totally different with respect to the transposition of Article 9(2) of the Damages Directive, which regards to the binding effect of final decisions issued by competition authorities or reviewing courts originating from other Member States. Due to differences in the approach, as well as different understanding of the notion of *prima facie* evidence, the degree of harmonisation will be lower.

Julija Jerneva (PhD candidate, Riga Graduate School of Law & Vilgerts Law Firm, Latvia) spoke next. She presented a paper prepared jointly with Dr Inese Druviete (Riga Graduate School of Law, Latvia) on the Damages Directive's requirements on the disclosure of evidence and their implementation in CEE countries. The speaker analysed

the solutions adopted in CEE Member States and indicated that the Damages Directive had been transposed into national laws differently. Some of the EU countries decided on a full implementation and on the introduction of amendments to the Directive's rules on the disclosure of evidence, while the solutions employed by other countries require changes still. She emphasized that the disclosure of evidence is intrinsically linked to the achievement of one of the objectives of the Damages Directive, namely to ensure the balance between public and private enforcement of competition law.

The last paper in this session was delivered by Professor Anna Piszcz who discussed the issue of collective private enforcement of competition law in CEE countries. Professor Piszcz indicated that the Damages Directive does not oblige Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU. She also pointed out that such approach is contrary to the non-binding Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law. Motive 7 of this Recommendation states that the areas where the supplementary private enforcement of rights granted under Union law in the form of collective redress is of value are, amongst others, consumer protection and competition. In the subsequent part of her speech, Professor Piszcz presented general information regarding collective redress in CEE countries, discussing especially Bulgaria, Lithuania and Poland. She emphasised that CEE countries have to make a decision between a private competition law enforcement system with collective redress mechanisms or without them.

The last session concluded with a discussion on the procedural challenges of the implementation of the Damages Directive in CEE countries.

The Conference was concluded by Professor Tadeusz Skoczny who presented the activities of the academic platform CRANE (Competition Law and Regulation. Academic Network. Europe). Subsequently Adam Jasser (CRANE) introduced an open research project coordinated by CARS and encouraged the participants of the Conference to partake in it. The said project focuses on the issue of the unfair use of superior bargaining power, and is directly related to the entry into force of the Polish Act on counteracting unfair use of superior bargaining power in trade in agricultural and food products.

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# Conference on EU Competition Law and the New Private Enforcement Regime: First Experiences from its Implementation. Uppsala, 13–14 June 2017

On 13–14 June 2017, a two-day conference entitled 'EU Competition Law and the New Private Enforcement Regime: First Experiences from its Implementation' was held at Uppsala University (Sweden). The conference, organized by the Swedish Network for Legal Studies ('SNELS') in collaboration with Uppsala University, was a follow-up to a 2014 conference on the, at that time, recently adopted EU directive on damages actions for breaches of competition law (Directive 2014/104/EU; 'the Damages Directive'). The deadline for implementing the Damages Directive into national law lapsed on 27 December 2016, and the conference gathered practitioners and scholars from all over Europe to discuss first experiences with its implementation. As noted by the organizers, the Damages Directive (and the soft-law instruments accompanying it) does not only mark a new phase for competition law enforcement but also, more generally, a fresh instance of EU harmonization of certain aspects of private law and civil litigation.

The conference was opened by its three organizers: Magnus Strand, Vladimir Bastidas Venegas (both Uppsala University) and Marios C. Iacovides (Swedish Competition Authority) welcoming the conference participants to Uppsala. The opening speech was delivered by Professor Antonina Bakardjieva Engelbrekt (Stockholm University), chairman of the SNELS. The floor was then left open to the keynote speaker, Dr Ulrich Classen, partner at CDC Cartel Damages Claims, who shared his practical experiences from litigating cartel damages claims. Noting that this second pillar of EU antitrust enforcement is still under construction, Dr Classen discussed the remaining hurdles, identifying a potential need for parental liability and the adoption of a Leniency+ regime, where leniency applicants would be able to receive immunity from both fines and damages. Dr Classen also discussed the availability and conservation of evidence, and problems associated with the fact that it may take the Commission more than a decade to publish extended versions of its infringement decisions.

The keynote speech was followed by a plenary address made by Filip Kubik, policy analyst at DG COMP, who gave an update on the state of private enforcement from the Commission's perspective. Taking note of the fact that 18 Member States had so far transposed the Damages Directive into national law, Kubik declared that evidence would now be more easily accessible for cartel victims. Accessing evidence from the

files of the Commission or NCAs may prove an uphill battle, as the authorities are prevented from publishing or otherwise disclosing confidential information. Kubik predicted that the new rules on disclosure will remedy this problem as cartel victims should now be able to access information directly from the cartel participants. The final plenary address was made by Professor Alison Jones (King's College London) who had been given the task of predicting the implications of Brexit on the private enforcement system envisaged by the Damages Directive. Professor Jones noted that a number of features of the English system have made it an attractive forum for litigations involving Articles 101 and 102 TFEU. However, Brexit will certainly affect the possibilities to claim damages under the Damages Directive before UK Courts.

