

# Implementation of the EU Damages Directive in Central and Eastern European Countries

Edited by  
Anna Piszcz

Warsaw 2017



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Faculty of Management Press

**Implementation  
of the EU Damages Directive  
in Central and Eastern  
European Countries**



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Anna Piszcz\*

## Introduction to the issues of the implementation of the EU Damages Directive in CEE countries

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This summer, the Law Faculty of the University of Białystok (UwB) and the Centre for Antitrust and Regulatory Studies of the University of Warsaw (CARS) co-organise the 2<sup>nd</sup> International Conference on Harmonisation of Private Antitrust Enforcement: Central and Eastern European Perspective, an event held in Supraśl (north-eastern Poland).

The first conference of the series took place on 2–4 July 2015 also in Supraśl.<sup>1</sup> The series has a history starting as early as mid-2014. A couple of months before the final adoption of the EU Damages Directive,<sup>2</sup> Prof. dr hab. Tadeusz Skoczny, the Director of CARS, asked me what was my recent favourite research topic, and whether I planned to organise a conference thereon. I responded that I was very interested in the legislative works on the EU Damages Directive and that I hoped to organize an international conference with the theme of private competition law enforcement. Prof. Skoczny's response was to the point, 'Let's do it together!' and... it started. Frankly speaking, I would most probably never have realised my aspiration without Prof. Skoczny. Moreover, I feel honoured to cooperate with both Prof. Skoczny himself and CARS, hailed as a leading competition law research unit in Poland.

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<sup>1</sup> More information about the Conference can be found in the report by P. Korycińska-Rządca published in the *Yearbook of Antitrust and Regulatory Studies* 2016, vol. 8(12), p. 291–295.

<sup>2</sup> 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, OJ L 349, 5.12.2014, p. 1.

The first conference in Supraśl united an international community of experts, primarily from countries of Central and Eastern Europe (CEE countries), who are working on the topic of private competition law enforcement. The conference allowed them to share the experiences of CEE countries on issues related to the topic discussed, as well as formulating proposals with regard to the implementation of the Damages Directive while highlighting potential difficulties and drawbacks of the Directive. Furthermore, the conference, in its 1<sup>st</sup> edition, was preceded by a kick-off meeting of CRANE – the Competition Law and Regulation Academic Network, a special network of researchers originating from the Balkan, Baltic, Visegrad countries and Eastern Europe, founded by Prof. Skoczny. Our guests spent three intensive days in Supraśl, assisted by the friendly staff of the Department of Public Economic Law (Law Faculty, UwB). At the end of December 2015, the results of the meetings and discussions that took place during the first conference were published in the *Yearbook of Antitrust and Regulatory Studies* 2016, vol. 8(12). We were so satisfied with the outcome of the event that we decided shortly thereafter to co-organise its 2<sup>nd</sup> edition, scheduled after the deadline for the implementation of the Directive has passed, in order to compare the work done in the particular CEE countries. We considered several places to hold the second conference, but Supraśl ultimately won our hearts. Again, my younger colleagues from the Department of Public Economic Law are hard at work organising everything for the guests, including a social programme.

This year's conference is a two-day event (29–30 June) dedicated – as planned – to the implementation of the EU Damages Directive in our region. The conference will trace the implementation works throughout CEE countries from various perspectives, encompassing procedural and substantive law. It boasts a programme of presentations, ranging from those related to the scope of the implementation, through institutional, substantive and procedural issues, to reach, finally, consensual dispute resolution in antitrust enforcement. Some speakers will be returning to Supraśl after their first visit in 2015 while others will participate in our conference for the first time. Prof. Skoczny who celebrates his 70<sup>th</sup> birthday this year is a tireless organiser.<sup>3</sup> It was his brilliant idea that the national reports on the implementation of the Directive in individual CEE countries should be written and published in the form of a book. Publishing the book before the

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<sup>3</sup> 2017 also marks the 10<sup>th</sup> anniversary of an important milestone for the research on competition law in Poland – in 2007, Prof. Skoczny founded CARS as a research organisation seated at the University of Warsaw, Faculty of Management.

conference gives its participants a great source of information on issues to be discussed during the conference. With this in mind, I managed to find representatives of eleven CEE countries who agreed to write comprehensive national reports. What I consider indisputable is that, due to the lack of relevant literature in English, it is relatively difficult for a researcher from a CEE country to examine and compare their respective national solutions with those of our closest neighbours. In that context, it is much easier for us to analyse and compare our legal provisions to the legal frameworks of Western countries. Therefore, I believe that this English-language book will shed invaluable new light on the process of the implementation of the Directive in CEE countries.

Publishing the book a few weeks before the conference makes it possible to examine key concepts of the Damages Directive in relation to the national laws of eleven CEE countries. It needs to be clarified here that certain CEE countries already have new laws on private enforcement of EU and/or national competition rules. However, not all of us have come this far, even though the deadline for the transposition lapsed on 27 December 2016. Quite unexpectedly for us, for certain countries some of the discussed topics still remain almost as ‘fresh’ and relevant today as when they were discussed two years ago – the majority of CEE countries has not transposed the Directive into their national laws yet. As a result, some Authors describe already-binding laws, whereas others write about draft laws that might ultimately end up having a somewhat different shape. The tables of contents of all of the reports are very similar. From the very beginning, we wanted to ensure uniformity of the national reports and so I compiled a specific line-up of over a dozen of the most important questions relating to the implementation of the Directive.

First of all, the national reports narrate the history of the works on the harmonisation of private antitrust enforcement in CEE countries.

Second, the reports focus on the scope of the implementation of the Directive. The Damages Directive is restricted in its scope, a fact clearly noted in its very title. Seeing as the Directive only sets minimum requirements, did the drafters and/or legislatures of CEE countries choose these minimal solutions in spite of the excellent opportunity to introduce something more than the Directive? Firstly, the Directive refers to ‘actions for damages under national law’, whereas the system of private enforcement of competition law is made up of a variety of remedies. Here, in particular, injunctive relief (where the plaintiff requests the court to order the infringer to stop the violation and/or remove its effects) coexists with compensatory relief (damages) and declaratory relief, that is, the



declaration of invalidity (automatic nullity) of an agreement, decision of an association of undertakings or practice (S. Peyer mentions separately also interim remedies; see Peyer, 2012, p. 350). The Directive only takes into account actions for damages as defined in Article 2(4). An action for damages means ‘an action under national law by which a claim for damages is brought before a national court (...)’. Furthermore, pursuant to Article 2(5), a claim for damages means a claim for the compensation of harm caused by an infringement of competition law. However, beyond this there are claims for declaratory relief and injunctions. It can also be argued that, likewise, claims for the skimming-off of profits (ill-gotten gains) and the return of unjust enrichment (restitution of undue payment) are not included in the definition of a claim for damages. There is not much difference between those claims and claims for damages with respect to their nature (all of them are monetary claim), except that the function (goal) of the former category is not to compensate harm suffered by the injured party but, respectively, to deprive infringers of their illegal profits (disgorgement) and to reverse the unjust enrichment (Piszcz, 2015, p. 83 et seq.; Piszcz, 2017a). The national reports show the manner in which this issue was dealt with by the drafters and/or legislatures of specific CEE countries.

Next, the Damages Directive refers to ‘infringements of the competition law provisions’. Pursuant to Article 2(1) of the Damages Directive, an ‘infringement of competition law’ means an infringement of Article 101 or 102 TFEU or of national competition law. Further, Article 2(3) of the Directive stipulates that ‘national competition law means provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union competition law (...)’. However, competition law or competition protection covers a whole range of issues related not only to agreements, decisions by associations of undertakings or concerted practices (Article 101 TFEU and equivalent national provisions) and abuses of a dominant position (Article 102 TFEU and equivalent national provisions). It also covers anticompetitive concentrations of undertakings, practices in the sphere of Article 106 TFEU and State aid, abuses of economic dependence or bargaining power and unfair competition. The reports show if drafters and/or national legislatures (similarly to Portuguese and Spanish ones) decided to go ‘beyond’ the ambit of the Damages Directive with regard to the types of infringements covered by the Directive or not.

Furthermore, the Damages Directive refers to ‘competition law provisions of the Member States and of the European Union’. However, the already mentioned Article 2(3) of the Damages Directive defines

national competition law very narrowly. The definition quoted above is accompanied by Recital (10) of the Preamble stating that: ‘This Directive should not affect actions for damages in respect of infringements of national competition law which do not affect trade between Member States within the meaning of Article 101 or 102 TFEU’. The Directive distinguishes therefore between infringements which may affect internal trade and those which do not (purely national competition law infringements which cannot influence internal trade). The important conclusion from this provision is that the Directive does not require Member States to apply its own pattern with regard to purely national infringements; albeit Member States are free to do so. The fact has to be criticised therefore that the Directive does not contain an explicit provision – instead of Recital (10) of the Preamble – stating something like: ‘Nothing should prevent Member States from applying identical provisions also to infringements that do not harm internal trade within the meaning of Art. 101 or 102 TFEU’<sup>4</sup> or ‘This Directive does not impose an obligation upon Member States to use identical solutions to infringements that do not affect internal trade within the meaning of Art. 101 or 102 TFEU albeit it does provide such an incentive’<sup>5</sup>. Seeing that the Damages Directive refers in Recital (4) of its Preamble to ensuring the effectiveness of damages claims, I believe that the effectiveness requirement should relate to both EU law violations as well as purely national infringements. The national reports show whether CEE countries are going to apply double standards with respect to the two different types of infringements, especially considering that in practice the distinction between them is not that clear cut for a judge in a stand-alone case.

A form of a restriction of the personal scope of the rules may also be found when implementing the Directive. In Article 2(2) of the Directive, an ‘infringer’ is defined as ‘an undertaking or association of undertakings which has committed an infringement of competition law’. The Directive does not provide autonomous definitions of the concept of an ‘undertaking’ and an ‘association of undertakings’, especially since these are not neutral concepts but have been developed in the case-law of the EU Courts in the context of Articles 101 and 102 TFEU. As the Directive links the concept

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<sup>4</sup> Cf Recital 8 of the Preamble to Directive 2008/52/EC of the European Parliament and of the Council of 21.05.2008 on certain aspects of mediation in civil and commercial matters.

<sup>5</sup> Cf Recital 19 of the Preamble to Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21.04.2004 creating a European Enforcement Order for uncontested claims.

of infringement by an undertaking or association of undertakings to the civil liability of that same undertaking or association of undertakings, it is possible to argue that enforcers will need to apply the rules stipulated in the Directive using the interpretations of both concepts developed in the context of Articles 101 and 102 TFEU (Wijckmans, Visser, Jaques and Noël, 2015, p. 8). For the purposes of public enforcement of competition law, it is important to differentiate a single legal entity from a single economic entity which, under EU law, is also viewed as an undertaking. In terms of liability in proceedings before the European Commission, a parent company may be held legally liable for infringements of EU competition law committed by a subsidiary company, even if the parent company was not directly involved in the infringement of EU competition law. However, it should be kept in mind that national legal frameworks vary from Member State to Member State. The above solution is absent from some national competition law enforcement systems, which may result in an ‘inland’ discrimination in antitrust cases which are not governed by Articles 101 or 102 TFEU. Thus, a significant theme to be addressed by national lawmakers is the need (if any) to introduce a legal basis for the liability of the parent company for its subsidiaries (for its civil liability but also, if needed, for its liability for fines imposed by public enforcers), as it has already been done by Portugal and Spain. Considerations on this issue can be found in some of the national reports.

Third, the national reports refer to the issue of competent national courts, since the institutional (‘technical’) design of private competition law enforcement is one of the main issues left to Member States to decide while transposing the Directive. The latter only points out that private enforcement of EU competition law must be left to national courts within the meaning of its Article 2(9), which refers to Article 267 TFEU. Member States may uphold their *status quo* or change it, preferably, in a balanced way. The national reports explain at length how CEE countries are resolving this issue.

Fourth, the reports also delve into the substantive law side of private competition law enforcement issues. In this context, four topics tend to be covered. First, the Authors of the reports dedicate their efforts to analysing the transposition of the Directive’s provisions on limitation periods. They show whether CEE countries introduced only the limitation period compliant with Article 10(3) of the Directive (period *a tempore scientiae*), or also a second limitation period, which is not covered by the Directive, the course of which would not be dependent on the damaged entity’s knowledge of the infringement (*a tempore facti*). Moreover, Authors describe also

the manner in which CEE countries transposed the premise in the form of an injured party's 'knowledge' of the occurrence of a competition law infringement, of the fact that the violation had caused harm to the potential claimant, and of the identity of the infringer or infringers (Article 10(2)). The reports show whether the drafters and/or legislatures chose to interrupt or to suspend the running of the limitation period (Article 10(4)), and how they approached situations involving two or more infringers in the context of limitation periods.

In the context of substantive law issues, the national reports cover also joint and several liability (and in some reports – type of liability as such). The reports are dedicated to the question whether CEE countries were at all in need of the introduction of the principle of joint and several civil liability of competition law infringers (Article 11(1) of the Directive), or whether it already existed in their legal frameworks. The reports present an entire spectrum of topics related to the implementation of the principles of liability of competition law infringers, which respect the interests of competition protection (Article 11(2)–(6) of the Directive) including the modified liability of SMEs and immunity recipients.

The reports put an emphasis also on the quantification of harm. Article 17(2) of the Directive provides for a rebuttable presumption that cartel infringements cause harm. Article 17(1) is about the power of national courts to estimate the amount of harm, if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available. Article 17(3), in turn, creates the possibility to strengthen and expand the cooperation between a NCA and national courts with respect to the quantification of harm. The reports cast a light on the approaches of CEE countries in this context.

Furthermore, there is no doubt that rules on the passing-on of overcharges (Articles 12–16 of the Directive) have a vital role to play in national laws also, in particular in the context of the principle of full compensation. The reports show how the model provided by the Directive was used by their national legislatures.

Fifth, procedural issues are also strongly represented throughout the national reports with topics ranging from standing to sue, disclosure of evidence and effect of national decisions, to the issue of collective redress. At the forefront here is a question of standing to sue, that is, who is entitled to apply to start judicial proceedings. This issue may be considered as one of the most important determinants of the number of antitrust damages actions. In the light of Article 2(4) of the Damages Directive, a claim for

damages may be brought before a national court by: an alleged injured party, or a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim, or someone acting on behalf of one or more alleged injured parties, where Union or national law provides for that possibility. The national reports present how the issue of standing to sue is or is going to be regulated in their respective CEE countries. They also show whether business organisations and/or consumer organisations have standing to file private antitrust damages claims and, if not, whether the CEE countries were inspired to change their legal frameworks in this regard, even though the Directive does not require Member States to provide for the standing to sue of business organisations and/or consumer organisations.

In the context of procedural law issues, the national reports discuss also the disclosure of evidence. Articles 5–8 of the Directive were adopted in an effort to reduce the information asymmetry that characterises the relationship between the claimant and the defendant in actions for damages based on competition law infringements and, therefore, improve the conditions for claimants to pursue their claims. The reports show here the approaches of the drafters or legislatures of their CEE countries to the principles of the disclosure of evidence, including its general principles as well as the specific principles applying to the disclosure of evidence included in the file of a competition authority and on the limits on the use of evidence obtained solely through access to the file of a competition authority. The Authors offer also their individual perspective on national sanctions regarding evidence (Article 8 of the Directive).

Another issue emphasised in the reports is the change in the laws of CEE countries regarding the effect of national decisions. Article 9 of the Damages Directive contains the visibly minimised version, compared to its earliest drafts, of rules on the effect of NCAs' final infringement decisions on subsequent actions for damages (Pais and Piszcz, 2014, p. 230). The essential element of this concept, an irrefutable (absolute) presumption of an infringement, is limited to the non-cross-border effect of such decisions. In other words, such decisions are binding only on the courts of the same Member State where the decision was adopted by the NCA (Article 9(1)). Further on, Article 9(2) of the Directive states that 'Member States shall ensure that where a final decision referred to in paragraph 1 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 and, as appropriate, may be assessed along with any other evidence adduced by the parties'.

The quoted provision constitutes a minimum harmonisation clause that accounts for a cross-border effect of national decisions. This gives Member States a choice as to whether they wish their courts to be: bound by those decisions; governed in their assessments by an irrefutable or rebuttable presumption, or obliged to treat them as *prima facie* evidence. It is important to note that the concept of *prima facie* evidence comes from common law, a distinct legal family with its own legal tradition and as such it is adapted to the needs of common law. The national peculiarities of EU Member States with other legal traditions, such as the CEE countries, might not have been taken into account when Article 9(2) of the Directive was drafted. The national reports discuss therefore the issue of the ‘reformulation’ of the laws of CEE countries so that they comply with the above rules.

Consecutively, the national reports shed light on collective private enforcement of competition law in CEE countries. EU Member States can decide on the use of collective redress mechanisms in private enforcement of competition law. Recital (13) sentence 2 of the Preamble of the Directive confirms that Member States are not required to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU. On the other hand, Recital (7) of the Preamble of the *Recommendation on collective redress*<sup>6</sup> 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. The combination of the *Recommendation on collective redress* and Recital (13) of the Preamble of the Directive make the conclusion possible that ‘the fears of the excess of the American experience in the context of class actions, combined with the strong tradition and trust in European antitrust public enforcement, in the end led the European institutions to apparently discourage the use of collective redress’ (Pais, 2016, p. 201). It is worth remembering that collective redress may play an important role in Member States, not only in terms of procedural efficiency but also in relation to the enforcement of competition law by indirect purchasers. In the absence of some form of collective action, claims of indirect purchasers are unlikely to increase (Cauffman and Philipsen, 2014, p. 27). Although only a few CEE countries have legal frameworks for collective redress, this topic has not been omitted by the national reports. The reports show

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<sup>6</sup> 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; OJ 2013 L 201, p. 60.

whether the legislatures of CEE countries have taken the opportunity to address the need, if any, for the introduction of this concept or for the amendments to already existing solutions.

