

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 caused 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 Zaščirinskaitė (TGS Baltic Law Firm, Vilnius, Lithuania). It was dedicated to the quantification of harm. At the beginning, Advocate Zaščirinskaitė 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 Zaščirinskaitė 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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