After the plenary speeches, the afternoon continued with panel sessions. The first panel, chaired by Associate Professor Judge Eva Edwardsson, discussed the interfaces of public and private enforcement. The first speaker on this topic was Professor Torbjörn Andersson (Uppsala University) who deliberated on the binding effects of decisions and judgments in EU competition law. Per Karlsson, Head of Legal Department at the Swedish Competition Authority, shared his views next on the practical and legal effects of national decisions in subsequent damages actions. The first panel session ended with Katharina Voss (Stockholm University) discussing whether the enforcement of Articles 101 and 102 TFEU as carried out by the Commission is facilitating private enforcement, or whether the increased application of settlement procedures and other transactional resolutions has the opposite effect. Voss noted that private and public enforcement have different but complementary tasks, and that the two enforcement pillars may sometimes collide. For private enforcement, more infringement decisions would be beneficial Voss concluded.

The second panel session of the day was chaired by Dr Anna Södersten (Uppsala University) and concerned the limits of the private enforcement package. Professor Giorgio Monti discussed liability issues that have not been codified by the Damages Directive, and whether it is possible to fill these gaps, noting that some loosening of the reins of national judges might be in order. The floor was then left to Dr Julian Nowag (Lund University) who discussed EU competences and issues surrounding maximum and minimum harmonization. The last speech of the day was given by one of the organizers, Dr Magnus Strand, on the topic 'Labours of Harmony: Unresolved issues and Alternative Remedies'. The panel sessions were followed by panel discussions.

During the second day of the conference, Stefan Johansson and Associate Professor Ingeborg Simonsson, both judges at the Patent and Market Court in Stockholm, addressed private enforcement issues from a national court's perspective, discussing follow-on actions in the wake of the *TeliaSonera* margin squeeze case. The conference then proceeded into two parallel sessions. One session, which was chaired by Professor Hans-Henrik Lidgard (Lund University), was entitled 'Incentives and Strategies in Private Enforcement'. The other session, chaired by Professor Xavier Groussot (also Lund University), compared national experiences in the transposition of the Damages Directive. Both sessions were followed by panel discussions. In Panel I, Associate Professor Vladimir Bastidas Venegas (Uppsala University) gave an update on the state of play of implementation and also discussed whether the aims of the Damages

Directive are likely to be attained. He was followed by Professor Lars Henriksson (Stockholm School of Economics) who deliberated on the question of how to privately enforce public mandatory law, and whether there is a non-consistent approach to remedies. The session ended with Associate Professor Björn Lundqvist (Stockholm University) discussing defendant strategies and risk management in public and private enforcement. The other panel, Panel II, was represented by scholars from Poland, the Netherlands and Portugal. While Professor Sofia Pais (Portuguese Catholic University) presented the Portuguese law implementing the Damages Directive, Professor Anna Piszcz (University of Bialystok) discussed controversial aspects of its transposition in Poland against the background of other Central and Eastern European countries. Dr Agis Karpetas (University of Leiden) then shared topical issues from the transposition in the Netherlands and Greece, and discussed the controversies in the limitation of liability for successful leniency applications.

The afternoon of the second day was also divided into parallel sessions. Panel III was chaired by Associate Professor Eva Storskrubb (Uppsala University/Roschier) and the session focused on lingering issues of procedure and evidence. Professor Pieter van Cleynenbreugel (University of Liège) deliberated on the question whether harmonization of procedural rules can indirectly lead to a harmonization of substantive rules, taking the presumption of harm as an example. Van Cleynenbreugel was followed by Judge Karin Wistrand (Svea Hovrätt, Court of Appeal) who addressed issues of leniency statements as well as the disclosure and rejection of evidence from a national court's perspective. The panel session ended with Dr Helene Andersson (Stockholm University) elaborating on the possibilities for cartel victims to access evidence and the Commission's efforts to publish more detailed versions of cartel decisions in order to facilitate damages actions. The other panel, Panel IV, was chaired by Dr Magnus Strand (Uppsala University) and entitled 'Private Law Aspects Solved and Unsolved'. Featured here were papers by Dr Katri Havu from the University of Helsinki (Causation and Damage: What the Directive Does not Solve – Remarks on Relevant EU Law and on Finnish Implementation), Dr Marios C. Iacovides from the Swedish Competition Authority (Article 17 of the Directive and the Possibility for Competition Authorities to Assist in the Quantification of Harm) and Elisabeth Eklund, partner at Delphi (National Conditions of Culpability – Allowed under the Directive and/or the TFEU?).