Up next is consensual dispute resolution in antitrust enforcement (Articles 18–19 of the Directive). In recent years, the role of the consensual dispute resolution mechanism has become more important than ever before in resolving disputes. In addition to being one of the cheapest dispute resolution mechanisms, it shortens the time of dispute resolution and sustains a healthier business environment). The national reports explore the approaches of CEE countries to solutions provided for in the Directive with regard to consensual dispute resolution in antitrust enforcement.

The scope of the book is restricted to CEE countries but its subject matter is not about the eleven of us, but about all the EU Member States that face the same duties under the Damages Directive. What is of difference is that our region has so far remained almost untouched by the phenomenon of private competition law enforcement, compared to some Western jurisdictions, even though infringements of competition law occur, and are being dealt with by competition authorities responsible for public competition law enforcement. This begs the question: will the local attitude of consumers and undertakings be in step with the laws implementing the Damages Directive that create new possibilities for those injured by competition law infringements? I do hope to verify this after the implementation of the Directive in our region and several years at least of the application of the implementing provisions.

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## I. Manner of implementing the Directive

Directive 2014/104/EU on antitrust damages actions (the ‘Directive’) was adopted on 26 November 2014 and published in the Official Journal of the European Union on 5 December 2014. The Bulgarian national competition authority – the Commission on Protection of Competition (‘CPC’) – promptly recognized the transposition of the Directive into Bulgarian law as one of its priorities for 2015.<sup>1</sup> The CPC set up an internal working group, which within several months prepared a proposal for implementation via amendments in the Protection of Competition Act<sup>2</sup> (‘PCA’).<sup>3</sup> The original

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<sup>1</sup> CPC Annual Report for 2014, adopted by decision no. 431 of 25.05.2015, p. 57.

<sup>2</sup> Protection of Competition Act (*Закон за защита на конкуренцията*), promulgated in State Gazette no. 102 of 28.11.2008, in force as of 2.12.2008. 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 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 8.05.1998, in force as of 11.05.1998). Ten years later, at the end of 2008, following Bulgaria’s accession to the EU on 1.01.2007, 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 with Regulation 1/2003 and Regulation 139/2004.

<sup>3</sup> CPC Annual Report for 2015, adopted by decision no. 366 of 26.05.2015, p. 53.

approach was to follow as closely as possible the text of the Directive. This first draft was not circulated in public, since in the final months of 2015 a dedicated inter-departmental working group was created, comprising representatives from the CPC, the Ministry of Economy and the Ministry of Justice, with the task to prepare a joint legislative proposal. No external experts were invited to participate in the working sessions of the group, and there is no official information whether the European Commission ('EC') was consulted in the process.

The inter-departmental working group approved a final draft by June 2016, but its publication was deferred for several months – until September 2016. The implementing legislation represents a bill for an amendment to the PCA ('BAPCA'), replacing the currently existing four paragraphs of Article 104 on liability for damages with a full new Chapter XV, comprising 16 articles, and adding 26 new and revised definitions in paragraph 1 of the supplementary provisions of the act. The draft does not envisage amendments to other existing legislation.

The new PCA chapter on 'Liability for Damages' is divided into two sections. The first section 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 contains detailed rules on liability for damages caused by antitrust violations committed under Chapter III 'Prohibited Agreements, Decisions and Concerted Practices' and Chapter IV 'Abuse of Monopoly and Dominant Position' of the PCA, as well as under Article 101 and Article 102 of the Treaty on the Functioning of the European Union ('TFEU').

The final part of the BAPCA contains a single transitional provision specifying that all litigation proceedings pending as of the date of entry into force of the PCA amendments should be completed in accordance with the original procedure. As a specific date for entry into force is not specified in the draft, pursuant to the standard Bulgarian rule on *vacatio legis*,<sup>4</sup> its implementation should commence on the 3<sup>rd</sup> day after promulgation in the State Gazette.

The Ministry of Economy assumed primary responsibility for the legislative procedure. On 2 September 2016, the BAPCA was published

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<sup>4</sup> Pursuant to Art. 5, Sec. 5 of the Constitution of the Republic of Bulgaria all statutory instruments enter into force upon the expiry of 3 days after their official publication, unless a different term is expressly specified therein.

on the official website of the ministry<sup>5</sup> and public consultation procedure was launched via another dedicated online portal – [www.strategy.bg](http://www.strategy.bg).<sup>6</sup> The consultation period expired on 16 September 2016. There is no official information on the number of opinions from interested parties received by the Ministry of Economy within the 14 days accorded for the purpose, but considering the lack of activity on the website it seems that the proposal did not receive much public attention. The fact that the consultations coincided with the last weeks of the presidential election campaign in Bulgaria may have played an important role here.

Following official approval by the Council of Ministers, the BAPCA was formally submitted to the parliament on 15 November 2016.<sup>7</sup> The bill was discussed and received the general approval of the relevant parliamentary committees,<sup>8</sup> and was passed on its first reading in a plenary session on 20 December 2016. Due to the political turmoil that ensued following the resignation of the government on 14 November 2016, culminating with the premature dissolution of the 43rd National Assembly on 26 January 2017, the BAPCA did not reach the stage of second reading and did not become the law of the land. The draft will have to wait for a legislative approval from the next 44th National Assembly, which should be formed following the elections scheduled for 26 March 2017. In accordance with the rules of Bulgarian parliamentary procedure, discussions and decisions on legislative proposals of prior compositions of the parliament are not binding on the new composition. Therefore, the legislative procedure will be re-launched once the 44th National Assembly becomes operational.

In summary, due to the legislative interruption, it is unclear when the transposition of the Directive will be completed in Bulgaria. Moreover, political changes and the new parliamentary composition may encourage modifications in the legislative proposal, thus the comments and conclusions presented hereinafter should be regarded as tentative only, pending the final adoption of implementing legislation.

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<sup>5</sup> <http://www.mi.government.bg/bg/news/proekt-na-zakon-za-izmenenie-i-dopalnenie-na-zakona-za-zashtita-na-konkurenciyata-2711.html> (15.03.2017).

<sup>6</sup> <http://www.strategy.bg/PublicConsultations/View.aspx?lang=bg-BG&Id=2251> (15.03.2017).

<sup>7</sup> Legislative signature no. 602-01-74 – the full procedural history is available at: <http://parliament.bg/bg/bills/ID/66477/> (15.03.2017).

<sup>8</sup> The Committee on Legal Issues (leading the legislative process) and the Committee on Economic Policy and Tourism adopted positive reports on 7.12.2016. The draft was also sent to the Committee on European Issues and Control over European Funds, which also approved it on 14.12.2016.

## II. Scope of the implementation

The first regulation on recovery of damages from completion law violations was introduced in Bulgaria in 1998, when the second PCA restatement<sup>9</sup> (PCA 1998) came into force. Article 36, Section 2 PCA 1998 stipulated that any person harmed by violations under the act can lodge a claim for damages before the competent civil court pursuant to the ordinary litigation procedure, regulated by the Code on Civil Procedure<sup>10</sup> ('CCP'). This rule was restated in Article 104 PCA 2008 with the additional clarification that damages can be sought by any person who has suffered harm from an infringement even where it was not directed against them.<sup>11</sup> In principle, the statutory provisions provided a very broad base for the recovery of damages. However, the judicial practice accumulated during the almost 20 years of existence of these rules is extremely scarce, and there are just a few cases publicly available.<sup>12</sup> The primary culprit for this situation is the reluctance of infringement victims

<sup>9</sup> Promulgated in State Gazette no. 52 of 8.05.1998, in force as of 11.05.1998. The PCA 1998 was repealed by the PCA 2008, which entered into force on 2.12.2008. It should be noted that the PCA 2008 largely reiterates the substantive rules of the PCA 1998, while introducing new procedures for antitrust investigation, merger control and sector inquiries.

<sup>10</sup> Civil Procedure Code (*Граждански процесуален кодекс*), promulgated in State Gazette no. 59 of 20.07.2007, as subsequently amended and supplemented.

<sup>11</sup> Art. 104 PCA reads as follows: '(1) For damages caused as a result from committed infringements of this Act the person at fault shall owe an indemnity.

(2) Entitled to an indemnity shall be all natural persons and legal entities who have suffered damages even where the infringement has not been directed against them.

(3) The claims for indemnity shall be lodged under the procedure set forth in the Civil Procedure Code.

(4) The decision of the Supreme Administrative Court which has entered into force, and which upholds a decision of the Commission finding a violation of this Act, shall be binding upon the civil court as regards the fact whether the decision of the Commission is valid and compliant with the law. A decision of the Commission, which has not been appealed or the appeal against it has been withdrawn, shall have binding force upon the civil court as well. In these cases the right to claim indemnification shall lapse by limitation within 5 years as of the coming into force of the decision of the Supreme Administrative Court or of the Commission' (the official text of the PCA is available only in Bulgarian – see note 2 supra. An unofficial English translation can be found at the CPC website: [http://cpc.bg/storage/file/ZZK\\_eng.doc](http://cpc.bg/storage/file/ZZK_eng.doc)).

<sup>12</sup> There is no official statistical data about the number of cases involving claims for damages from competition law infringements brought before Bulgarian courts. A review of publicly available sources indicates 34 decisions in total. The main source of information used for the purpose of this paper is the website <[legalacts.justice.bg](http://legalacts.justice.bg)>, which is a web-based platform maintained by the Bulgarian Supreme Judicial Council (*Висш съдебен съвет*), where various judicial acts of the Bulgarian courts are published. The second source

to resort to litigation due to the significant evidentiary burden that has to be satisfied, the high cost and long duration of proceedings (Gouginski and Petrov, 2014). Moreover, Bulgarian judges are hesitant when approaching disputes involving competition law elements.

The Directive can tackle some of the existing problems with private enforcement in Bulgaria, but does not seem to provide a full solution. The regulatory scope of the Directive is restricted to damages for ‘infringements of competition law’, which are defined as infringement of Article 101 or 102 TFEU, or of provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to EU competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003.<sup>13</sup> Therefore, the harmonised rules cover only the so-called ‘restraints of competition’, which are just one part of the domain of competition law. The currently effective PCA has a much broader regulatory scope, comprising *inter alia* the substantive rules on restrictive horizontal and vertical agreements, abuse of dominance and monopoly, merger control, unfair competition and abuse of superior bargaining position.<sup>14</sup> Accordingly, under Bulgarian law the right to seek redress for damages caused by ‘infringements of competition law’ traditionally encompasses both violations of antitrust and unfair competition. This specific feature of national law was recognized by the drafters of the BAPCA, who sought to reconfirm the broad scope of indemnification rights. They did so by compiling the old rule of Article 104 PCA with the right of full compensation under Article 3 of the Directive to form an independent general section of Chapter XV that should apply to all types of infringements under the PCA. The remaining provisions of the Directive are transposed in the second section of Chapter XV, which according to its title should apply only to ‘Liability

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relied upon is the website of the Supreme Court of Cassation (*Върховен касационен съд*) ([www.vks.bg](http://www.vks.bg)), where its own decisions are published.

<sup>13</sup> Art. 2(1) and (3) of the Directive.

<sup>14</sup> In July 2015, the 43<sup>rd</sup> National Assembly adopted a package of measures, aiming to combat unfair trading practices in the grocery supply chain, which included amendments to the PCA (a new Chapter VIIa), introducing a prohibition against abuse of superior bargaining position. The new rules mirror existing regulations that deal with unfair competition and (to some extent) rules on unfair terms in consumer contracts. The rationale behind the newly introduced provisions is to expand the scope of the existing ‘fair play’ rules to also cover vertical B2B relationships. Moreover, in long-term contractual relations, characterized by a significant imbalance in the parties’ bargaining positions, some undertakings may indeed be in the same position as ordinary consumers *vis-à-vis* their contractual counterpart and should, therefore, be granted some protection against the risk of exploitation.

for damages from infringements under Chapter III and IV and Article 101 and 102 TFEU' – i.e., only to damages from antitrust violations.

The approach chosen by the drafters of the BAPCA is generally in line with the requirements of the Directive, which does not intend to step outside the scope of the implementation of Article 101 and 102 TFEU and the respective national equivalents. However, it creates a dual standard for infringements under national law, since the substantive and procedural benefits for claimants arising out of the harmonized provisions would not be accessible for parties injured by unfair competition torts or actions in abuse of superior bargaining position. It is true that some of the rules prescribed by the Directive are very specific and can be applied only in the context of litigation concerning cartels (e.g. Article 17(2)). However, rules on limitation periods, quantification of harm, joint and several liability, etc. are not as context specific.

One of the reasons for the chosen approach seems to be the desire to stay similar to the original text of the Directive. At the same time, it should be noted that the provisions of the Directive were not simply copied and pasted into the BAPCA. The text was reordered with the intention to start from substantive and end with procedural rules. In the process, some of the provisions of the Directive were scattered among different provisions of the BAPCA. Furthermore, some of the procedural rules which already had a national equivalent were disregarded (such as judges' right to estimate the amount of harm under Article 17(1) or the requirement for effective penalties for the obstruction of justice under Article 8 of the Directive).

The Directive was clearly not intended as a complete solution for all problems in litigation of disputes involving competition law elements. The two (conflicting) objectives stated in the original proposal of the EC were: (i) optimising the interaction between public and private enforcement of competition law and (ii) ensuring that victims of infringements of EU competition rules can obtain full compensation for the harm they suffered.<sup>15</sup> Thus, the intention was to harmonize only the rules of private litigation in relation to infringements, which may affect intra-Union trade. This position is also confirmed in Recital 10 of the Directive.<sup>16</sup> In this aspect, the BAPCA

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<sup>15</sup> 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, 11.06.2013, p.3.

<sup>16</sup> Recital 10 of the Directive's Preamble reads as follows: 'This Directive should not affect actions for damages in respect of infringements of national competition law which do not affect trade between Member States within the meaning of Article 101 or 102 TFEU'.

goes beyond the scope of what is required by ensuring that the new rules would apply to all antitrust infringements – irrespective of whether they affect trade between Member States or their effects are confined within the Bulgarian national borders.

As noted above, one of the primary goals of the Directive is to coordinate public and private enforcement.<sup>17</sup> The EC expressly noted in its proposal, as well as in the Impact Report,<sup>18</sup> that the interaction between public and private enforcement has become problematic due to private parties seeking access to documents held by competition authorities. These access requests create ‘*legal uncertainty and the risk of negative consequences on the public enforcement of EU competition law*’.<sup>19</sup> One of the main issues of concern was how to protect leniency and settlement submissions from access, especially after the Court of Justice of the EU (‘CJEU’) prescribed a case-by-case test for requests seeking access to leniency material.<sup>20</sup> Therefore, the purpose of the Directive is to find some form of balance between public and private enforcement in antitrust cases, ensuring the confidentiality of administrative files and preventing in the process the collapse of the leniency system.

The confidentiality concern is applicable not only in the context of EU competition law enforcement but also in a purely national setting. It is true that the leniency procedure in Bulgaria has so far been completely ineffective. Since its adoption in 2003,<sup>21</sup> there were only a couple of reported applications and not a single investigation came out of them. Nevertheless, due to the fragmented nature of the EU leniency system, the importance of national leniency programmes will continue to rise until better synchronisation between NCAs is achieved (Petrov, 2016). As confirmed by CJEU’s decision in the *DHL* case,<sup>22</sup> the current EU leniency system

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<sup>17</sup> Also confirmed by Art. 1(2) of the Directive.

<sup>18</sup> Commission staff working document accompanying document to the White paper on damages actions for breach of the EC antitrust rules – Impact assessment (SEC(2008) 405, 2.04.2008).

<sup>19</sup> *Ibid.*, para. 34.

<sup>20</sup> Notably the decisions in case C-360/09, *Pfleiderer AG v Bundeskartellamt*, ECLI:EU:C:2011:389 as well as case C-536/11, *Bundeswettbewerbshörde v Donau Chemie AG*, ECLI:EU:C:2013:366.

<sup>21</sup> The possibility for exemption or reduction of fines for antitrust infringements in recognition of cooperation for cartel discovery was first introduced in Bulgaria in 2003 by an amendment of the PCA 1998, promulgated in State Gazette no. 9 of 31.01.2003. Following the enactment of the PCA 2008, the CPC adopted a detailed Leniency Programme and application by virtue of decision no. 274 of 8.03.2011.

<sup>22</sup> Case C-428/14, *DHL Express (Italy) srl, DHL Global Forwarding (Italy) SpA v Autorità Garante della Concorrenza e del Mercato*, ECLI:EU:C:2016:27.



follows a ‘multi-stop’ approach, where immunity applicants investigated by the EC are forced to file summary applications under national law to ensure protection in parallel investigations. In this situation the BAPCA provides another tool for the CPC to ensure the protection of national case files and the viability of its own leniency programme.

The Directive’s objective is to build a true two-pillar system, where public and private enforcement work as complementary tools to ensure the overall effectiveness of competition rules and enhance their deterrence (Merola and Armati, 2016). It provides general rules without distinguishing between stand-alone or follow-on claims. The same approach is followed in the BAPCA.

### III. Competent courts

The Directive confirms that national courts have ‘an equally essential part to play in applying the competition rules’,<sup>23</sup> but does not prescribe a specific organizational or procedural mode for the implementation of private enforcement. In this respect, the BAPCA upholds the traditional approach dating back to 1998, empowering all Bulgarian general courts to oversee claims for damages from competition law violations. This solution is in line with the theoretical position that liability for competition law violations is a sub-category of general tort liability, committed in the course of exercising a commercial activity.<sup>24</sup>

However, it should be noted that despite this broad statutory empowerment, Bulgarian courts have decided to limit their own competence refusing to recognize the right of private claimants to initiate stand-alone actions for damages. While follow-on procedures are regarded as the normal avenue for pursuing indemnification, though most of the existing case law concerns damages from unfair competition,<sup>25</sup> there is a line of court rulings finding that

<sup>23</sup> Recital 3 of the Directive.