After the panel sessions, the participants reassembled for the closing address, which was delivered by Professor Ulf Bernitz (Stockholm University). The conference then closed with a goodbye speech by the organizers and a round of applause for everyone who had put so much effort into planning, organizing and hosting a conference on this new and potentially very important area of antitrust enforcement. Hopefully, there will be yet another conference on the new private enforcement regime once all Members States have transposed the Damages Directive and its effects have become even more visible.

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# Workshop – Reform of Regulation 1/2003: Effectiveness of the NCAs and Beyond. Warsaw, 28 April 2017

An International Workshop entitled 'Reform of Regulation 1/2003 – Effectiveness of the NCAs and Beyond' was held at the University of Warsaw, Faculty of Management on the 28 April 2017. It was organized jointly by the Competition Law Scholars Forum (CLaSF) and the Centre for Antitrust and Regulatory Studies (CARS, University of Warsaw). The Conference focused on issues connected to Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

After Professor Alojzy Z. Nowak introduced Professor Barry Rodger (CLaSF) and Professor Alan Riley, Professor Giorgio Monti (European University Institute) delivered the keynote speech about amending Regulation 1/2003.

Professor Giorgio Monti started with stressing that the timing of the workshop could not have been better because the Commission proposed a new directive to empower NCAs (hereinafter, ECN+) only about a month before the workshop. Professor Giorgio Monti emphasised that when the Commission published its paper on assessing 10 years of the working of Regulation 1/2003, there was a sense of celebration. Notwithstanding the initial celebration, the Commission started to think how to make the system work even more efficiently – the ECN+ Project started with ideas to improve NCAs' enforcement tools, fining powers and leniency programmes and also to ensure their independence. Professor Monti pointed out that the project has taken the form of a questionnaire published by the Commission and that this was not the best manner of finding a way to design an optimal enforcement toolkit. Professor Monti also stated that the Commission's proposal was politically incorrect, because it basically suggested that NCAs should have similar powers to those of the DG Competition. Such proposal indirectly insinuates that the Commission has nothing to learn from the NCAs, and yet there are many examples that prove it wrong – for example, the whistleblowing policy in some countries, etc. In fact, some enforcement tools should be included in the Directive that originate from the Member States, not the Commission. Another point made in this context was that most NCAs take cases with domestic effects, so why do they need to apply EU competition law? Almost all actions taken by a NCA have an effect on trade, but NCAs predominantly apply national laws. Professor Monti also mentioned cross-border cartel cases (Flour Mills or Booking.com), stating that the way in which they are dealt with can be improved.

He criticised the Commission's proposal for more procedural convergence, stating that there are many obstacles to do so, for example national case-law. Professor Monti also stated that maybe we are rushing the Directive, while we have ECN's best practices. Professor Monti proposed strengthening cohesive action by NCAs, for example by issuing joint guidelines or working in joint case teams. In his view, there should be exclusive application of EU competition law above certain thresholds, and NCAs should have the power to issue non-infringement decisions.

Professor Alan Riley commenting on Giorgio Monti presentation underlined a severe asymmetry among NCAs when it comes to resources. Designing a perfect system should, however, be based on symmetry. He also pointed out that whatever procedural changes a given NCA makes, it still does not operate in the name of the Commission.

Miguel Sousa Ferro asked why we are not discussing moving into the European Cartel Office with regional delegations, where only the EU would have the power to apply EU competition law? Francisco Marcos went even further and asked why don't we get rid of national law, leaving just EU law? In his response, Professor Monti pointed out that in an ideal world such system would be right, but there are many procedural problems standing in the way of such reforms.

Adam Jasser (former President of the Polish NCA) stated that the central question we need to ask ourselves is to what extent is the system broken? Only then, we should ask are we fixing it because it's broken, or are we fixing it because some other things are happening? Adam Jasser pointed out the practical problems with working on a case in joint teams with other NCAs. This has lead, in fact, to situations where either one of the NCAs does the work by itself, or persuades the Commission to do it.

Ondrej Blazo referred to Slovakian experiences with implementing the Directive. He also spoke of the question of fines in Slovakia where, on the basis of national law, a settlement fine can be reduced by up to 15%. According to the speaker, the system works very efficiently, but the European Commission is against such approach, stating that such low fines can undermine the EU competition law system.