<sup>24</sup> Decision no. 171 of 11.02.2013 on case no. 64/2012 of the SCC, Commercial Division, 2<sup>nd</sup> Chamber.

<sup>25</sup> E.g. decision of 12.08.2013 on civil case no. 61792/2010 of Sofia District Court (*Софийска районен съд*), Civil Division, 66 Chamber; decision no. 12 of 25.01.2016 on commercial case no. 142/2015 of Pleven Provincial Court (*Окръжен съд – Плевен*); decision no. 15 of 25.03.2011 on commercial case no. 35/2009 of Razgrad Provincial Court (*Окръжен съд – Разград*); decision no. 21 of 18.02.2008 on case гр. т. д. № 552/2007 of Veliko Tarnovo Court of Appeals (*Великотърновски апелативен съд*), Civil Division; decision no. 215 of 22.02.2010 on case no. 805/2008 of the SCC, Commercial Division, 2 Chamber.

stand-alone claims under Article 104 PCA are inadmissible.<sup>26</sup> In the opinion of the majority of the Bulgarian courts, *the establishment of a violation* under the PCA and the TFEU falls within the exclusive competence of the CPC or respectively the EC – i.e. public enforcement authorities.<sup>27</sup> This position was confirmed in 2014 at the highest judicial level with a ruling of the Supreme Court of Cassation (‘SCC’), which stated that the civil courts should deny hearing a case for damages unless it was already examined by the NCA, and the latter had found that a violation of competition law was committed.<sup>28</sup> The effect of this ruling is to grant to the CPC complete exclusivity to determine violations of competition law in Bulgaria – both with respect to the PCA and the TFEU. This solution is in clear contradiction with Regulation 1/2003 but the case was never allowed to reach the CJEU on the ground that the facts defined a ‘purely national violation’.<sup>29</sup> It is true that the CPC shares ‘expertise’ with the Supreme Administrative Court (‘SAC’) exercising judicial supervision over its decisions, but in effect all other courts in Bulgaria are denied competence to apply directly the rules on competition protection. The SCC went so far as to even refuse to recognise a right of claim without an administrative finding of a violation. In other words, a court seized with a stand-alone claim is not allowed to suspend proceedings and wait for the CPC to decide whether an infringement was committed, but is obliged to dismiss the claim as premature.

Interestingly, even though the SCC guidance is formally binding it is not followed strictly. While stand-alone claims for damages from alleged antitrust violations are routinely dismissed,<sup>30</sup> courts are often willing to review claims related to unfair competition even in the absence of a CPC decision.<sup>31</sup> Considering that unfair competition disputes are usually regarded

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<sup>26</sup> Ruling no. 1702/19.04.2013 of Varna District Court (*Варненски районен съд*) on case no. 2282/2012, confirmed on appeal by the Varna Court of Appeal (*Варненски апелативен съд*) with ruling no. 515 of 29.07.2013 on case no. 423/2013; Decision no. 224 of 29.04.2011 on civil appellate case no. 53/2011 of Pleven Provincial Court.

<sup>27</sup> Decision no. 156 of 23.10.2015 on case no. 310/2015 of the Varna Court of Appeal; as well as the most recent decision no. 43 of 10.02.2017 on case no. 915/2016 of Pleven Provincial Court.

<sup>28</sup> Ruling no. 520 of 28.07.2014 on case no. 4004/2013 of the SCC, Commercial Division, 2<sup>nd</sup> Chamber.

<sup>29</sup> The appellant in case 4004/2013 did file a request for reference for a preliminary ruling on the applicability of Regulation 1/2003 to the dispute, but the SCC decided that EU law is not directly applicable to the case and dismissed the reference request.

<sup>30</sup> See e.g. decision no. 122 of 17.02.2016 of Varna Provincial Court (*Окръжен съд – Варна*) on commercial case no. 1924/2015, as well as the most recent decision no. 43 of 10.02.2017 on case no. 915/2016 of Pleven Provincial Court.

<sup>31</sup> Decision of 7.11.2013 on civil case no. 29318/2012 of Sofia District Court, 1<sup>st</sup> Civil Division, 35<sup>th</sup> Chamber; decision no. 842 of 18.05.2013 on civil case no. 8674/2012 of

as less complex, this indicates that the primary obstacle facing private enforcement in Bulgaria is most probably rooted in the lack of experience among judges, leading to reluctance to engage in dispute resolution. The fact that the ‘mutiny’ taking place against the approach prescribed by the SCC comes from lowest courts, composed of younger judges, who have received training on competition law during their studies, is also suggestive of the fact that lack of expertise is the real problem here.<sup>32</sup>

Turning to subject-matter competence, pursuant to the general CCP rules disputes with 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.<sup>33</sup> However, Article 365(5) CCP also states that provincial courts should follow the procedure for commercial disputes when deciding cases related to cartel agreements, decisions and concerted practices, concentrations of economic activities, unfair competition, and abuse of monopoly or dominant position.<sup>34</sup> A literal interpretation of this rule leads to the conclusion that all disputes involving infringements of competition law should be reviewed at first instance by a provincial court. The ambiguity has caused jurisdictional disputes, which has so far been resolved in favour of the district courts, based on the argument that the two conditions – value and nature of dispute – should be evaluated cumulatively.<sup>35</sup> As a result, in the district courts claims for damages under Article 104 PCA are reviewed by a single judge following the ordinary procedure for civil disputes, whereas in provincial courts a panel of 3 judges implements the procedure for commercial disputes.

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Burgas District Court (*Районен съд – Бургас*), Civil Division, 36<sup>th</sup> Chamber; decision no. 644 of 3.12.2015 on commercial case no. 130/2015 of Plovdiv Provincial Court (*Окръжен съд – Пловдив*), Commercial Division, 15<sup>th</sup> Chamber; as well as decision no. 2414 of 14.04.2015 on civil case no 16573/2013 of Sofia City Court (*Софийския градски съд*), appeal pending.

<sup>32</sup> A good example in this respect is provided by decision no. 3381 of 28.07.2015 on civil case no. 16483 /2012 of Varna District Court, Civil Division, 14<sup>th</sup> Chamber, where the judge attempted to demonstrate impudence, but was subdued and reversed on appeal by Varna Provincial Court with decision no. 122 of 17.02.2016 on case no. 1924/2015.

<sup>33</sup> Art. 104(4) CCP.

<sup>34</sup> The most important feature of the procedure for commercial disputes under Chapter XXXII CCP is the increased reliance on the written form. Two rounds of written submissions are exchanged between the litigating parties within strict deadlines and only then an open hearing is held. This provides for a better opportunity to clarify all important factual issues before the court proceeds to rule on evidentiary motions.

<sup>35</sup> Ruling no. 3103/2016 of the Sofia Court of Appeals (*Софийски апелативен съд*) on civil case no. 4102/2016. So far, the SCC has not been called upon to rule on the issue of subject-matter jurisdiction.

The duality of this approach is problematic. While it is true that usually the value of the claim is indicative of its complexity, competition law disputes are rarely straightforward and require superior expertise and experience, which are normally found at the level of provincial courts. Moreover, due to the comparatively high court fees (calculated at the flat rate of 4%) and the desire to reduce the risk of losing the investment in litigation, the predominant practice in Bulgaria is to file partial claims – i.e. to declare the full value of the claim, but request that the defendant is ordered to pay only part of it and pay fees only on that amount. Therefore, the nature of a dispute provides a better indication of its potential complexity than its value. The argument about access to justice is not relevant in the case of Bulgaria, because provincial courts oversee comparatively small territories, thus claimants would not find it difficult to communicate with the court or attend hearings.<sup>36</sup>

Territorial jurisdiction can also cause problems. Pursuant to the general rules, claims against legal entities should be filed with the court in the venue of which is located the registered seat of defendant.<sup>37</sup> Jurisdiction based on the location of a branch would usually be disregarded in competition law cases, unless they concern an isolated local behaviour.<sup>38</sup> However, claims for damages can be also filed with the court in the venue of which the harmful effect has occurred.<sup>39</sup> This permits limited forum shopping, unless countered by the defendant with an objection lodged within the timeframe allocated for initial response.<sup>40</sup>

#### IV. Substantive law issues

In accordance with Article 3 of the Directive, Bulgarian law confirms the right to obtain full compensation for harm caused by a competition infringement. The rule of Article 3(2) of the Directive concerning compensation for actual loss, loss of profits and payment of interests already

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<sup>36</sup> There are 28 provincial courts in Bulgaria, each with a venue (territorial jurisdiction) almost equivalent to the respective administrative province – 4,000 sq. km. on average. Further information is available at: [https://e-justice.europa.eu/content\\_judicial\\_systems\\_in\\_member\\_states-16-bg-en.do?member=1](https://e-justice.europa.eu/content_judicial_systems_in_member_states-16-bg-en.do?member=1) (15.03.2017).

<sup>37</sup> Art. 108(1) CCP.

<sup>38</sup> Ruling of 18.08.2014 of Shumen Provincial Court (*Окръжен съд – Шумен*) on commercial case no. 264/2014, confirmed by ruling no. 722 of 28.10.2014 of Varna Appellate Court on case no. 613/2014.

<sup>39</sup> Art. 115 CCP.

<sup>40</sup> Art. 119(3) CCP.

exists in Article 104 (2) PCA, supplemented by the general rules on tort – Article 45–54 of the Obligations and Contracts Act<sup>41</sup> ('OCA'). The BAPCA will not introduce changes in this respect.

## 1. Limitation periods

Article 10 of the Directive sets a minimum limitation period for damages claims of no less than five years running from the time the infringement has ceased and the claimant knows or should reasonably have known about the harm caused to them by the infringement and the identity of the infringer. Bulgarian law is already in line with this requirement, since the general limitation period applicable to claims in tort is 5 years running as of the discovery of the tortfeasor.<sup>42</sup> The BAPCA drafters decided to reproduce verbatim the rule of Article 10(2) in the PCA amendment in order to clarify that all the 3 elements (infringing behaviour, harm and infringer) must be established before the limitation period would commence.<sup>43</sup>

The Directive prescribes an identical limitation period to both stand-alone and follow-on actions. However, follow-on actions benefit from a suspension of the period of limitations for the duration of the public investigation plus one more year. The special status of follow-on litigation is also recognised under Bulgarian law. Pursuant to Article 104(4) PCA, currently the 5-years limitation period is counted as of the entry into force of the final administrative (or judicial) decision on the case. The BAPCA prolongs this suspension period by adding one more year.

The Directive furthermore advocates the introduction of special rules on limitation periods for claims against immunity recipients, which are 'reasonable and sufficient' to ensure indemnification of the injured parties. In Bulgaria, it was decided that the limitation period for claims against the immunity recipient should start running as of the moment it becomes apparent that full compensation cannot be obtained from the other infringers.<sup>44</sup> It is not clear how this rule will be applied. Considering that the problem with lack of a suitable recovery source can become 'apparent' only at the stage of award enforcement, which can be delayed by 3 instances of litigation, the liability of the immunity applicant is potentially suspended for decades.

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<sup>41</sup> Obligations and Contracts Act (*Закон за задълженията и договорите*), promulgated in State Gazette no. 275 of 22.11.1950, as subsequently amended and supplemented.

<sup>42</sup> Art. 114(3) OCA.

<sup>43</sup> BAPCA proposal for a new Art. 111(1) PCA.

<sup>44</sup> BAPCA proposal for a new Art. 111(3) PCA.

The Directive (Article 18(1)) also tries to encourage out-of-court settlements by prescribing the suspension of the limitations period for the duration of consensual dispute resolution. This rule is reproduced verbatim in the BAPCA.

## 2. Joint and several liability

The Directive advocates the joint and several liability of co-infringers as a solution to the problem of multiple defendants in cartel cases. Bulgarian law already contains such a principle enshrined in Article 53 OCA stating that where the damage was caused by several persons they would be jointly and severally liable. In the area of concerted anticompetitive behaviour, this means that each cartel member is potentially liable for the whole amount of the harm caused by all co-infringing undertakings to a particular claimant. In this respect, the BAPCA reproduces without substantial deviations the rules of Article 11 of the Directive.

Furthermore, traditionally Bulgarian law does not implement the theory of piercing the corporate veil and so parent companies would normally not be deemed liable for the actions of their subsidiaries, unless evidence of instructions to proceed in a specific manner is found.<sup>45</sup> On the plane of public enforcement, however, parent companies have been accused of illegal activities on the basis of the concept for a 'single economic unit'.<sup>46</sup> Pursuant to the general rule of Article 9 of the Directive (reproduced in the BAPCA proposal for a new Article 105(4) PCA), in case of a final and binding infringement decision that also covers the parent company, private claimants would be entitled to also direct their claims to all infringers. On the other hand, a claim directed towards a party that is not expressly listed among the cartel members in the decision of the NCA would be dismissed.<sup>47</sup> Furthermore, there is clear SCC guidance that founders cannot be deemed jointly liable with the company for infringements of competition law, unless they have contributed to the infringement in a personal capacity.<sup>48</sup>

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<sup>45</sup> Ar. 49 OCA.

<sup>46</sup> E.g. CPC ruling 1244 of 18.09.2014 joining Aurubis AG as party to the investigations against its Bulgarian subsidiary.

<sup>47</sup> Decision no. 100 of 18.04.2016 on commercial case no. 459/2015 of Varna Court of Appeals.

<sup>48</sup> Ruling no. 520 of 11.08.2009 on case no. 805/2008 of the SCC, Commercial Decision, 2<sup>nd</sup> Chamber.

### 3. Quantification of harm

The Directive clarifies that the right to full compensation covers actual loss and loss of profit, plus payment of interest from the time the harm has occurred until compensation is paid. This principle was already part of Bulgarian law and its restatement by the BAPCA would not add much value. The main innovation of the Directive is the presumption that cartel infringements cause harm.<sup>49</sup> This rule shifts the burden of proof in favour of claimants, which can be expected to ease the process of proving damages.

On the question of quantifying harm, the EC has noted that national legal rules should determine the appropriate standard of proof and the required degree of precision in showing the amount of harm suffered, as well as to assign the respective responsibilities of the parties to make factual submissions to the court.<sup>50</sup> The BAPCA does not intend to introduce changes in Bulgarian law in this respect. Neither the current PCA, nor the contemplated amendment provides specific definition for the concepts of 'harm' and 'damages', thus they are qualified under the general provisions of Bulgarian civil law. The OCA sets out the principle of compensation for any foreseeable damage, defining its two types: pecuniary and non-pecuniary. However, pursuant to established case law only a natural person may suffer non-pecuniary damage (e.g. pain and suffering), whereas legal entities may only claim compensation for a pecuniary damage.<sup>51</sup>

Pecuniary damage may take the form of loss incurred (*damnum emergens*) or loss of profits (*lucrum cessans*). Damage may be also direct or consequential. Consequential are all those damages that are not only caused by the illegal behaviour and its result, but also by other things or events, which are legally irrelevant.<sup>52</sup> The tortfeasor is not liable to indemnify damages that the aggrieved party could have avoided by acting diligently in accordance with the circumstances. In other words, consequential damages are primarily due to something else, and not so much to the illegal behaviour of the defendant.

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<sup>49</sup> Art. 17 (2) of the Directive, reflected in the BAPCA proposal for a new Art. 113(1) PCA.

<sup>50</sup> 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), para. 8.

<sup>51</sup> Ruling no. 267 of 20.05.2009 on commercial case no. 625/2008 of the SCC, Commercial Division, 2<sup>nd</sup> Chamber.

<sup>52</sup> Art. 83(2) OCA.

Under Bulgarian law, liability in tort, including under Article 104 PCA, is limited to direct damage only.<sup>53</sup> Still, the latter may also result in ‘loss of revenue or profits’, ‘loss of information’, ‘business interruptions’, etc., which may be recovered. All those forms of lost profit represent an unrealised increase in the property sphere of the injured party, and in order for the court to award indemnification, their expected occurrence – thwarted only by the illegal activities of defendant – should be unconditionally established with a high level of certainty.<sup>54</sup> For example, evidence that the infringing activity has prevented the conclusion or performance of contracts would be deemed a direct and immediate form of harm.<sup>55</sup> Lost profit from a decreasing client base can also represent direct and immediate harm, where in the normal course of business former clients of the claimant, currently using defendant’s services, would have preferred to contract again the services of the claimant.<sup>56</sup> On the other hand, inability to recover value from an investment cannot be automatically attributed to the infringing behaviour and is therefore not a direct harm within the meaning of Article 51 OCA.<sup>57</sup>

Quantifying harm from competition law infringements is a very fact-intensive process and may require the application of complex economic models, although in some situations it is a relatively straightforward exercise (Mouta Pereira, 2015). It requires comparison between the situation that has actually occurred on the market with a conjectural scenario in which no infringement is present. These estimations require special exercise and the accuracy of the calculations performed can never be fully conclusive.

As a remedy, the Directive requires the Member States to ensure that national courts have the power to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult to precisely quantify the harm suffered on the basis of the evidence available.<sup>58</sup> Bulgarian courts already have such powers: the CCP requires from the judges when the grounds of a claim are fully established, but there is no evidence on its amount, to use their own estimation or to take into account the valuation proposed by an expert.<sup>59</sup>

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<sup>53</sup> Art. 51 OCA.

<sup>54</sup> Decision no. 12 of 25.01.2016 on commercial case no. 142/2015 of Pleven Provincial Court.

<sup>55</sup> Decision no. 156 of 23.10.2015 on case no. 310/2015 of Varna Court of Appeals.