The first panel entitled 'NCAs Design and Context' was chaired by Angus MacCulloch, Lancaster University.

The first panellist, (University of Lisbon), considered the question what are the current institutional design obligations derived from EU law (before the Proposed Empowering Directive reshapes the system). He started by presenting the institutional design obligations for national authorities in other areas of EU law. Miguel Sousa Ferro explained that there are several obligations already arise from Regulation 1/2003: the design of a NCA must (in light of national constitutional law) allow it to adopt certain types of decisions and measures and have certain powers, it must comply directly with obligations to cooperate with the EC as well as be able to protect confidential information. Furthermore, distributing enforcement tasks between national administrative and judicial authorities, as well as separating prosecution/decision phases is explicitly allowed. Some other obligations arise also from Articles 101 and 102 TFEU together with general principles of EU law, such as the principle of

equivalence, the principle of loyal cooperation and the principle of effectiveness. To the extent that certain institutional design characteristics are necessary to ensure the effectiveness of Articles 101–102 TFEU, Member States must set up their NCAs accordingly. By analysing and drawing analogies from ECJ case-law relating to other regulated sectors, Miguel Sousa Ferro pointed out that there seems to be a rather extensive range of specific obligations which derive from the principle of effectiveness. The logic that led the Court to impose those requirements in those sectors is exactly the same as what would have to be followed for NCAs. Such obligations relate to adequate financial and human resources as well as financial autonomy, impartiality and incompatibility regime, appointment and dismissal of board members and staff, accountability and judicial review of NCAs decisions. It was stated that despite the fact that such obligations can be derived from the principle of effectiveness, the EU should legislate on the institutional design of NCAs. That is because the 'mere principle' approach has been insufficient and it cannot be used to impose as high of a degree of design requirements as would be possible via the legislative path.

Marek Martyniszyn (Queen's University Belfast) and Maciej Bernatt (CARS, University of Warsaw) delivered a presentation on the introduction and development of modern competition law in Poland in the context of new competition law regimes. It was emphasised that assessing the success of new regimes is not an easy task. According to some authors and the theory of lifecycles, it can take up to 25 years for a NCA to be able to achieve the goals of competition law. Some of the tentative focal points identified in the speech were the issues of independence and autonomy. There are three key features of independence: organisational, functional and budgetary. It was noted that there is no requirement under EU law for any formal independence of NCAs, and that, for instance, the Bundeskartellamt is supervised by the Federal Minister of Economy and Technology. The speakers presented in details the appointment process of the President of UOKiK (Polish NCA) and listed names of former UOKiK Presidents. The second part of the presentation focused on meritocratic enforcement in the following two areas: state or state-owned enterprises and cartels. The speakers stressed that state-owned enterprises were inherited from the communist era, and were the main addressees of the actions of the Polish Authority in the years 1990–1995. The Authority adopted a more structural approach at that time, supervising changes in the ownership structure of state- enterprises, even dividing them. The years 1995–2015 saw active enforcement against state-owned enterprises, in particular in infrastructure markets. Most common were excessive pricing practices, limitations of consumer choice, or foreclosure of potential competitors. Numerous anticompetitive contract clauses were identified that were used by dominant, state-owned firms. The latter included, for example, PGNiG (oil and gas mining), PKP Cargo (rail freight), Orlen (oil refiner and petrol retailer), Polski Zakład Ubezpieczeń (insurances), PGE (energy supplier), Enea (energy supplier), Poczta Polska (post services), PKP (railways) or Polish Airports State Enterprise (airport services) and, especially, Telekomunikacja Polska which was repeatedly investigated for tying (telephone and Internet services), excessive prices (international phone calls) and

foreclosure (lowering quality of foreign data transmission services). The end of the speech focused on the issue of cartel enforcement. Since 2000, the UOKiK is equipped with modern investigatory powers, including independent searches both on business and private premises. Yet enforcement is very limited in this field (the cement cartel being a notable exception). Since 2014, lessening focus on vertical agreements was observed, but there has been no significant improvement in the field of hard-core cartels. New tools were introduced in 2014, such as leniency plus or fines on managers, but detection has not improved.

In the following discussion, Eva Lachnit asked that if data protection institutions should be independent, why should the same not apply to competition authorities? Marek Martyniszyn noted that under Article 35 Regulation 1/2003 there can be no formal criticism of the Polish situation. If there was an issue, the Commission should say something. He also noted that the principle of effectiveness would be a better basis than Article 35 Regulation 1/2003 for such an evaluation. Professor Giorgio Monti emphasised that it is unclear how to concretise the principle of effectiveness. Adam Jasser also added that while sector regulators deal with a number of different values, and competition is not their main goal, competition agencies deal with only one value, that is competition.