<sup>56</sup> Decision of 12.08.2013 on civil case no. 61792/2010 of Sofia District Court, Civil Division, 66 Chamber.

<sup>57</sup> Decision no. 644 of 3.12.2015 on case no.130/2015 of Plovdiv Provincial Court, Commercial Division, 16 Chamber.

<sup>58</sup> Art. 17(1) of the Directive.

<sup>59</sup> Art. 162 CCP.



However, this power cannot be utilised arbitrarily – the amount of the claim must be determined after the consideration of all admissible and relevant facts, and only where there are no other indications – then the amounts should be set by the court following its own evaluation.<sup>60</sup> Where the available evidence points to a specific manner of calculation of the amount (such as market benchmark, annuity formula, etc.) the court may not implement its own free estimation.<sup>61</sup> Moreover, even where judges are entitled to estimate the harm in accordance with their own understanding of justice, it is still recommended that they first formulate the task for an expert in a way that would allow them to consider the relevant facts to the fullest degree.<sup>62</sup> The SCC has advised that an expert evaluation may be appointed not only upon a request of one of the litigating parties but also *ex officio* by the court, and that this would not violate the adversarial nature of the proceedings.<sup>63</sup>

It should be noted that experts in civil cases in Bulgaria are always appointed by the court – even though the request for evaluation in most cases comes from one of the litigating parties. The selection is usually made from a list of designated experts. It is possible to nominate a person from outside the list, though the practice is rare since judges usually prefer to entrust the task to people they are used working with. Unfortunately, this approach does not guarantee that the analysis will be prepared by a person with adequate expertise. In this respect the availability of the Practical Guide on quantifying harm<sup>64</sup> should be extremely useful for claimants. On the one hand, it would provide assistance to litigants and judges when formulating the scope of the expert analysis and on the other, it would play an instructive role for the experts, restraining the utilization of unconfirmed and problematic economic methods and techniques.

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<sup>60</sup> Decision no. 64 of 4.04.2011 on case no. 1748/2009 and decision no. 164 of 20.05.2014 on case no. 7672/2013, both rendered by SCC, Civil Division, 4<sup>th</sup> Chamber.

<sup>61</sup> Decision no. 75 of 5.04.2016 on case no. 4880/2015 of the SCC, Civil Division, 3<sup>rd</sup> Chamber.

<sup>62</sup> Decision no. 215 of 22.02.2010 on case no. 805/2008 of the SCC, Commercial Division, 2<sup>nd</sup> Chamber.

<sup>63</sup> Interpretative decision no. 1 of 4.10.2001 on case no. 1/2000 of the General Meeting of the Civil Division of the SCC, item 10.

<sup>64</sup> 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 (C(2013) 3440).

#### 4. Passing-on of overcharges

Three distinct elements contribute to the magnitude of the harm caused by an infringement of competition law (Durand et al, 2016). First, the increase in costs that the claimant may have suffered – the ‘overcharge’. Second, the claimant may have responded to this overcharge by adjusting its own prices upwards, thereby at least partially offsetting the adverse effect on its profit margins. This is the ‘passing-on effect’, which reduces the harm suffered by the claimant. Third, to the extent that a claimant suffers a loss of sales volumes as a consequence of pass-on, it will lose the profit margins associated with those sales, which comprises the ‘volume effect’.

One of the main areas of the reform intended by the Directive is the standing of direct and indirect purchasers. As noted in Section 2 above, Bulgarian law already recognised a broad right of claim that theoretically extends also to indirect purchasers. However, there are no records of civil cases initiated in Bulgaria where the claim was filed by the end-customers or another party, which is not a competitor or direct contractual partner of the infringer. The BAPCA reproduces almost verbatim all relevant provisions of the Directive,<sup>65</sup> but the question is whether this will make an actual difference.

The Directive takes into account that indirect purchasers will find it difficult to obtain sufficient evidence for their claims. The rebuttable presumption under Article 14(2) that harm was passed on down the supply chain will certainly help indirect purchasers show that they are qualified to bring a claim. However, the new rules do not alleviate their burden to show exactly how much of the overcharge was passed on to them and that is a complicated task. It is not possible to establish a typical pass-on rate that would apply in most situations, and a careful examination of all the characteristics of the market in question will be necessary.<sup>66</sup>

The Directive recognises the risk that claims by both direct and indirect purchasers may lead to overcompensation. The intended solution is the ‘passing-on defence’, by which a defendant can counter a claim by arguing that the claimant passed on the whole or part of the overcharge resulting from the infringement.<sup>67</sup> While this issue was never discussed by the Bulgarian courts so far, pursuant to general rules of procedure it is always incumbent upon the claimant to show that the infringing behaviour

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<sup>65</sup> Art. 13 and 14 correspond to the BAPCA proposal for new Art. 108 and 109 PCA.

<sup>66</sup> Practical Guide, *supra* note 64, para. 168.

<sup>67</sup> Art. 13 of the Directive.

has caused them harm. Therefore, this rule is primarily important as a defence against the new presumption that a cartel always inflicts damages. In order to overcome the defence, the claimant would need to rely on the discovery and disclosure techniques also ensuing from the Directive, and the overall success of the interaction between all of the new rules is difficult to predict. As noted by Peyer (2016), it is highly likely that the passing-on defence will have a negative effect on the incentives of direct purchasers to bring legal actions, since it actually increases their burden of proof (Peyer, 2016, p. 107).

## V. Procedural issues

A number of the new provisions that will be transposed into Bulgarian law in lieu of the Directive are procedural in nature. Nevertheless, the BAPCA does not propose amendments in the CCP or any other Bulgarian piece of legislation besides the PCA. Undoubtedly, the intention was to keep all new rules in one act, but this cannot change the fact that upon their entry into force the civil procedure for claims for damages from competition law infringements will be substantially affected.

Pursuant to paragraph 4 of the BAPCA, all litigation proceedings pending as of the date of entry into force of the PCA amendments should be completed in accordance with former rules of procedure. Arguably, this ambiguous transitory rule should affect only those new elements introduced by the Directive that constitute changes in the procedural flow and burden of proof (e.g. the presumptions discussed in the preceding sections). All substantive elements introduced by the Directive (such as the guidance on the quantification of harm and joint and several liability) should become immediately applicable.

### 1. Standing

The Directive (Article 12(1)) grants both direct and indirect purchasers the right to sue for damages. Transposition of this rule would not change significantly the substance of Bulgarian law, since even now pursuant to the Article 104 PCA damages can be sought by any person who has suffered harm from an infringement, even where it was not directed against them. In theory, it has been long recognised that PCA infringements can cause harm not only to the parties involved in the CPC proceedings, but

also to external parties – e.g. competitors of the infringers, but also their contractual partners, clients and even end-customers (Nikolov et al, 2009, p. 484). Unfortunately, Bulgarian judges are not entirely supportive of this position. There is conflicting case law where the courts have refused to recognise standing in relation to alleged damages from competition law infringements, arguing that the claimants (natural persons) were not parties to the main CPC proceedings or the subsequent SAC judicial review and were not directly affected by the infringement.<sup>68</sup> Therefore, the express rules introduced by the BAPCA would certainly improve the position of indirect victims, at least as far as damages from antitrust violations are concerned.

The question of standing should be analysed in conjunction with the issue of admissibility of stand-alone claims. As noted above, for the moment they are completely barred, at least where the alleged cause is an antitrust violation. The obligation for a prior CPC infringement decision limits the circle of passively legitimated parties – i.e. only an undertaking which was included in the public enforcement proceedings could be considered a tortfeasor, and only those that have dealt with it (directly or indirectly) could commence litigation for damages.<sup>69</sup> Therefore, until the problem with recognition of stand-alone claims is resolved the circle of parties with standing (both active and passive) in damages cases would remain unjustly restricted.

## 2. Disclosure of evidence

The Directive sets out minimum standards for the disclosure of evidence, allowing Member States to introduce rules ‘which would lead to wider disclosure’.<sup>70</sup> 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,

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<sup>68</sup> Decision no 215 of 22.02.2010 on case no. 805/2008 of the SCC, Commercial Division, 2<sup>nd</sup> Chamber.

<sup>69</sup> For example, the objection of a borrower for undue interest based on the EC decision in the Euro Interest Rate Derivatives Cartel (Case AT.39914) was dismissed with the argument that the lender was not among the parties fined by the EC (Decision no. 100 of 18.04.2016 on commercial case no. 459/2015 of Varna Court of Appeals).

<sup>70</sup> Art. 5(8) of the Directive.

the scope and cost of disclosure, and whether the evidence that is to be disclosed contains confidential information.<sup>71</sup>

Similar rules of disclosure already exist under Bulgarian law (Article 161, 176(3), 190 and 191 CCP), permitting a claimant to request that the court orders the defendant or a third party to produce specific evidence. Refusal to comply is sanctioned with fines for contempt of authority in the amount of up to BGN 1200 (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 by 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.

Furthermore, where a party resists a disclosure order the judge is empowered to draw prejudicial consequences against it.<sup>72</sup> 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. In damages litigation, especially in the follow-on scenario, the most important issue is usually the causal link and quantification of harm, and for clarifying such issues the sanction of Article 161 CCP is not that useful.

The Directive incorporates the recent jurisprudence of the CJEU, allowing claimants to specify requested ‘categories’ of documents to facilitate the disclosure procedure.<sup>73</sup> This would bring a substantial improvement to the 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.<sup>74</sup> The BAPCA rules do not go any further than the Directive and with respect to the disclosure of documents collected in the files of the 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.<sup>75</sup>

The Directive requires national courts to have ‘effective measures’ at their disposal to protect confidential information that is disclosed. The

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<sup>71</sup> Art. 5(3) of the Directive.

<sup>72</sup> Art. 161 CCP.

<sup>73</sup> Case C-536/11 *Bundeswettbewerbshörde 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.

<sup>74</sup> Ruling no. 520 of 28.09.2015 on case no. 2048/2015 of the SCC, Commercial Division, 2<sup>nd</sup> Chamber.

<sup>75</sup> BAPCA proposal for a new Art. 118 PCA.

BAPCA transposition confirms this obligation to protect confidential information, but in reality such measures do not yet exist in Bulgaria. To date 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 redaction of sensitive documents, hearings held behind closed doors, restrictions on the circle of persons allowed to see specific evidence ('confidentiality rings'), etc.

### 3. Effect of national decisions

Article 9 of the Directive aims to assist litigating parties by making the final decisions of the NCAs<sup>76</sup> 'binding' in follow-on civil action proceedings in the respective jurisdiction. The imperative wording of the first paragraph implies that the courts should not re-examine a final infringement decision even where it was not appealed or the appeal was withdrawn, thus the legality of the administrative measure was never subject to judicial scrutiny. However, depending on the specific composition and status of the NCA, the rule of Article 9 may come into collision with two basic principles of the rule of law – separation of powers and judicial independence.

In most EU Member States, Bulgaria included, the NCAs are administrative agencies, part of the executive branch. Their decisions are acts of executive power, which are subject to judicial oversight. Concerns were raised in several jurisdictions around the EU that denying the possibility for judicial review would contravene basic principles of constitutional law (Merola and Armati, 2016, p. 89). There are also others who argue that courts do not have a monopoly on the interpretation of the law and executive authorities in EU competition enforcement have adjudicative functions (Wright, 2016). This second position is based on the CJEU ruling in the *Masterfood* case,<sup>77</sup> which confirmed the binding effect of EC decisions under Article 16(1) Regulation 1/2003. In response, it has been argued that Article 16 only imposes a 'negative duty of abstention' on national courts, which retain the possibility to have recourse to a reference for a preliminary ruling on validity under Article 267 TFEU and are, therefore, 'positively' bound only by decisions of the EU courts (Komninos, 2007, p. 1393).

<sup>76</sup> By virtue of Art. 9(2) of the Directive, there is no obligation to ensure binding authority of decisions adopted by NCAs in other jurisdictions.

<sup>77</sup> C-344/98, *Masterfoods Ltd v HB Ice Cream Ltd*, ECLI:EU:C:2000:689, at para. 60.

The Bulgarian Constitutional Court already had a chance to review this problem in 1998 in relation to the provision on liability for damages of the preceding PCA enactment.<sup>78</sup> The original version of Article 36 PCA 1998 contained a second paragraph stating generally that an infringement decision of the CPC shall be mandatory for the civil courts. The legality of this provision was challenged and the Constitutional Court held that the statutory text contradicts with Article 4 (rule of law), Article 8 (separation of powers), and Article 117, Sec. 2 (judicial independence) of the Bulgarian Constitution.

The Constitutional Court noted that in a rule of law state, only the courts are entitled to resolve a legal dispute in a final matter. Therefore, where a CPC decision was appealed before and confirmed by the SAC, it would be binding on any other court in Bulgaria, because its legality was verified and attested by judicial review. In fact, it is the SAC decision that has binding effect on other courts. However, if the CPC decision was not appealed it should be susceptible to challenge and the civil courts would be entitled and obliged to exercise indirect control on its substantive legality.<sup>79</sup> This position was confirmed again in a case from 2008 where the Constitutional Court expressly noted that the courts should always have the last and decisive word with respect to the observance of the rights and legitimate interests of natural persons and legal entities and the resolution of legal disputes.<sup>80</sup>

This position was taken into account by the legislator when the PCA 2008 was designed. The current provision on indemnification (Article 104 PCA) states that a SAC decision which has entered into force, and which upholds a CPC infringement decision, shall be binding upon the civil courts. The provision contains a second ambiguous sentence stating that a CPC decision, which has not been appealed or the appeal against it has been withdrawn, shall also have binding force upon the civil courts. Considering the decisions of the Constitutional Court, the conformity of this second provision with constitutional law is debatable. Moreover, the courts seem to disregard it completely and continue to re-examine CPC decisions, arguing

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<sup>78</sup> Decision of the Constitutional Court (*Конституционен съд*) no. 22 of 24.09.1998 on case no. 18/1998.

<sup>79</sup> Pursuant to Art. 17 CCP, the court adjudicating a civil dispute must rule on all questions relevant to the subject matter of the case, with the exception of the question as to whether a criminal offence has been committed. The court is entitled and obliged, in particular, to adopt an incidental ruling on the validity of any administrative act, even where that acts is not subject to judicial review.

<sup>80</sup> Decision of the Constitutional Court no. 6 of 11.11.2008 on case no. 5/2008.

that where the administrative decision was not appealed and the result of the litigation depends on it, each party may challenge its legality and the court would be obliged to comply.<sup>81</sup> Some judges even argue that while the SAC appeal is still pending, the civil court would not be obliged to follow the CPC reasoning and would be entitled to review all facts of the case.<sup>82</sup>

The BAPCA drafters were obviously reluctant to revive the old dispute and the transposition of Article 9 of the Directive is effected by the literal restatement of the currently existing rules.<sup>83</sup> However, this approach neglects the subtleties of the provisions of the Directive. The latter not only limits any binding effects to decisions adopted by the NCA of the same Member State, but also clearly departs from the wording of the original proposal, which was modelled on Article 16(1) of Regulation 1/2003 and prevented court decisions from ‘running counter’ to NCA decisions (Merola and Armati, 2016, p. 97). Article 9(1) of the Directive thus only accords binding effect to the ‘positive’ finding of an infringement, with the national courts remaining free to re-examine the lawfulness of a conduct in the residual ‘negative’ cases, where the NCA has ruled that it is compatible with competition law. This distinction is completely neglected in the second sentence of the PCA provision, which attempts to prevent re-examination of all non-appealed CPC decisions irrespective of the nature of the ruling.

The exact scope of the actual ‘finding of an infringement’ that supposedly has binding effect on the courts is also controversial. Usually it is argued that the ‘binding effect’ means that the defendant may not challenge the infringement finding, and the court should only establish the presence, type and amount of harm and award damages. However, this is not entirely true. Pursuant to Article 302 CCP, a decision of an administrative court, which has entered into force, is binding upon the civil court with respect to the conclusion whether the administrative act subject to review is valid and in conformity with the law. Thus, the civil court seized with a claim for damages would not be allowed to analyse the substantive legality of

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<sup>81</sup> E.g. Decision of 12.08.2013 on civil case no. 61792/2010 of Sofia District Court, Civil Division, 66<sup>th</sup> Chamber, and Decision no. 12 of 25.01.2016 on commercial case no. 142/2015 of Pleven Provincial Court, Commercial Division, 1<sup>st</sup> Chamber.

<sup>82</sup> Decision no. 8587 of 19.12.2013 on civil case no. 11808/2011 of the Sofia City Court. The case concerned a claim for damages from unfair competition filed simultaneously with a complaint to the CPC. The administrative procedure ended before the civil action with the CPC decision no. 262/2012, which found that no violation was committed. This decision was confirmed on appeal by decision no. 354 of 13.01.2015 on case no. 6073/2012 of the SAC, 4<sup>th</sup> Chamber. The civil litigation ended before the administrative appeal procedure.

<sup>83</sup> The provision of the old Art. 104(4) PCA is restated as a new Art. 105(4).



a CPC infringement decision, which was confirmed by the SAC. The substantive legality of an administrative act comprises its conformity with the requirements, imposed by relevant regulations with respect to the subject matter of the administrative proceedings – i.e. the determination about the nature of the infringement and its material, personal, temporal and territorial scope.<sup>84</sup> This is the scope of findings that the civil court would not be allowed to re-examine.<sup>85</sup> Similarly, where the CPC infringement decision was overruled by the SAC, the civil court would refuse to find a violation and dismiss the damages claim.<sup>86</sup> Furthermore, the ‘binding effect’ is restricted *in personam* to the litigating parties that were also parties in the administrative and/or appeal procedure.<sup>87</sup> Only a court decision which annuls an administrative act has *erga omnes* effect.<sup>88</sup>

However, the restriction would only apply where the substantive scope of the damages claim coincide with the CPC/SAC finding – i.e. where the case is completely identical.<sup>89</sup> Using guidance from CJEU case law it can be deemed that the legal and factual context is ‘completely identical’ where a conflict may arise between the grounds and the operative part of the CPC/SAC decision and the decision of the civil court.<sup>90</sup> This would require concurrence in relation to the 5 basic elements – the nature of the infringement, as well as its material, personal, temporal and territorial scope. In all other situations, where the conduct or the parties are different, the administrative findings would have merely the status of admissible evidence which, although

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<sup>84</sup> Decision no. 171 of 11.02.2013 of the SCC, Commercial Division, 2<sup>nd</sup> Chamber, on case no. 64/2012.

<sup>85</sup> Decision no. 15 of 25.03.2011 on commercial case no. 35/2009 of Razgrad Provincial Court, confirmed on appeal by decision no. 230 of 27.10.2011 on case no. 367/2011 of Varna Court of Appeals.

<sup>86</sup> *Idem in dicta*. The research on publicly available decisions as of the date of this paper did not discover cases where the claimant tried to sue for damages despite a negative CPC decision confirmed on SAC appeal. This can be regarded as a confirmation that the aggrieved parties perceived their chances of litigation success as minimal, considering the higher evidentiary burden in civil litigation in comparison with the administrative route.

<sup>87</sup> Art. 17(2) CCP.

<sup>88</sup> Art. 177(1), second hypothesis, of the Code on Administrative Procedure (*Административнопроцесуален кодекс*), promulgated in State Gazette no. 30 of 11.04.2006, as subsequently amended and supplemented.

<sup>89</sup> Decision no. 1202 of 3.07.2013 on commercial case no. 973/2010 of the Sofia City Court, Commercial Division, 16<sup>th</sup> Chamber.

<sup>90</sup> Opinion of AG Cosmas in case C-344/98, *Masterfoods Ltd v HB Ice Cream Ltd*, ECLI:EU:C:2000:249, para. 16.

persuasive, could be challenged by the defendant who did not take part in the public enforcement proceedings and would otherwise be denied a fair trial.

For the sake of completeness, it should be noted that the BAPCA drafters decided to disregard the option under Article 9(2) of the Directive. Therefore, even when the proposed amendments enter into force no special authority will be accorded to the decisions of NCAs of other Members States presented before the Bulgarian courts.

#### 4. Collective redress

The Directive does not require from the Member States to introduce class actions or other methods of collective redress. This topic was considered separately as part of the Initiative on Collective Redress, where the EC issued recommendations on common principles.<sup>91</sup> The EC recommended that Member States adopt procedures for opt-in class action, but this is not a binding legal measure. It is furthermore recommended that standing is given to representative organisations that should be qualified in advance and punitive damages should be prohibited.<sup>92</sup>

In Bulgaria, rules on class action are regulated by the CCP<sup>93</sup> and the BAPCA does not propose any changes to the existing model. The class action system is based on the opt-in principle.<sup>94</sup> Claims for protection of collective interests can pursue discontinuation of an infringement, rectification of its adverse consequences or indemnification.<sup>95</sup> Provincial courts are competent to review class action cases in first instance<sup>96</sup> and territorial competence is determined in accordance with the ordinary rules of procedure.

A class action lawsuit may be initiated by one or several persons having suffered direct harm from an illegal conduct or by an organization representing the entire harmed class.<sup>97</sup> The formal claimants have the capacity

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<sup>91</sup> Commission Recommendation of 11.06.2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), para. 21.

<sup>92</sup> 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).

<sup>93</sup> Chapter XXXIII.

<sup>94</sup> Art. 383 CCP.

<sup>95</sup> Ruling no. 184 of 30.03.2009 on case no. 164/2009 of the SCC, Commercial Division, 2<sup>nd</sup> Chamber.

<sup>96</sup> Art. 380(1) CCP.

<sup>97</sup> Art. 379(2) CCP.

of procedural substitutes for all class members, but their representative authority is limited to those affected parties who were expressly admitted to the class.<sup>98</sup> The CCP requires that the statement of claim specify the criteria which objectively define the affected collective interest, as this determines active standing, as well as the circle of persons affected by the infringement whose right of claim is exercised by the substitutes. In addition, the claimants must propose a mode for publicising the class action initiation, which is subject to confirmation by the court.<sup>99</sup>

Class action had a difficult start in Bulgaria, partly because of the higher hurdles for admissibility of class claims, constitution and representation of a 'class', but also because of the high initial funding requirements. There are no special exemptions for class actions, thus the 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. Ensuring publicity can lead to additional expenses, which can be quite substantial – courts normally require dozens of TV and radio spots as well as publications in major national printed media, and non-compliance would bar the development of the case.<sup>100</sup> Considering that in competition law infringement cases the aggregate value claimed for the entire class is usually very high, this creates substantial, if not insurmountable, barriers for litigation. Moreover, due to the lack of clarity on the actual number of harmed parties, it is often impossible to calculate precisely the claim value, which results in prolonged deliberation on preliminary issues. For all those reasons, although the class action is a possible instrument for B2B relations, according to publicly available information it is so far used primarily in a B2C setting.<sup>101</sup>

Economic analysis of the available incentives indicates that Bulgarian claimants are unlikely to initiate or join a class action for one simple reason – they have nothing to gain by doing so (Markova, 2015). The Directive does not deal with claim funding arrangements, the costs of initiating the civil action or the additional costs associated with maintaining the proceedings and proving damages. If more compensation is desired, just implementing the Directive is unlikely to incentivise more victims to seek redress from

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<sup>98</sup> Ruling no. 603 of 20.10.2011 on case no. 298/2011 of the SCC, Commercial Division, 2<sup>nd</sup> Chamber.

<sup>99</sup> Art. 383 CCP.

<sup>100</sup> Ruling no. 334 of 30.06.2015 on case no. 859/2015 of the SCC, Civil Division, 1<sup>st</sup> Chamber.

<sup>101</sup> Published decisions on class action cases indicate that almost all of them are initiated by the Commission on Consumer Protection (public authority) or representative consumer organizations with the aim to obtain an injunction for the discontinuation of alleged unfair commercial practices. There is no record of successful class actions for damages.

competition law infringers (Peyer, 2016, p. 112). In order to boost the allure and effectiveness of private enforcement the legislators must go beyond the narrow scope of the Directive. Unfortunately, the BAPCA remains within the same confinement as the Directive and does not offer a solution for the problems with class actions in Bulgaria.

## VI. Consensual dispute resolution in antitrust enforcement

The Directive does not regulate in detail consensual dispute resolution and only establishes the main principles that govern the effect of settlements on subsequent actions for damages. It also obliges Member States to ensure suspension of the limitation period during consensual dispute resolution procedures. The BAPCA does not go further than what is required and only restates the basic rules of the Directive. Notably, the provisions on disclosure are not expressly extended to consensual dispute resolution.

Bulgarian law already provides for the suspension of the civil action where the parties attempt consensual dispute resolution.<sup>102</sup> In fact, the court is obliged to direct the parties to consensual dispute resolution at the end of the first hearing and before issuing its report on the case, as well as once again at the end of the evidence collection phase.<sup>103</sup> There are also additional financial incentives, since in the event of completion of the case with a settlement, half of the state fee is refunded to the claimant.<sup>104</sup> The litigation expenses remain for the respective parties, unless otherwise agreed in the settlement.

There is no public data on the frequency of dispute resolution with respect to alleged competition restraints or unfair completion with the help of mediation or arbitral institutions. There is no mandatory ADR system before accessing the judicial system and arbitration and mediation can only be applied subject to an agreement between the parties. For procedural reasons, and the management of evidentiary burden, civil litigation is rarely used. Therefore, assuming that ADR solutions are even less common, it seems that with respect to competition law infringements this is the least often used dispute resolution avenue in Bulgaria.

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<sup>102</sup> Art. 229, (1), para. 1 CCP.

<sup>103</sup> Art. 145(3), Art. 149(1) and Art. 384(1) CCP.

<sup>104</sup> Art. 78(9) CCP.

## VII. Summary

The Directive was clearly not intended as a complete solution for all problems in the litigation of disputes involving competition law elements. Evidence from the discussion in the preparatory stages, as well as the final text of the Directive, indicate that the main concern of the EC was to find some form of balance between public and private enforcement in antitrust cases, ensuring the confidentiality of its case files and preventing in the process the collapse of the leniency system. While optimization of the interaction between public and private enforcement may have been achieved, the effect on the position of private litigants cannot be defined in simple terms, at least as far as Bulgaria is concerned.

The transposition of the Directive will improve the position of independent claimants by providing better tools for the discovery of evidence, especially now that the authority of the court will be backed by the power to impose sizable fines. At the same time, the expected effect on collective redress is minimal, since some of the pressing issues in antitrust class actions have not been addressed, namely cost rules and claim aggregation (Peyer, 2016, p. 95). The overall effect of the new rules on burden of proof is also ambiguous. On the one hand, the presumption that the overcharge was passed-on down the supply chain will create more incentives for indirect purchasers to initiate civil actions, but on the other – it will reduce the chances of direct purchasers. The positive effect of the presumption that a cartel always inflicts damages will be mitigated by the passing-on defence.

A weak point of the BAPCA is the decision to restrict the scope of the application of the new rules to damages litigation concerning antitrust infringements only, which is a major departure from the national legislative tradition in the area of competition law.<sup>105</sup> The introduction of double standards with respect to different types of infringements would make private enforcement of competition law in Bulgaria even more difficult for both injured parties and judges.

Hopefully, the transposition will overcome the existing reluctance of the Bulgarian courts to handle antitrust disputes. As the primary obstacle before private enforcement in Bulgaria seems to be rooted in the lack of experience among civil judges, the introduction of specific procedural

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<sup>105</sup> The PCA introduces a uniform sanction regime for all types of violations falling within its regulatory scope – antitrust infringements, abuse of dominant position or unfair competition torts. Pursuant to Art. 100–103 PCA, fines for commercial companies and other legal entities may reach up to 10% of their annual turnover in Bulgaria, whereas fines for individuals are in the range of BGN 500–50,000 (approx. EUR 256–25,565).

rules, supplemented by detailed practical guides (helpfully translated by the EC into Bulgarian), should prove that the competition law topics are not exceedingly complex and are not the exclusive domain of the CPC and the SAC. More training in competition law issues and the introduction of more possibilities for civil judges to interact and exchange experiences at the national and international level would help achievement of an adequate quality of decision-making.

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## I. Manner of implementing the Directive

In Croatia, the Antitrust Damages Directive is about to be implemented via a special new *Act on actions for damages arising out of antitrust infringements* (hereinafter, draft Act on antitrust damages). Alternative implementing options, such as the full integration of the Directive into the Competition Act<sup>1</sup> (hereinafter, CA), or the combined integration of the Directive into the Civil Procedure Act<sup>2</sup> (hereinafter, CPA) and the Obligations Act<sup>3</sup> (hereinafter, OA) was never seriously contemplated. The predominant view was that, in the light of the novelties to be introduced, a special act devoted to this particular subject matter would serve best the achievement of legal clarity, certainty and transparency.

The entity responsible for drafting the Act on antitrust damages is the Ministry of Economy, Entrepreneurship and Crafts who authorized the Croatian Competition Agency (hereinafter, CCA) to establish and coordinate a working group for drafting the new Act. Currently, the draft Act on antitrust damages is being finalized, following a public consultation and the suggestions received from the EU Commission, and will soon be discussed in Parliament under the regular legislative procedure. Although the expedient legislative procedure would fast track the enactment of the

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<sup>1</sup> Official Gazette – Narodne novine 79/09, 80/13.

<sup>2</sup> 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.

<sup>3</sup> Official Gazette – Narodne novine 35/05, 41/08, 125/11, 78/15.



Act, the implementation of which was due already in December 2016, opting for a regular legislative procedure will enable the legislator to fine-tune the complex and novel legal rules on antitrust damages. This decision, however, comes at the expense of risking the commencement of an infringement procedure against Croatia before the EU Court on the ground of Article 258 TFEU.<sup>4</sup>

Although the draft Act on antitrust damages for the first time elaborates in detail the legal framework for antitrust damages actions, it is worth mentioning these procedures were explicitly recognised already in the 2013 CA. In fact, Article 69.a CA provides that undertakings who have infringed national or EU competition rules (Article 101 and 102 TFEU) are liable for compensation of damages thereby induced.<sup>5</sup> Most procedural and substantive aspects of these procedures were left out of the CA (to be regulated by general tort and civil procedure rules contained respectively in the OA and CPA) albeit some important aspects of antitrust damages cases were addressed. The CA touched upon the role of infringement decisions in follow on cases; the suspension of proceedings, interruption of limitation periods; and the obligations of the commercial courts to inform the Croatian Competition Agency of any initiated antitrust damages cases.<sup>6</sup> Since some

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<sup>4</sup> The European Commission has already sent out an official warning to 21 out of the 28 Member States for failing to transpose the Directive in due time including: Latvia, Spain, Estonia, the UK, Belgium, Czech Republic, Slovenia, Cyprus, Malta, Italy, Romania, Poland, Germany, France, Bulgaria, the Netherlands, Austria, Greece, Portugal, Ireland and Croatia. See Crofts, 2017.

<sup>5</sup> Article 69.a(2) CA.

<sup>6</sup> Article 69.a CA:

- (1) The competent commercial courts shall decide on the claims for damages based on the infringements of this Act or Article 101 or 102 of the TFEU.
- (2) The undertakings who have infringed the provisions of this Act or Article 101 or 102 of the TFEU shall be responsible for the compensation for damages resulting from the infringements concerned.
- (3) When deciding on the compensation for damages referred to in paragraph (1) of this Article the competent commercial court shall particularly take into account the legally valid decision of the Agency on the basis of which an infringement of this Act or Article 101 or 102 of the TFEU has been established or the final decision of the European Commission in the case where the European Commission established the infringement of Article 101 or 102 of the TFEU. This is without prejudice to the rights and obligations under Article 267 of the TFEU.
- (4) Where case relating to the establishment of the infringement of Article 101 or 102 of the TFEU is being dealt by the Agency or the European Commission, the competent commercial court may assess whether it is necessary to stay in its proceedings or to suspend the proceedings until the legally valid decision of the Agency or the final decision of the European Commission is made.

of the solutions envisaged by the CA do not conform to the Directive, and consequently the draft Act on antitrust damages, following the entry into force of the draft Act, the CA will have to undergo a legislative change to conform to the new rules.

Generally, the draft Act on antitrust damages follows the normative structure of the Directive and for the most part, it faithfully takes over its solutions (and pitfalls). It consists of 20 articles and, just like the Directive on antitrust damages, it establishes the right to full compensation of damages resulting from antitrust infringements; it regulates the disclosure of evidence in general; the disclosure of evidence contained in the file of the competition authority; limits to such disclosure; penalties for non-compliance; effects of national decisions; limitation periods; suspension of procedure; joint and several liability; passing-on of overcharges; passing-on defence; actions for damages by claimants from a different level of the supply chain; and finally, quantification of damages and consensual dispute resolution. The draft Act on antitrust damages is a *lex specialis* in relation to the general provisions of the CPA and OA. Therefore, any issue not regulated by the draft Act on antitrust damages remains to be regulated by the general rules of civil procedure and civil law.<sup>7</sup> It is impossible to give a detailed critical analysis of the entire draft Act on antitrust damages in a single paper. For that reason, the author will present the most interesting parts of the transposition, mostly those that relate to the measures envisaged for the efficient application of the rules on antitrust actions.

## II. Scope of the implementation

Irrespective of the legislative possibility to regulate by a single legislative act all legal measures of private relief in cases involving antitrust infringements, the Croatian draft Act on antitrust damages, just as the

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(5) The competent commercial court shall without delay inform the Agency of any claim filed regarding the right to seek compensation for damages resulting from the infringement of the provisions of this Act or Article 101 or 102 of the TFEU.

(6) The limitation period for damages claims filed regarding the right to seek compensation for damages referred to in paragraph (1) of this Article shall be suspended from the day on which the proceeding was initiated by the Agency or by the European Commission until the day on which the relevant proceedings have been closed. English version of the Ca is available for download at [http://www.aztn.hr/uploads/documents/eng/documents/legislation/THE\\_ACT\\_ON\\_THE\\_AMENDMENTS\\_TO\\_COMPETITION\\_ACT.pdf](http://www.aztn.hr/uploads/documents/eng/documents/legislation/THE_ACT_ON_THE_AMENDMENTS_TO_COMPETITION_ACT.pdf) (20.04.2017).

<sup>7</sup> Art. 4 of the draft Act on antitrust damages.

very name suggests, relates exclusively to antitrust damages actions, leaving other remedies pertinent to private antitrust enforcement outside its scope. Besides action for damages, the Croatian legal order recognises actions aimed at declaratory and injunctive relief that are subject to general rules of civil procedure considered to be adjustable to the specific needs of cases involving antitrust infringements (for a detailed overview on these types of remedies see Butorac Malnar, Pecotić Kaufman, Petrović, 2013). Although the Directive does not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU,<sup>8</sup> in cases where national law recognises this opportunity it would be logical to incorporate such actions in the national legislation dealing with private antitrust enforcement. In Croatia however, the protection of collective rights is left out of the scope of the draft Act as the Croatian legal order does not even recognise the right to collective compensatory relief.<sup>9</sup> This is however a separate issue, going beyond the scope of the draft Act on antitrust damages and the Directive itself, and most certainly an issue undermining the efficiency of antitrust damages that will have to be addressed soon by the Croatian legislator.

The draft Act on antitrust damages as defined in Article 1 covers claims for damages incurred as a result of an infringement of competition law,

<sup>8</sup> Recital 13 of the Directive.