The second panel entitled 'NCAs Institutional Setting and Relation with Courts' was chaired by Barry Rodger (CLaSF). The first presentation by Annalies Outhuijse (University of Groningen) focused on the effectiveness of Dutch cartel fines in the context of judgments delivered by two specialized Dutch Courts. Annalies Outhuijse introduced the Dutch system of competition enforcement, presenting the Authority for Consumers and Markets (ACM) and the two specialised courts: the District Court Rotterdam and the Trade and Industry Appeal Tribunal (TIAT). In the analysis, she found that the Dutch system of public enforcement of the cartel prohibition is not efficient. Such conclusions arise from the amount of ACM decisions that end up annulled by the District Court and the TIAT. The main points of the disagreement are often related to evidence, both factual and economic, and the proportionality of the fine.

The next presentation by Maciej Bernatt assessed the intensity of judicial review of NCAs' decisions with particular emphasis on Central-Eastern Europe. First, the speaker introduced the concept of judicial deference and made some general remarks concerning the institutional design of courts in Poland, Slovakia, Czech Republic and Hungary. According to Maciej Bernatt, judicial deference relates to respecting the choice made by a NCA. The analysis of judicial review in Poland showed that there is very little place for judicial deference to the findings made by the Polish NCA at the moment. However, the expertise of the UOKiK (market studies revealed in the justification of UOKiK decisions) and the UOKiK playing an active role during contradictory judicial proceedings may be of relevance in the future. In the Czech Republic, there is an intense review on merits, which may often lead to the annulment of the decisions issue by the NCA. Unlike Polish Courts however, less emphasis is put on reducing fines. It was then said that judges in Slovakia have been found to often lack specialised knowledge and that it is common for them to repeat

the positions of the parties. Many decisions are also repealed on formal grounds in Slovakia. In Hungary, similarly to Poland, courts lower the fines imposed by the NCAs but a deferential approach regarding economic findings is possible. Maciej Bernatt concluded his presentation by stating that there is need for some institutional changes during administrative proceedings which could make space for a more deferential style of judicial review. In particular, internal walls can be introduced in Poland, Slovakia and the Czech Republic, meaning that the same case handlers should not investigate and work on draft decisions. Such a solution proves itself effective in Hungary, where case handlers investigate specific practices while the decisions are issued by the Competition Council.

The last panellist, Francisco Marcos, IE Business School, spoke about dissenting opinions in competition authorities. He started by introducing the idea of collegiate bodies in competition law enforcement. Such decision-making bodies within NCAs are generally comprised of several members and are in many ways more effective than individuals. Collegiate bodies have a larger pool of knowledge, more diversity of ideas and they allow for a critical assessment and the identification of flaws. Later, the concept of separate judicial opinions was presented. It is an institutional feature available in judicial multi-member bodies in most judicial systems. It provides an outlet for a lack of consensus on a given case, be it in the assessment of the facts or in the interpretation of the law, and is a sign of integrity and independence of judges. This concept is of huge relevance in courts of last resort (such as the ECHR, or Constitutional and Supreme Courts) but is also useful in lower courts where it introduces an additional element that may help reviewing a majority decision in the case of an appeal. Francisco Marcos asked whether it would be useful to extend the same concept to administrative bodies and to competition authorities. In the case of the latter, this can constitute a challenge to institutional legitimacy, affect legal certainty and enhance judicial activism. Adopting specific rules for dissenting opinions within competition authorities would probably be necessary.

Professor Alan Riley suggested giving Dutch courts the power to increase fines. He also said that in the EU we don't have a deep antitrust culture that makes dissent tolerable. Marek Martyniszyn added that in the history of Japan there have only ever been 2 dissenting opinions due to cultural consideration. Professor Giorgio Monti stated that opinions which are not overruled by higher courts are often the cause for a promotion of a judge from a first instance courts. This may be the reason why first instance courts cut fines more often.

The third panel was chaired by Adam Jasser (President of the Polish Competition Authority in 2014–2016), and it was dedicated to the toolbox available to NCAs.

The first panellists, Evi Mattioli (University of Liège) and Tim Bruyninckx (European University Institute), considered the question why NCAs do not enforce EU competition law extraterritorially. They started by introducing the concept of extraterritorial enforcement of EU competition law. According to Regulation 1/2003, NCAs have a duty to apply EU Competition law extraterritorially and yet lack of such enforcement was identified. The speakers stressed that this could lead to ineffective and inefficient application of EU competition law, under-fining and in

some cases, risk of parallel intervention. These risks were explained on the basis of the following two cases: *Industriele Batterijen* from the Belgian competition authority and the *Online Travelling Agencies* case. The former case concerned a practice which had effects outside the Belgian territory, yet the fine was calculated based on the Belgian turnover. The latter case concerned parallel investigation of 'parity clauses' by several NCAs. The NCAs, by not fully cooperating with each other, risked an inconsistent application of EU competition law. Further on, the speakers presented the agency theory, and how it can apply to Regulation 1/2003. In the realm of EU competition law enforcement, the European Commission (principal) has different interests than the NCAs (agents). NCAs are very often driven by national priority policies and interests, purely within the national territory. It was concluded, that under Regulation 1/2003, the Commission monitors NCAs by means of, for example, the prior notification mechanism, information exchange through the ECN or various reports and studies, but lacks any instruments of intervention. The speakers suggested that the Commission could take over the enforcement, but this would be contrary to the spirit of Regulation 1/2003. The second suggestion was that the Commission should be able to force a NCA to apply EU competition law extraterritorially, and in the case of failure, its Member State could be brought before the ECJ.

The next panellist, Carsten Koenig (Georg-August-Universität Göttingen), spoke of the imposition of follow-on penalties on managers and employees. The author first presented the background of this issue, outlining that unlike NCAs, the European Commission is not empowered to impose penalties on individuals for competition law infringements. Carsten Koenig asked whether it would be legal for NCAs to impose penalties on individuals following a Commission decision prohibiting an anticompetitive practice and potentially fining undertakings. The analysis of Regulation 1/2003 rendered a positive answer in this context, namely that it is possible for a NCA to impose follow-on penalties on individuals. Neither Regulation 1/2003 not the principle of *ne bid in idem* preclude NCAs from doing so, and considering the added deterrence and preserved effectiveness and equivalence, imposing such follow-on penalties would be desirable.

The last panellist, Eva Lachnit (Utrecht University) presented individual guidance as an alternative tool of European competition law enforcement. In the beginning, the speaker introduced the relevant concept by defining it as advice given to (groups of) companies with regard to competition concerns about their proposed collaboration or other market behaviour. Various arguments were presented on whether such tool should be considered as 'enforcement' or 'advocacy'. Eva Lachnit described then the use of individual guidance by the European Commission and by NCAs (Belgium, the Netherlands, United Kingdom, France, Denmark). The European Commission has the power to issue 'Guidance Letters', concerning Articles 101 and 102 TFEU. This power is based on the European Commission Notice on Informal Guidance from 2004. To date, the Commission has not yet issued any guidance letters. Eva Lachnit emphasised that individual guidance should be recognized as a tool of European competition law enforcement, and that the debate on the reform of Regulation 1/2003 should be

extended to cover the merits of individual guidance and its desired procedure. After all, as she summarized, better enforcement means an improvement of all enforcement tools, both formal and informal.

In the following discussion, Professor Giorgio Monti noted some problems with the principle agent theory relating to the priorities of agents. Later, Maciej Bernatt suggested that when it comes to pursuing fines on individuals, the needs for procedural guarantees are even broader than on companies. Adam Jasser added that it is very difficult for a NCA to impose fines on individuals in a case which was handled by the Commission without conducting their own investigation.

The last panel of the workshop was dedicated to due process, proportionality and independence; it was chaired by Aleksander Stawicki, partner at WKB Wierciński Kwieciński Baehr (the sponsor of the workshop).

Maciej Bernatt commenced the panel, speaking also on behalf of absent Marco Botta (Max Planck Institute for Innovation and Competition) and Alexandr Svetlicinii (University of Macau). Maciej Bernatt addressed the application of the right of defence by the European Commission and the competition authorities of the newer EU Member States. In the introduction, he presented the framework regulating the right of defence in EU competition law proceedings and the relevant case-law. The first subject of the analysis – the right to be informed – was found to be recognized in all jurisdictions (Poland, Czech Republic, Slovakia, Hungary, Bulgaria, Romania and Croatia). Its main guarantee is the Statement of Objections, but the notification of the opening of the proceedings could be considered as an alternative. The right to access the file was also found to be recognized in all of the analysed jurisdictions. A potential conflict with the protection of business secrets was particularly underlined. The right to an oral hearing is, in Poland, subject to the discretion of the NCA, unlike in other jurisdictions where it is obligatory either after the Statement of Objections is issued (Croatia), or if a party requests it (Bulgaria, Romania, Hungary). The privilege against self-incrimination (hereinafter, PASI) and the legal professional privilege (hereinafter, LPP) were also discussed. It was found that PASI was not directly recognized in any of the analysed jurisdictions, except Hungary but with a limited scope. The LPP was found to be recognized either by courts (Slovakia, Czech Republic and Poland) or expressly in the competition act (Croatia, Hungary). One of the conclusions of the research project and the presentation was that there is procedural divergence and some limitations to the right of defence in the analysed national jurisdictions. The degree of protection granted to the rights of defence was generally lower in the enforcement practice of NCAs than that of the European Commission. Article 3 of the 2017 Proposal for a Directive to Empower NCAs requires NCAs to respect the right of defence, but it does not clearly specify further steps in this context. The conclusion of the presentation was that enhanced investigatory powers of NCAs should be counter-balanced with a harmonization of the right to defence.