<sup>9</sup> 'Generally speaking, in Croatia the only available mechanism is the collective injunctive relief regulated by the general rules of the CPA and Consumer Act as *lex specialis* that currently leaves out the possibility of collective injunctive claims in cases of the infringement of competition rules. The CPA, as *lex generalis*, provides an action for the protection of collective interests and rights. However, only those organisations engaged in the protection of collective interests and rights of citizens which have been explicitly authorised by the law (e.g. Consumer Protection Act) can file a lawsuit. The plaintiff may request the court: (i) to find that legally protected collective interests and rights of persons, whose interests the plaintiff was authorised to protect, were harmed or jeopardized by the defendant; (ii) to prohibit such actions; (iii) to order the defendant to eliminate the harmful consequences of its actions and; (iv) to pay for the publishing of the ruling in the media. In essence, that covers the collective injunctive redress. The plaintiff is not authorized to request compensation – only legal persons and individuals who were injured by the illegal conduct of the defendant may request compensation in separate legal actions and the judgment in collectives injunctive redress serves as the legal basis with binding effect. Thus, the collective compensatory redress is not available. Similarly, Consumer Protection Act provides for injunctive collective redress; however, CA is not mentioned among the legal provisions which are enumerated as the basis for establishing the illegal conduct of undertakings. At the same time, the CA does not explicitly authorize any organization for filing a collective suit. Consequently, in summary, mechanisms of collective redress are not available (neither compensatory nor injunctive) for antitrust claims'. Butorac Malnar, Mataija, Petrović, 2016.

the latter being defined as the infringement of rules establishing prohibited agreements, the abuse of dominance and Articles 101 and 102 TFEU. Consequently, the draft Act on antitrust damages is narrow in scope. It leaves out actions for damages resulting from anticompetitive concentrations of undertakings, the latter being the only remaining competition law institute regulated by the CA and falling under the competence of the CCA's public enforcement of competition law. Although part of a wider competition policy, other infringements such as the violation of state aid rules, or unfair commercial practices are not embedded in the legislative structure of CCA nor the competence of the CA (they fall under a separate regulatory framework subject to specialized procedural and substantive rules)<sup>10</sup>. Given the narrow approach to the implementation of the Directive on antitrust damages, they fall outside the scope of the new implementing Act on antitrust damages as well.

The Directive on antitrust damages relates only to actions for damages resulting from the infringement of Article 101 and 102 TFEU or the combined infringement of national and EU antitrust rules (i.e. cases affecting trade between Member States).<sup>11</sup> In other words, it leaves to the Member States the possibility to introduce separate rules regulating actions for damages in a completely domestic context. This freedom given by the Directive is a reflection of the EU principle of conferral, which bars the European legislator from regulating purely domestic legal relationships. However, the freedom of Member States to introduce a separate set of rules for the same types of claims arising out of substantially the same types of infringements is not a practical legislative option for any of the Member States. It would be illogical and extremely difficult to have a parallel set of rules for domestic antitrust damages cases and those having an EU scope. Consequently, the draft Act on antitrust damages does not take this opportunity. Instead, it opts for all-inclusive rules equally applicable to all damages cases involving antitrust infringements (resulting from the infringement of domestic competition rules; EU competition rules alone; or the parallel infringement of EU and national competition rules).<sup>12</sup>

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<sup>10</sup> Act on Trade, Official Gazette – NN 87/08, 96/08, 116/08, 76/09, 114/11, 68/13, 30/14; State Aid Act, Official Gazette – NN 47/14.

<sup>11</sup> Art. 2 (3) of the Directive in conjunction with recital 10 of the Directive.

<sup>12</sup> Art. 1 of the draft Act on antitrust damages defines the scope of its application by stating that it established rules that enable any person who suffered damages as a result of an infringement of competition law to obtain full compensation for the loss thereby suffered. Art. 3(1) defines the infringement of competition law as the infringement of competition rules related to prohibited agreements and the abuse of a dominant

As to the personal scope of application, the draft Act follows the linguistic definitions of the Directive. The ‘injured’ party is *any* person that has suffered harm by an antitrust infringement. This wording is in line with the general tort rules recognising the right of any individual or legal person to be compensated for a legally recognisable harm suffered. On the other hand, the ‘infringer’ is defined as an undertaking or association of undertakings which have committed an infringement of competition law.<sup>13</sup> The notions of undertaking and association of undertakings are derived from the CA.<sup>14</sup> Therefore, the same criteria apply – autonomous functional interpretation developed in the context of Article 101 and 102 TFEU, taken over by the CA and so far applied consistently by the CCA. With that in mind, any person engaged in production and/or trade in goods and/or provision of services, thereby participating in economic activity, might be a tortfeasor in civil proceedings.<sup>15</sup> The application of the notion of an undertaking as defined by the CA implies the application of the concept of a single economic unit in civil proceedings as well. Yet this fact does not provide a definite answer whether a parent company may be held

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position and the infringement of Art. 101 and 102 TFEU. National competition rules are defined as rules applied autonomously or in combination with the Art. 101 and 102 TFEU.

<sup>13</sup> Article 3(2) of the draft Act on antitrust damages.

<sup>14</sup> Article 3(3) of the draft Act on antitrust damages.

<sup>15</sup> Art. 3(1) CA reads as follows:

Undertakings within the meaning of this Act shall mean companies, sole traders, tradesmen and craftsmen and other legal and natural persons who are engaged in a production and/or trade in goods and/or provision of services and thereby participate in economic activity. This Act shall also apply to state authorities and local and regional self-government units where they directly or indirectly participate in the market and all other natural or legal persons, such as associations, sports associations, institutions, copyright and related rights holders and similar who are active in the market.

- (2) The definition of an undertaking referred to under paragraph (1) of this Article shall apply to any persons who are engaged in a direct or indirect, permanent, temporary or single participation in the market, irrespective of their legal form or ownership structure, form of financing and intent or effect to make profit, notwithstanding their place of establishment or residence within the territory of the Republic of Croatia or outside its territory.
- (3) This Act shall also apply to undertakings which are entrusted pursuant to separate laws with the operation of services of general economic interest, those having the character of a revenue-producing monopoly, or, which are by special or exclusive rights granted to them allowed to undertake certain economic activities, insofar as the application of this Act does not obstruct, in law or in fact, the performance of the particular tasks assigned to them by separate rules or measures and for the performance of which they have been established.

liable for antitrust damages caused by an infringement of competition rules committed by its subsidiaries. Namely, even though the CA defines the concept of a single economic unit,<sup>16</sup> it does not regulate the issue of liability of a parent company in that context. The CA being silent on that issue, and in the absence of public enforcement decisions on that subject matter (Kapural, 2016, p. 56–57), it is unclear whether the autonomous interpretation provided by the Court of the EU would apply, just as it does to the notion of an undertaking in more general terms, or the general rules of company law<sup>17</sup> would be applicable. The predominant view seems to be that the general rules should apply whereby the parent company would be held liable ‘only if that company has abused the principle of non-liability, which is the default rule. In that case rules on piercing the corporate veil apply’ (Kapural, 2016, p. 57; Butorac Malnar, Mataija and Petrović, 2016).

### III. Competent courts

In Croatia, competent courts to hear antitrust damages disputes are Commercial courts. This legislative solution has been introduced already by the 2013 CA<sup>18</sup>, restating the general subject matter jurisdiction of Commercial courts as regulated by Article 34(b)9 of the CPA.<sup>19</sup> These are specialized courts within the Croatian judicial structure and are thus the most suitable to hear antitrust damages cases. Opting for commercial over general courts was meant to accommodate for the need to provide courts capable of hearing complex issues related to competition law infringements. There was a limited debate within the working group on the benefits of antitrust

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<sup>16</sup> Article 4 CA provides:

- (1) An undertaking shall be deemed to be controlled by another undertaking if the latter undertaking, directly or indirectly: 1.holds more than half of share capital or half of shares, or 2.may exercise more than half of voting rights, or 3.has the right to appoint more than half of the members of the management board, supervisory committee or similar administrative or managing body, or 4.in any other way exercises a decisive influence on the right to manage business operations of the undertaking.
- (2) The undertakings referred to in paragraph (1)of this Article, are considered to be a single economic entity.

<sup>17</sup> Companies Act, Official Gazette – NN NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15.

<sup>18</sup> Article 69 CA.

<sup>19</sup> Commercial courts in civil disputes in the first instance adjudicate, *inter alia*, disputes arising out of acts of unfair market competition, monopolistic agreements and disruption of equality on the single market of the Republic of Croatia.

specialisation within Commercial courts. This idea has been abandoned very quickly, as the legal framework on the organisation of the judiciary does not envisage the existence of departments specialized in particular subject matters. In addition, the rules on case allocation bar the possibility of allocating cases to particular judges who would be trained specifically in competition law. Cases are allocated randomly, without human intervention to assure objectivity and prevent corruption.<sup>20</sup> Under these circumstances, there was no room for the introduction of targeted specialisation for the purposes of antitrust damages cases, irrespectively of potential benefits. Whether commercial courts' judges will live up to the task is still to be seen. However, with the new detailed rules in place, and additional efforts to train judges, the expectations are high.

## IV. Substantive law issues

### 1. Strict liability

The Directive on antitrust damages did not establish the type of liability to be applicable in cases of antitrust damages. In fact, the Directive expressly states, '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.' The draft Act on antitrust damages opted for a strict liability, notwithstanding the general tort rule of liability based on presumed fault. This solution is in accordance with the spirit of the Directive, and yet there are many reasons why the applicability of liability based on fault could have been kept to antitrust damages cases as well.

Under Croatian general tort law, strict liability is an exception to the general rule of presumed fault. In fact, according to the general rule of Article 1045 OA, a person who has caused damage to another shall compensate it unless he has proven that the damage has not occurred as a result of his fault, the lack of duty of care being presumed. On the contrary, strict liability is limited to a relatively small number of situations having in common the specific nature of the harm and the right thereby protected. Mostly, strict liability is confined to acts that may substantially affect the health of people or cause substantial amount of loss. While undeniably

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<sup>20</sup> [http://www.vtsrh.hr/index.php?page=news&article\\_id=2189&lang=hr](http://www.vtsrh.hr/index.php?page=news&article_id=2189&lang=hr) (1.03.2017).

cartels cause large-scale loss, the same may not be necessarily said about all other types of antitrust infringements also covered by the Directive and the implementing national legislation. Having in mind the fact that the draft Act on antitrust damages is not limited to cartel induced losses, the overall structure of Croatian tort law and the position of strict liability within that framework, it is very questionable whether the introduction of strict liability for damages caused by other types of antitrust infringements fits the overall legal structure. In addition, from the perspective of an economic analysis of the law, the introduction of strict liability for damages caused by all antitrust infringement might not be the best solution. Strict liability is very burdensome for undertakings, which may be inclined to calculate possible negative regulatory consequences in the overall business risk assessment, which may negatively affect the prices of goods and services on the market – an argument that should be considered from the perspective of consumer protection, which is the ultimate goal of competition law.

On the other hand, should have the draft Act on antitrust damages kept the general principle of presumed fault, the same result could have been achieved without jeopardising the recovery of damages and causing a perceivable higher regulatory risk for undertakings. This is so because ‘in competition law related claims for damages, the highest possible level of care should be required due to the specific nature of harmful acts committed and the characteristics of the tortfeasor as a professional in his field (Bukovac Puvača and Butorac Malnar, 2008, p. 41). Tortfeasor itself has the burden of proof that he is not liable. However, [...] it is highly improbable that the infringer would be able to rebut the presumption of his fault because it operates on the market in a professional capacity’ (Pecotić Kaufman, 2012, p. 47; Bukovac Puvača and Butorac Malnar, 2008, p. 41; see also Butorac Malnar, Mataija, and Petrović, 2016). At the same time, in some rare but justifiable situations, the rebuttal of fault would be possible. This particularly relates to situations of novel infringements that are subjected only to symbolic fines in public enforcement of competition law. In such situations, it seems unjust to subject the infringers to a strict liability in civil procedure with no exonerating reasons. Despite many arguments in favour of maintaining culpability, the working group opted for strict liability with no exonerating reasons. Arguments brought forward relate to the spirit of the Directive, its implied inclination towards the introduction of strict liability and the fact that antitrust infringements are based on strict liability as well.



## 2. Limitation periods

The draft Act on antitrust damages brought novel solutions with regard to limitation periods for bringing actions for damages. Namely, under *general rules* of the OA, Article 230, a time limit for bringing actions for damages is set to three years from the time the injured party became aware of the damage and the person causing the damage, while the objective limitation period is set to five years from the moment the damage has been caused. These general limitation periods, coupled with the general rules on their suspension and interruption, are unsuitable for antitrust damages actions, particularly for cases involving continuous or repeated antitrust infringements, as their application would hamper the bringing of antitrust damages action (Butorac Malnar, Matajija, and Petrović, 2016).

Following the legislative solution of the Directive, the draft Act on antitrust damages now provides tailor-made limitation periods for antitrust damages claims. According to Article 12 of the Draft Act on antitrust damages, a claim for damages may be brought within 5 *years* from the date the infringement of competition law has ceased or the date when the injured party knew or should have known about the infringement of competition law, the harm suffered and the identity of the infringer. The limitation periods are *interrupted* where the competent competition authority *initiates proceedings* with respect to the infringement to which the action for damages relates. In that case, the limitation period *restarts* running<sup>21</sup> from the date when the infringement decision of the competition authority has become final and binding<sup>22</sup> (decisions of national competition authorities confirmed by a review court or those which were not subject to review and a final decision of the EU Commission), or the proceeding was otherwise finalised. This wording is somewhat imprecise, as the rules triggering the initiation of an infringement proceedings might differ substantially across Member States. For the sake of legal certainty the term ‘initiation of proceedings’ should be interpreted to refer only to the formal opening of proceedings and should not include actions for the purpose of an investigation. The *suspension* of limitation periods is envisaged in situations of consensual dispute resolution in relation to the parties involved and lasts for the duration of such a process, after which it *continues* to run.

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<sup>21</sup> On the differentiation between interruption and suspension of limitation periods under Croatian law see, Čuveljak, 2003.

<sup>22</sup> On effects of decisions in Croatian administrative procedure see, Sikić, 2012.

No specific rules on limitation periods are envisaged for victims who are neither direct nor indirect costumers of the immunity recipient, such as direct or indirect costumers of other co-infringers, umbrella claimants or competitors. Such victims, according to rules on joint and several liability, may lodge a claim against the immunity recipient only after they were unsuccessful in claiming compensation from other co-infringers.<sup>23</sup> In that regard, the Directive expressly states that Member States must ensure that any limitation periods in such cases are reasonable and sufficient to allow injured parties to bring such actions.<sup>24</sup> In other words, it would have been appropriate to introduce a rule whereby limitation periods for these victims are suspended for bringing an action against the immunity recipient for the duration of proceedings against other co-infringers. Given the fact that the Croatian draft Act on antitrust damages fails to do so, such victims might eventually be time-barred from claiming compensation from the immunity recipient.

Croatia took up the possibility granted by the Directive and provided an absolute limitation period of 15 years from the date the infringement ceased. This period, however, serves the purpose of legal certainty for the infringers, and cannot efficiently solve the potential problem for the injured persons who are neither direct nor indirect purchases of the immunity recipient.

### 3. Joint and several liability

Rules on joint and several liability are very complex and they follow rather truthfully the language of the Directive on antitrust damages. According to Article 14(1) of the draft Act on antitrust damages, tortfeasors that have infringed competition law by joint behaviour are jointly and severally liable for the harm caused. In essence, this means that in circumstances in which a number of persons/undertakings are liable for the same harm caused by the joint behaviour, the injured party may claim the compensation of the entire harm suffered from any of the infringers, irrespectively of his relative share in the overall harm caused (Gorenc et al, 2014, p. 1852). Following the *verbatim* of the Directive, as an exception to this rule, the draft Act on antitrust damages limits joint and several liability of the immunity recipient, i.e. the undertaking that has been granted full immunity under the leniency programme, only to his direct and indirect purchasers or providers. To

<sup>23</sup> Article 11(4)(b) of the Directive / Article 14(2)2 of the draft Act on antitrust damages.

<sup>24</sup> Article 11(4) of the Directive.

other injured parties, the immunity recipient is jointly and severally liable only where full compensation cannot be obtained from other tortfeasors/infringers.<sup>25</sup> This rule accommodates the requirement of the Directive, whose purpose was to protect an immunity recipient 'from undue exposure to damages claims' as a preferential target of litigation, given the fact that an infringement decision against him becomes final sooner than decisions related to other co-infringers.<sup>26</sup> Here however, 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. Although this solution of the Directive has already been criticized for imprecision and ambiguity (Howard, 2013, p. 458; Pais and Piszcz, 2014), the draft Act on antitrust damages does not even attempt to provide more clarity here. Most likely, it will be considered to be the moment when a final judgment against the co-infringers will prove to be unenforceable because of liquidity problems and lack of assets. However, because rules on debt enforcement envisage several possible rounds of debt enforcement, it is unclear at which point of the enforcement procedure it will be considered that the compensation was unsuccessful. This ambiguity might jeopardise the right to obtain full compensation from the immunity recipient, particularly when coupled with limitation periods discussed above.

When one of the joint tortfeasors compensates the entire amount of damages, the obligation of other tortfeasors towards the injured party ceases to exist.<sup>27</sup> In such a situation, the tortfeasor/co-infringer that has paid more than his share of the harm by the application of rules on joint and several liability is entitled to recover a contribution from other tortfeasors/co-infringers.<sup>28</sup> The draft Act on antitrust damages explicitly sets out exemplary objective criteria for determining the relative co-infringers' share in the overall harm. Such determination is based upon all the circumstances of a case, such as market share, turnover, role in a cartel or some other infringement and alike, it is irrespective of whose purchasers or providers are affected by the infringement.<sup>29</sup> In essence, this provision codifies Recital 37 accompanying Article 11 of the Directive and it will provide a very useful guidance for national courts in attributing relative shares in the harm to co-infringers. In addition, the draft Act on antitrust damages establishes

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<sup>25</sup> Article 14(2) of the draft Act on antitrust damages.