The next speaker, Antonio Robles (Universidad Carlos III de Madrid) delivered a presentation on effectiveness, proportionality and deterrence under Spanish competition law. Antonio Robles started by explaining that when fixing the amount of

the fines, the duration of the infringements must be considered, as the most important factor, as well as all other factors capable of affecting the assessment of the gravity of the infringements. Such reasoning stems from the Judgment of the Court of 7 June 1983 in joined Cases 100–103/80 *Musique diffusion française* and the fact that the 'duration' is mentioned separately therein. Later, the principle of proportionality was introduced through the definition provided by the Judgment of the Court of 12 January 2006 in Case C-504/04, *Agrarproduktion Staebelow GmbH*. According to the judgment, the principle of proportionality requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary. Moreover, if there is a choice between several appropriate measures, the least onerous one must be used and the disadvantages caused must not be disproportionate to the aims pursued. Antonio Robles also noted that it is not competition authorities who are able to set fines, but the legislator. Finally, various charts were analysed, such as the fining rate, dispersion fining rate, ratio fine/affected market turnover (deterrent effect) and ratio of fine imposed/optimal deterrent fine.

The last speaker of the workshop was Pieter Van Cleynenbreugel (University of Liège) who considered the independence of NCAs. The starting point of his presentation was the reform proposals of Regulation 1/2003, where the Commission acknowledged lack of harmonisation relating to functional independence (independence from politics), operational independence (independence from market) and procedural independence (segregated procedures). Pieter Van Cleynenbreugel noted that there are different degrees of accountability at the Member States level. In some Member States, there is parliamentary involvement in leadership appointments, others have ministerial oversight; generally there are variable reporting obligations. Segmented and separate attention to a variety of independence features result in three preliminary question being addressed: What kind of independence do we want from NCAs?; What kinds of legal standards/principles do we want to structure the operations of NCAs as a matter of EU competition law?; How should different accountability features interrelate in order to comply with EU expectations and legal standards? It was suggested that harmonisation is possible because the EU has powers to directly structure NCAs. Such intervention could be legitimized by the ECN framework. It could provide clear functional independence requirements, clear due process and judicial review requirements, as well as political independence. Furthermore, an alternative to harmonisation could be enhanced bottom-up convergence (Court of Justice-guided convergence of the functioning of NCAs when applying EU law), but it is slow paced and does not permit the full development of a convergence-focused framework, nudging NCAs to be structured in the same fashion.

On the notion of independence, Adam Jasser said that it is an illusion that one can assure independence by 'ticking a few formal boxes'. He also recalled the words of William Kovacic, who said that politics will always invade this space, because it is an important space. If politicians are not interested in a competition authority, it means that the authority is irrelevant. True independence comes from confidence, knowledge, creditability and due process. Aleksander Stawicki added budget to that list also. He explained that if you don't have money, you can't keep good people and therefore

you can't evolve, which is crucial for an effective functioning of a NCA. Małgorzata Modzelewska de Raad stated that effectiveness and independence are different and separate issues. There are many authorities that are very dependent and very effective.

Professor Stanisław Piątek, CARS, closed the seminar. He thanked CLaSF for its cooperation, the WKB law firm for sponsoring the event, and Maciej Bernatt and Nina Łazarczyk for the organization of the seminar.

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# 6th International PhD Students' Conference on Competition Law. Białystok, 27 April 2017

The 6th International PhD Students' Conference on Competition Law took place on 27 April 2017 in Białystok, Poland. It was organized by the Department of Public Economic Law at the Faculty of Law of the University of Białystok. The conference focused on issues related mainly to the Europeanization of competition law. The international character of the conference provided an excellent opportunity for the participants to exchange opinions on issues related to the Europeanization of competition law in particular. This conference was the 6th edition in the series of International PhD Students' Conference on Competition Law organised by Department of Public Economic Law at the Faculty of Law of the University of Białystok.

The conference was opened by Professor Anna Piszcz (University of Białystok) who welcomed the participants and introduced the speakers from the Supervisors' session including: Professor Miguel Sousa Ferro (Law School, University of Lisbon), Professor Kseniia Smyrnova (Taras Shevchenko National University of Kyiv) and Professor Marko Jovanovic (Faculty of Law, University of Belgrade). Subsequently, Professor Piszcz presented the assumptions and scope of the conference.

The first session was dedicated to students' presentations and was chaired by Professor Kseniia Smyrnova.

Paulina Korycińska-Rządca (PhD student, University of Białystok) delivered the first presentation on the Europeanization of the Polish leniency programme. The speaker presented selected issues connected to the Polish leniency programme in the light of three harmonisation methods: spontaneous harmonisation, legislative harmonisation and jurisprudential harmonisation. She emphasized that despite the fact that the makers of EU law have not decided to use legislative harmonisation, the Polish leniency programme is a result of Europeanization that occurred through spontaneous harmonisation. This method resulted in certain discrepancies between the solutions adopted at the national level and those used by the European Commission. The speaker stated that so far the Polish leniency programme has not been a subject of legislative or jurisprudential harmonisation.

The next presentation, prepared jointly with Aleksandra Kozak (PhD student, Catholic University of Leuven), was delivered by Magdalena Knapp (PhD student, University of Białystok). The speaker focused on the role of CJEU in Standard Essential Patent (hereinafter, SEP) dispute resolution, which are mostly categorised

as competition law cases. She presented and analysed landmark cases to demonstrate the relevance of the CJEU in shaping the EU law regime. The speaker emphasized that the case law sets important general rules and guidelines to follow, accordingly, influencing the manner in which national competition rules are applied. However, as the cases presented by the speaker demonstrate, there is still inconsistency in the approaches of national courts to CJEU judgments relating to SEP disputes.

The last paper in the first session was presented by Manuel Cirre (BA student, University of Granada) and was dedicated to the issue of collective redress in the EU with particular reference to Spain. He started by outlining the legal background of collective redress in EU law, highlighting common principles that apply in group proceedings. Next, he focused on Spain, thoroughly describing and analysing the key features of the Spanish collective redress model. The speaker noted that some aspects, such as legal standing, still need to be harmonised, while others require further clarifications, especially those regarding publicizing claims and the rules on the group composition in collective actions.

The first session of the Conference was concluded with a debate, comments and questions addressed to students regarding their presentations. The discussion was followed by the second part of the Conference, the supervisors' session, which was moderated by Professor Anna Piszcz.

The first presentation in this session was delivered by Professor Kseniia Smyrnova. She presented the process of 'Europeanization' of competition law in Ukraine, which began with a big shift from planned economy to free market economy. According to Professor Smyrnova, Ukrainian competition law has been adopted in accordance with key principles of EU competition law, leading Ukraine towards a gradual integration with the EU internal market. Professor Smyrnova described the main provisions of Ukrainian regulation, pointing to the challenges associated with their introduction into the national legal order, such as the many procedural problems the legislator is facing in the process. She also emphasized the differences in the EU approach to free trade agreements concluded with Georgia and Moldova in contrast to Ukraine.

Professor Marko Jovanovic spoke next presenting the issue of consensual dispute resolution in Directive 2014/104/EU. In the first part of the presentation, he presented and analysed the core provisions of Directive 2014/104/EU relating to arbitration. The speaker pointed out the benefits of a consensual way of resolving the cases, for example full confidentiality, simplicity and the reduction of time of the proceedings. He also described the potential downsides, focusing on additional burdens placed on the parties to the dispute and possible difficulties in preserving the right to access to justice. In conclusion, Professor Jovanovic referred to the assessment of the efficiency and reliability of consensual dispute resolution provided by Directive 2014/104/EU.

Professor Miguel Sousa Ferro discussed the problem of compensating consumers for an antitrust infringement in the light of the Damages Directive. Professor Sousa Ferro argued that EU law stresses greatly public enforcement of competition law, diminishing the role of private enforcement at the same time. He provided arguments in favour of shifting the balance, considering the different roles of national competition authorities in the process. In the opinion of Professor Sousa Ferro, introducing changes

in the current approach would significantly impact the number of private enforcement of competition law cases, including cases on consumer collective redress, contributing also to the increase of the effectiveness of competition law enforcement.

The conference was subsequently closed by Professor Anna Piszcz.

The next edition of International PhD Students' Conference on Competition Law is going to take place in Białystok on 10 October 2017 and will be dedicated to state aid and private enforcement of competition law.

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