<sup>26</sup> Recital 38 of the Directive.

<sup>27</sup> VSRH, Rev-1264/97, 6 December 2000, Izbor 1/01-40.

<sup>28</sup> Article 14(3) of the draft Act on antitrust damages.

<sup>29</sup> *Ibidem*.

that where the relative shares of co-infringers in the overall harm cannot be established (by application of the objective criteria), all co-infringers will be attributed equal share in the overall harm *unless this is unjust in a particular case*.<sup>30</sup> This wording is taken over from the general legislative solution of Article 1109(3) of the OA regulating the relationship between jointly and severally liable tortfeasors. The possibility of allocating evenly the shares in the overall harm between co-infringers might prove to be a very practical tool in situations where the objective criteria do not produce decisive results. However, it remains very unclear when such an even distribution would be considered *unjust* – especially given the strict form of liability both for the infringement of competition law and the harm caused. The possibility for deciding on the grounds of fairness under the OA is limited to exceptional circumstances, such as those involving minors, persons with diminished mental capacity, and persons with poor economic status or alike (Gorenc et al., 2014, p. 1859). It seems implausible that any of the situations in antitrust damages cases would qualify for decision-making based on fairness. This wide discretion is superfluous and even if only theoretically, makes room for arbitrary decisions leading to legal uncertainty.

As an exemption to these rules on establishing the relative co-infringers' share in the overall harm, Article 14(5) of the Draft Act on antitrust damages establishes that the relative share of an immunity recipient infringer may not exceed the amount of harm caused to his direct or indirect purchasers or providers. A different rule applies where the harm was caused and compensated to persons other than direct or indirect purchasers or suppliers of any of the co-infringers, such as umbrella customers or competitors. In such situations, Article 14(5) establishes that the relative share of an immunity recipient cannot be higher than the amount of his part in the harm.

Similar to the immunity recipients, under certain circumstances, SMEs have a limited joint and several liability. Following the wording of the Directive, the draft Act on antitrust damages provides that an SME is jointly and severally liable only to its direct and indirect purchasers or providers when its market share was below 5% of the relevant market during the infringement and if general rules on joint and several liability would irreversibly jeopardise its economic viability and cause the complete loss of its assets.<sup>31</sup> These are cumulative criteria, and thus if any of them are not met, general rules on joint and several liability apply. This rule, however,

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<sup>30</sup> Article 14(4) of the draft Act on antitrust damages.

<sup>31</sup> Article 14(6) of the draft Act on antitrust damages.

would not apply when the SME in question was an initiator or instigator of the competition law infringement that caused the harm (particularly using coercion) or that SME has been already found to have infringed competition law.<sup>32</sup> Although for different reasons, this provision on the limitation of joint and several liability for SMEs resembles those concerning immunity recipients. However, while immunity recipients are nevertheless liable to victims that are neither their direct nor indirect purchasers or providers when they prove unable to obtain compensation from other co-infringers, here there is no such possibility with respect of SMEs. It seems that SMEs have received preferential treatment that may not be objectively justified, particularly keeping in mind that compensation of damages might bring large enterprises in the same situation, that is, they may risk their economic viability (for a detailed analysis on joint and several liability of SMEs see, Jurkowska-Gomułka, 2015, p. 66–68). However, given that implementing legislation was not meant to correct the potential pitfalls of the Directive, nor was there room for the introduction of different rules, the draft Act on antitrust damages, only correctly takes over the legislative solution of the Directive.

#### 4. Quantification of harm

Quantification of harm has been identified as one of the most important obstacles in obtaining compensation due to ‘overly demanding requirements regarding the degree of certainty and precision of a quantification of the harm suffered.’<sup>33</sup> In fact, in quantifying damages in antitrust cases, asymmetry of information should be taken into account as well as the fact that determining the amount of damages implies assessing how the relevant market would have evolved in the absence of the infringement. This assessment essentially means the comparison with a hypothetical situation, which may never be completely accurate.<sup>34</sup> Because EU primary law guarantees the right to full compensation of the harm caused by the

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<sup>32</sup> Article 14(7) of the draft Act on antitrust damages.

<sup>33</sup> 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](http://ec.europa.eu/competition/consultations/2011_actions_damages/draft_guidance_paper_en.pdf) (1.03.2017).

<sup>34</sup> Reasoned explanation accompanying Article 17 of the draft Act on antitrust damages / Recital 46 of the Directive.

breach of Articles 101 and 102 TFEU,<sup>35</sup> it was necessary to make sure that national legislation regulating the matter complies with the principles of effectiveness<sup>36</sup> and equivalence<sup>37,38</sup>. For that purpose, the 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, and so national courts should have the power to estimate that harm.<sup>39</sup> In other words, this article does not deal with the methods of quantifying damages, but rather the consequences of the applied standard of proof for the quantification.

Given the wide discretion of the Member States, Croatia opted for the introduction of a very general and simple rule, procedural in nature, which allows national courts accommodate particular circumstances of the case, guaranteeing that the difficulties in calculating the amount of damages will not result in non-compensation, when the liability of the infringers has been established. Accordingly, Article 17 of the draft Act on antitrust damages provides that where the right to compensation has been determined, and the amount of damages cannot be established based on *available evidence*, or when such a determination would be possible only with *disproportional difficulties*, the court shall, by free evaluation, estimate the amount of damages to be compensated. This rule is *ad verbatim* taken from the CPA (Article 223), which constitutes an exemption to the general rule whereby each party is obliged to provide facts and present evidence on which his or her claim is based, or to refute the statements and evidence of his or her opponent.<sup>40</sup> With this in mind, the legislative solution of the draft Act on antitrust damages is not new, and fits well the general civil procedure framework. The draft Act on antitrust damages is intentionally silent on the applicable *methods* for calculating the amount of damages in order not to limit the courts in that regard, as different methods may be suitable depending on the concrete circumstances of a particular case.

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<sup>35</sup> See C-453/99 *Courage* [2001] ECLI:EU:C:2001:465, 26; joined cases C-295/04 to C-298/04 *Manfredi* [2006] ECLI:EU:C:2006:461, 60; case C-360/09 *Pfleiderer* [2011] ECLI:EU:C:2011:389, 36 and case C-199/11, *European Community v. Otis NV and others* [2012], ECLI:EU:C:2012:684.

<sup>36</sup> That the exercise of that right is not excessively difficult or practically impossible.

<sup>37</sup> That rules governing the exercise of that right are not less favourable than those governing damages actions for breaches of similar rights conferred by domestic law.

<sup>38</sup> Recital 46 of the Directive.

<sup>39</sup> Art. 17 of the Directive.

<sup>40</sup> Art. 219 CPA.

It is expected that judges will avail themselves with the Practical guide on quantification of harm published by the Commission.

The novelty of the draft Act on antitrust damages is the possibility of national courts to require help in quantifying harm from the NCA. Although the draft Act on antitrust damages does not provide explicitly which competition authority it refers to, if one is to look at its definitions, the term NCA covers the CCA, NCAs of other Member States and the Commission.<sup>41</sup> This is a very novel solution, unprecedented in Croatian civil procedure. It is ambiguous whether it may be interpreted in such a way, or whether this right should be confined to the assistance of the CCA only. The other side of the coin is the right or the obligation of the CCA to provide assistance to national courts of other Member States in their antitrust damages cases. In that regard, no national legal basis exists. In addition, on the grounds of general civil procedure rules, the court may use expert opinions for the quantification of damages as well.<sup>42</sup>

Finally, when it comes to the implementation of Article 17(2) of the Directive establishing the presumption that cartel infringements result in harm, it has been considered appropriate to introduce this as a rule for proving liability, instead of serving the purpose of the quantification of harm. Thus, this rule is incorporated in the article regulating the right to full compensation.<sup>43</sup>

## 5. Passing-on of overcharges

Rules on passing-on of overcharges are definitely the most innovative rules in the Croatian tort law and they pretty much follow the wording of the Directive. The draft Act on antitrust damages regulates by a single article the passing-on defence and indirect purchasers. As to the passing-on defence, the draft Act on antitrust damages provides that the infringer/tortfeasor may invoke as a defence against a claim for damages the fact that the victim passed on the whole or part of the overcharge down the supply chain, thereby reducing the amount of his actual loss. This reduction of harm is however without prejudice to the right to full compensation of indirect purchasers, including the loss of profit caused by the passing-on of overcharges.<sup>44</sup> The burden of proof rests with the defendant, and for

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<sup>41</sup> Art. 3(12) of the draft Act on antitrust damages.

<sup>42</sup> Art. 250 CPA.

<sup>43</sup> Art. 5 of the draft Act on antitrust damages.

<sup>44</sup> Art. 15(1) of the draft Act on antitrust damages.

that purpose, he may require disclosure of evidence from the claimant of a third party.<sup>45</sup>

When it comes to indirect purchasers, the draft Act *ad verbatim* takes on the language of Article 14 of the Directive. To begin with, it defines an indirect purchaser as a natural or a legal person who purchased goods or services that were the object of an infringement (or products or services containing them or derived therefrom), from the infringers' direct purchaser, or a subsequent purchaser. An indirect purchaser is deemed to have proven that a passing-on to him occurred where he has shown that: (a) the defendant has committed an infringement of competition law; (b) the infringement resulted in an overcharge for the direct purchaser; and (c) the indirect purchaser has purchased goods or services that were the object of the infringement, or goods or services derived from or containing them.<sup>46</sup> Following the basic principles of civil procedure and the Directive, the draft Act on antitrust damages states that the infringer may refute the statements of the claimant by proving that the overcharge was not passed onto him, or that it was passed on in a smaller amount.<sup>47</sup>

According to the general rules on civil procedure, the decision whether the standard of proof has been met is left to the 'discretion of the judge after conscientious and careful assessment of all the evidence presented individually and as a whole and taking into consideration the results of the entire proceedings'.<sup>48</sup> Additional guidance is given by Article 15 of the draft Act on antitrust damages according to which for that purpose the judge may take into account pending cases related to the same infringement, initiated by claimants from other levels of the supply chain, judgements rendered in such proceedings, and publicly available information arising from public enforcement of competition law.<sup>49</sup> This rule is meant to safeguard the principle of full compensation while avoiding overcompensation, expressly provided for by Article 16 of the draft Act on antitrust damages. In addition, the Directive expressly provides that in order to avoid overcompensation, Member States must lay down appropriate rules 'ensuring that the compensation of actual loss at any level of the supply chain *does not exceed*

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<sup>45</sup> Art. 15(2) of the draft Act on antitrust damages.

<sup>46</sup> Art. 15(3) of the draft Act on antitrust damages.

<sup>47</sup> Art. 15(4) of the draft Act on antitrust damages.

<sup>48</sup> Art. 8 CPA. Relevant are also Article, 8, 219 and 220(2) of the CPA, 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.

<sup>49</sup> Art. 15(5) of the draft Act on antitrust damages.



*the overcharge harm suffered at that level*.<sup>50</sup> Yet the Croatian draft Act on antitrust damages only restates this principle<sup>51</sup> without attempting to lay down additional rules to avoid overcompensation, save those referred to above which may prove to be insufficient.

Avoidance of overcompensation will necessitate intensive coordination and cooperation between courts hearing these disputes and prompt availability of information in that regard. Likewise, some of the cases might be pending before courts of other Member States, additionally complicating the issue, and there is no specific mechanism envisaged to tackle these situations. Coupled with the problem of quantification of passing-on of overcharges, these difficulties will render claims by indirect purchasers very burdensome for the parties and courts alike, while the principles of full compensation and avoidance of overcompensation might be jeopardised. Overall, the draft Act on antitrust damages fails to overcome the pitfalls and vagueness of the Directive itself (for a more detailed analysis of passing-on of overcharges see Büyüksagis, 2015, p. 18–30; Reppo, 2015). In addition, neither the Directive nor the draft Act on antitrust damages address the issue of causation, particularly important in cases involving indirect purchasers. Finally, most of the indirect purchasers suffer small and scattered harm, particularly consumers, and thus their incentive to initiate proceedings and their ability to obtain compensation will depend upon the availability of procedural rules regulating collective redress. As there is no such mechanism under Croatian civil procedure, but only collective declaratory and injunctive relief,<sup>52</sup> it is likely that these types of proceedings will not play a major role in private enforcement in Croatia.

## V. Procedural issues

### 1. Standing

According to general rule of the OA, every person is obliged to refrain from taking any action that may cause damage to others.<sup>53</sup> This rule essentially establishes one of the basic principles of the law on obligations (Gorenc et al, 2014, p. 19) and provides a base ground for rules regulating

<sup>50</sup> Art. 12(2) of the Directive.

<sup>51</sup> Art. 16(2) of the draft Act on antitrust damages.

<sup>52</sup> For a summary on collective relief in Croatia see fn 9; for a more detailed discussion see, Jelinić, 2014, p. 116–143; Pavlović, 2015).

<sup>53</sup> Art. 8 OA.

the right to compensation and the obligation to compensate the harm caused.<sup>54</sup> Standing to sue is given to any person having a legal interest to pursue his claim before the courts. The legal interest is derived from the existence of a legally recognisable harm. According to general rules of the OA, legally recognisable harm is a loss of a person's assets (actual loss), halting of an increase in assets (loss of profit), and a violation of an individual's and a legal person's privacy rights (non-material damage).<sup>55</sup> The draft Act on antitrust damages decided to recognise all these types of harms, which in addition to interests, represent full compensation.<sup>56</sup> In condemnatory claims, such as claims for damages, the legal interest of a claimant is presumed.<sup>57</sup> Accordingly, under Croatian law, any person who claims to have suffered damages resulting from an antitrust infringement will have standing to sue without having to demonstrate the existence of his legal interest. The draft Act defines the injured party as any person who has suffered damages due to a competition law infringement. Consequently, in Croatia, standing to sue is given to any person who has suffered damages, irrespectively how far removed from the competition law infringer he is, including indirect purchasers, umbrella claimants,<sup>58</sup> and competitors.

## 2. Disclosure of evidence

### 2.1. General remarks

The disclosure of evidence was the most challenging part of implementation, as the Directive states very detailed rules some of which are difficult to implement given the general legal framework on disclosure that is narrower in scope. General rules of the CPA provide that each party is obliged to provide facts and present evidence supporting their claims.<sup>59</sup> Court assisted disclosure is available in cases when the document is in possession of a state

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<sup>54</sup> Any person who causes damage to another is obliged to make compensation. Art. 1045 et seq. OA.

<sup>55</sup> Art. 1046 OA.

<sup>56</sup> Art. 5 of the draft Act on antitrust damages.

<sup>57</sup> See Gž-2082/32 of 24/03/1992 Okružni sud Zagreb. See also Triva et al., 1986, p. 248; Opatić, N., 2002, p. 7–8).

<sup>58</sup> Specifically on umbrella claimants see Butorac Malnar, 2017, forthcoming.

<sup>59</sup> Art. 219 of the 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. Which of the proposed evidence shall be presented to establish the decisive facts, is left to the assessment of the court.

authority, the opponent or a 3<sup>rd</sup> person.<sup>60</sup> When it comes to documents in possession of a state authority, court-assisted disclosure will be available only upon showing that a party requesting disclosure was unable to obtain those documents by himself (for instance through general rules on access to documents). This solution is basically the same as the one envisaged by the Directive with regard to court ordered disclosure of documents contained in the file of an NCA and so this rule was not problematic for implementation.<sup>61</sup> A different situation arises in the context of court ordered disclosure of documents held by the opposing party. According to the general rules of CPA, the opposing party may resist court ordered disclosure for a number of justifications such as attorney-client privilege, religious confession, professional secrecy, or if there is a risk of exposing him- or herself or a close family member to criminal prosecution or significant material damage. These are justifications pertinent to witness privileges that apply *mutandis mutatis*.<sup>62</sup> The draft Act on antitrust damages maintained these rules on opposing party disclosure explicitly giving full effect of the legal professional privilege,<sup>63</sup> while specifying that the interest of a defendant to avoid actions for damages or avoid compensation is not a justifiable reason for withholding evidence.<sup>64</sup> While the court cannot enforce the disclosure order against the opposing party, it may draw inferences from the fact that evidence was withheld by the party who was ordered its disclosure.<sup>65</sup> The draft Act on antitrust damages sanctions non-compliance with a court order for disclosure in the following manner: (a) facts that should have been determined by the evidence will be considered established,<sup>66</sup> and (b) the party opposing discovery or who had destroyed or tried to destroy evidence may be heavily fined – undertakings from 10.000kn [cca. EUR 1.342] up to maximum of 1% of total turnover in the

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<sup>60</sup> Art. 232–233 of the Civil Procedure Act. When one party refers to a document and claims that it is in the possession of the other party, the court shall order the latter to furnish the document, giving him/her a time limit to do so. The court, in view of all the circumstances and according to its conviction, shall assess the significance of the fact that the party who has possession of the document refuses to act according to the court ruling ordering him/her to furnish the document or, contrary to the conviction of the court, denies that the document is in his/her possession.

<sup>61</sup> Art. 8(2) of the draft Act on antitrust damages.

<sup>62</sup> Art. 237–238 CPA.

<sup>63</sup> Art. 6(4) of the draft Act on antitrust damages.

<sup>64</sup> Art. 6(6) of the draft Act on antitrust damages.

<sup>65</sup> Art. 233 CPA.

<sup>66</sup> Art. 6(8) of the draft Act on antitrust damages.

last year for which financial statements have been completed; for responsible persons or individuals from 500 to 50.000,00 kn [cca. EUR 67 – 6.700].<sup>67</sup>

A major obstacle in implementation relates to court assistance in disclosure of ‘relevant categories of evidence’. Trying to make sure that parties are not unduly barred from making such a motion, while trying not to interfere in the general rules on civil procedure which do not recognize disclosure of ‘categories of documents’, the draft Act makes it possible for the parties to obtain court-assisted disclosure of *specified or specifiable* evidences<sup>68</sup> (circumscribed as narrowly as possible considering the circumstances of the case<sup>69</sup>). This wording is meant to cover the term ‘relevant categories of evidence’ but it is only to be seen how the application of this rule will evolve in court practice.<sup>70</sup> Given the interpretation of relevant categories of evidence in Recital 16 of the Directive, the term ‘*specifiable evidence*’ could be adequate to accommodate the interpretation of ‘relevant categories of evidence’. According to Recital 16, a category should be identified by reference to common features of its constitutive elements such as nature, object or content of documents or other criteria, so long as they are relevant and defined as precisely and narrowly as possible. These elements render evidence sufficiently specifiable to be identified and ordered for disclosure. It will be very important for the judges to follow the interpretation of the Directive in that regard, otherwise we may be facing a major obstacle in antitrust damages cases.

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 claim for damages as well. The standard of showing *plausibility* has not been explicitly defined by the draft Act on antitrust damages. However, it is

<sup>67</sup> Art. 10(2) of the draft Act on antitrust damages.

<sup>68</sup> Art. 6(1) of the draft Act on antitrust damages.

<sup>69</sup> Art. 6(5) point 2. of the draft Act on antitrust damages.

<sup>70</sup> The closest general procedural rule is the possibility for a plaintiff that is unable to obtain the information needed to formulate his claim to ‘rely on the rules on multi-step complaints (‘stupnjevite tužbe’) in Art 186.b of the CPA. He or she could request the court to order the respondent to present accounts or submit an overview of assets and liabilities or say what he/she knows about concealed or hidden assets, if it is proven that there is an underlying legal obligation for the respondent to do so. Also, if the plaintiff is unable to specify the amount of damages sought without obtaining information held by the respondent (which he or she is either obliged to give according to the contents of their civil law relationship or which may be deemed to be common to both parties), the complaint may state that the amount will be defined only after obtaining the relevant information’. Butorac Malnar, Mataija and Petrović, 2016.

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’.

The draft Act on antitrust damages provides that while deciding on disclosure requests, the court must apply the principle of proportionality, i.e. it has to balance ‘opposing interests in a given situation – the interests which would be favoured by the disclosure of the documents in question 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 through 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 for 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.

## 2.2. Protection of business secrets

A very difficult issue for implementation relates to the protection of business secrets because the Directive demands effective measures in that regard. However, given that the Croatian civil procedure is adversarial in nature, and thus all of the evidence presented by one party has to be available to the other for the latter to be able to respond to it in court proceedings, the introduction of a data room or alike was not an option. Consequently, there is no measure that would prevent a competitor who is a party to action for damages from using information obtained during a damages procedure to gain a competitive advantage without necessarily infringing the duty of secrecy. Overall, we had a very limited manoeuvring space, which left us with only few measures that may be granted upon a motion of a party. The first one is the exclusion of the public from the entire or parts of the proceedings. However, based on general rules of civil procedure this may be done only when this ‘would be unconditionally necessary in special circumstances in which the public could be harmful to the interests of justice.’<sup>71</sup> It remains unclear whether this condition of the CPA would be applicable. The second measure relates to the avoidance of the use of the e-notice board, which is followed by a prohibition of

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<sup>71</sup> Art. 307/1 of the CPA.

copying documents containing confidential information.<sup>72</sup> In addition the court may order confidential information to be sealed in an envelope that may be opened only in court, in which case the envelope would be sealed again, having been specified who and when inspected the documents contained therein.<sup>73</sup> Before allowing the inspection of documents containing confidential information, the court will instruct those present that they are ‘obliged to treat as a secret anything they come to know’ who will then have to sign a statement that they are aware of their legal obligations of secrecy.<sup>74</sup> According to general rules, violating that rule can result in criminal liability.<sup>75</sup> The most effective measures are found, most probably, in heavy fines for the breach of the secrecy duty. Legal persons may be fined from 10.000kn [cca. EUR 1.342] to up to a maximum of 1% of total turnover in the last year for which financial statements have been completed and responsible persons or individuals may be fined from 500 to 50.000,00 kn [cca. EUR 67 – 6.700].<sup>76</sup>

### 2.3. Disclosure of evidence contained in the file of a competition authority

When it comes to the disclosure of evidence contained in the file of the CCA, the draft Act on antitrust damages follows truthfully the Directive. It specifies that the national court may order disclosure of the following evidence only after the proceedings before the competition authority have been finalized: (a) information prepared specifically for the proceedings; (b) information drawn by the competition authority for the parties; (c) withdrawn settlement submissions.<sup>77</sup>

However, some ambiguity arises out of the requirement of proportionality of the disclosure entrenched in Article 6(4) of the Directive. The draft Act specifies more rigidly that a *motion for disclosure* must be specific, i.e. must contain the description of the nature, subject or content of the files of documents the disclosure of which is requested; must relate to the damages case; the party must prove that it failed to obtain the documents by itself prior to requesting disclosure, and must ensure the protection of an efficient public enforcement of competition law.<sup>78</sup> However, from a practical point of

<sup>72</sup> Art. 7(4) and (2) of the draft Act on antitrust damages.

<sup>73</sup> Art. 7(3) of the draft Act on antitrust damages.

<sup>74</sup> Art. 7(4) of the draft Act on antitrust damages.

<sup>75</sup> See Criminal Code (Kazneni zakon, Official Gazette 125/2011, 144/2012, 56/2015, 61/2015), Arts 262 and 307.

<sup>76</sup> Art. 10(3) of the draft Act on antitrust damages.

<sup>77</sup> Art. 8(1) (2) of the draft Act on antitrust damages.

<sup>78</sup> Art. 8(1) of the draft Act on antitrust damages.

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.

Given that the Directive regulates the exemptions from disclosure via a maximum harmonisation rule, those have been implemented fully and precisely. Accordingly, documents that may never be disclosed are 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.<sup>79</sup> When it comes to penalties for infringing the rules on disclosure, according to the draft law, the court may impose significant fines, for legal persons from 10.000 kn [cca. EUR 1.342] to up to maximum of 1% of total turnover in the last year for which financial statements have been completed and for responsible persons or individuals from 500 to 50.000,00 kn [cca. EUR 67 – 6.700].

### 3. Effect of national infringement decisions

With regard to the effect of national infringement decisions, the Directive differentiates two scenarios. The first one relates to effects of final infringement decisions rendered by an NCA (on the ground of EU competition law or national competition law when applied parallel to EU competition law) in damages actions brought before national courts in that same jurisdiction. According to the Directive, infringement findings of such decisions are to be deemed irrefutably established (for an extensive debate over the effects of NCAs infringement findings see, Frese, 2015). This is a *maximum harmonisation rule* and given that fact, Member States cannot provide otherwise. Therefore, there was no debate on this issue and the draft Act on antitrust damages provides that domestic infringement findings (both those based only on domestic competition law, or combined with Article 101 and 102 TFEU) have a binding effect in antitrust damages cases. This is a very practical rule, as prior to the implementation of the Directive, CA only provided that in such situations, the competent commercial court must only take into account such decisions.<sup>80</sup> There was no binding effect and the finding of an infringement could have been relitigated in civil proceedings.

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<sup>79</sup> Art. 3(26) of the draft Act on antitrust damages.

<sup>80</sup> Art. 69a(3) CA.

A completely different situation arises in the context of effects of infringement decision rendered by competition authorities of other Member States. Here the Directive provides a *minimum harmonisation rule* whereby final decisions that are based on Article 101 and 102 TFEU should have at least the effect of *prima facie* evidence that an infringement of competition law has occurred, and may be assessed along with other evidence. Thus, minimum harmonisation requires giving only an evidentiary effect to infringement findings of NCAs of other Member States in situations when they are based on EU competition law. The Directive completely leaves out the issue of legal effects of infringement findings of NCAs of other Member States based purely on national competition law as this issue falls outside the EU's legislative competence. Having in mind the functioning of minimum harmonisation, in regulating this situation, Member States had the following alternative options at their disposal:

- 1) Infringement findings of other Member States' NCAs that are based on EU competition law could have been given:
  - a. Evidentiary effect
  - b. Binding effect
- 2) Infringement findings of other Member States' NCAs that are based on national competition law could have been given:
  - a. No effect
  - b. Evidentiary effect
  - c. Binding effect

The Croatian draft Act on antitrust damages adopted a solution whereby infringement findings of other Member States' NCAs based on EU law are deemed to be proven. This is a rebuttable presumption and thus may be rebutted. On the other hand, findings based on national competition law are given no legal effect. The minimum harmonisation rule, and the resulting differences in treatment across EU countries, will be a strong incentive for forum shopping (Merola and Armati, 2016, p. 100), as it will be much more attractive for claimants to initiate proceedings in countries giving binding effect to infringement findings of foreign NCAs. Given the chosen standards of legal effects of other Member States' NCAs in the draft Act on antitrust damages, Croatia will not be a likely forum of choice for antitrust damages cases.



## VI. Consensual dispute resolution

According to the draft Act on antitrust damages, consensual dispute resolution is defined as any form of out-of-court dispute resolution between the parties.<sup>81</sup> In Croatia, these may include out-of-court settlement, mediation, conciliation and arbitration. However, given the nature of arbitration, it may be concluded that the rules regarding consensual dispute resolution in the draft Act on antitrust damages would not refer to it. This is so because parties to an arbitration agreement must arbitrate instead of litigate their dispute. The arbitral award is final and binding, and has a *res iudicata* effect, unless of course ‘the award is invalid and is set aside by a court of a competent jurisdiction’ (Redfern and Hunter, 1999, p. 396). Therefore, rules of the Directive pertinent to limitation periods in case of consensual dispute resolution and suspension of court proceedings for the duration of consensual dispute resolution would not be applicable to arbitration. The Directive, and as a result the draft Act, ‘deal in essence, with situations when the parties attempt to resolve the case primarily through mediation or conciliation without referring to arbitration/litigation’ (Driessen-Reilly, 2015). ‘In case the parties do not resolve their dispute through mediation, arbitration/litigation follows’ (Moisejevas, 2015, p. 187–188).

The rules of the Directive regarding consensual dispute resolution seem to encourage such proceedings as beneficial for both parties. The infringers may benefit from the limited joint and several liability, costs of proceedings and their confidentiality, while the victims benefit from the costs of proceedings and its duration. In essence, the parties have ‘nothing to lose’ as any attempt to resolve the dispute consensually does not affect or diminish their right to a full trial.

Just as envisaged by the Directive, the draft Act on antitrust damages provides that where the parties reach a settlement, the overall amount of damages be reduced by the settling co-infringer’s share of the harm.<sup>82</sup> The remaining part of the claim may be claimed only against non-settling co-infringers. In addition, non-settling co-infringers cannot recover a contribution for the remaining claim from the settling co-infringer.<sup>83</sup> As an exemption, the injured party may claim from the settling co-infringer the remaining claim when non-settling co-infringers ‘cannot pay’ the damages.<sup>84</sup>

<sup>81</sup> Art. 3(22) draft Act on antitrust damages.

<sup>82</sup> The relative share is determined by the application of the rules of Art. 14 of the Draft Act regulating contributions between co-infringers.

<sup>83</sup> Art. 18 of the draft Act on antitrust damages.

<sup>84</sup> Art. 18(3) of the draft Act on antitrust damages.

The problem with this provision is that the draft Act does not specify when it is to be considered that the remaining co-infringers ‘cannot pay’ the damages. What is the final moment establishing this fact, and in turn, giving rise to the right of the injured party to request payment from the settling co-infringer? Since the draft Act on antitrust damages explicitly provides that settling parties may exclude such a possibility under the terms of the consensual settlement, it is expected that this will be a regular practice between settling parties. Hence, the imprecision of the draft Act on antitrust damages regarding the term ‘cannot pay’ will not play a significant role here.

In addition, the draft Act on antitrust damages specifies that in determining the amount of the contribution that an infringer may recover from other infringers, in accordance with their relative share in the overall harm, the court shall take into account the damages paid pursuant to consensual settlements.<sup>85</sup> The limitation periods are suspended for the duration of a consensual dispute resolution with regards to the parties involved in such a process. When the parties have already entered into litigation, they may request the court to suspend its proceedings for the purposes of consensual settlement of their dispute and the suspension may last for up to two years.<sup>86</sup> The court proceedings will restart following the motion of the parties, or *ex officio* when the period of two years has lapsed.<sup>87</sup>

By Article 18(3), the Directive gives the Member States a possibility to introduce a rule whereby the NCA would be allowed to consider compensation paid as a result of a consensual settlement a mitigating factor in determining a fine. Obviously, such a situation would arise only in cases of stand-alone antitrust damages proceedings, which have been terminated via consensual settlement prior to an infringement decision being rendered by the NCA. Croatia did not take this opportunity. As Croatia opted to implement the Directive via an act specifically dealing with antitrust damages, this act is limited in its subject matter. It was impossible to introduce rules that would be applicable to the CCA. The only possibility would be to incorporate such a rule in the CA, as this is the act regulating the procedure before the CCA. Whether such a rule will be introduced in some future amendments to the CA is difficult to say. For the time being, we do not see this omission as a particular problem. Based on already forwarded arguments in academic literature, most consensual settlements will follow a prior infringement decisions and thus the application of this rule will ‘most likely be quite uncommon’ (Driessen-Reilly, 2015).

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<sup>85</sup> Art. 18(5) of the draft Act on antitrust damages.

<sup>86</sup> Art. 13(1) (2) of the draft Act on antitrust damages.

<sup>87</sup> Art. 13(4) of the draft Act on antitrust damages.

## VII. Summary

The overall impression is that the Directive has been implemented fairly well into the draft Act on antitrust damages. However, while it took on board many of its good solutions, the draft Act on antitrust damages takes on some of the pitfalls and ambiguities of the Directive as well, such as those related to limitation periods with regard to immunity recipients, or terms such as ‘unable to pay’ or ‘unjust’ with regard to joint and several liability. Other issues that may prove to be problematic in practice have not been addressed by the draft Act on antitrust damages at all. In particular the issue of causation (save in cases of cartels) that will be of crucial importance in finding liability and it is only to be seen how judges will apply the adequation theory in practice. This issue may affect indirect and umbrella claimants the most. Quantification of harm will be very burdensome as well, particularly in cases involving the passing-on of overcharges. The lack of collective redress mechanism will undermine dramatically the injured parties’ incentive to commence antitrust damages proceedings, leaving them uncompensated. It is expected that findings in actions for damages will rest heavily on expert opinions and a wide discretion of national judges. Many of the envisaged solutions will have to be interpreted to accommodate the needs of the concrete facts of each case, and we expect the involvement of the Court of the EU to define more closely the requirements of the Directive through the preliminary ruling procedure.

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Michal Petr\*

## CZECH REPUBLIC

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### I. Introduction

In the Czech Republic, experience with private enforcement of competition law is very limited. Concerning court practice, a recently published study, the only one of its kind, was able to identify less than 25 cases in the last 15 years, even though the number of judgements and decisions adopted in such cases exceeded 70. This suggests the extreme instability of jurisprudence, as most of the judgements of lower courts were (repeatedly) overturned on appeal. Damages were claimed only in a third of these cases, but the claimant has never been successful, as all these cases were settled or dismissed (Petr and Zorková, 2016, p. I–VIII).

Private enforcement, and claims for damages in particular, is therefore a purely theoretical topic in the Czech Republic; at the same time, it is not widely discussed in academia either. In connection with the Czech EU Presidency in 2009, a conference was organised by the Charles University in Prague that discussed the White Paper and the first draft of the Damages Directive (Basedow, Terhechte and Tichý, 2011). Subsequently, claims for damages have been addressed only by a single monograph (Pipková, 2014) and in international publications comparing the regulation of private enforcement in different EU jurisdictions (Blanke and Nazzini, 2012; Bándi, Darák, Láncoš and Tóth, 2016).

Not even the transposition of the Damages Directive stimulated a relevant debate, as will be described below. The author is not aware of any conference specifically addressing this topic or any publication dedicated to it.

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## II. Implementation of the Directive

By mid-March 2017, the Damages Directive has not been implemented in the Czech Republic yet. The proposal for an Act on Compensating Damages in the Area of Competition Law (hereinafter, 'Damages Act')<sup>1</sup> was adopted by the Government and submitted to the Parliament in December 2016. It has not yet passed the first, out of three readings in the Lower Chamber of the Parliament, which is to be followed by a discussion in the Senate. Even though the Government asked the Lower Chamber to adopt the Damages Act already in the first reading, without any substantive discussion, it cannot be realistically expected that the Damages Act will come into force before July 2017. All the observations in this Article are, therefore, unfortunately based on a legislative proposal, the final version of which is not yet known.

It was the duty of the Czech Competition Authority – the Office for the Protection of Competition (hereinafter, 'CCA'), in cooperation with the Ministry of Justice, to submit the draft Damages Act to the Government.

The first issue concerning the implementation of the Damages Directive concerned whether it should take place by way of a new law or by way of an amendment of existing ones. It needs to be observed that Czech civil law was fully re-codified in 2012, when the completely new Civil Code was adopted,<sup>2</sup> replacing its over 60 years old predecessor. The Ministry of Justice, generally responsible for civil law regulations, was therefore absolutely opposed to any amendments of the new Civil Code and suggested that the implementation of the Damages Directive shall be contained in the Competition Act.<sup>3</sup> This, in turn, was strongly opposed by the CCA, which claimed that the Competition Act is a public law regulation, whereas private enforcement is exclusively concerned with private law. As a matter of compromise, it was agreed that a new, self-standing act shall be adopted for the purposes of implementing the Damages Directive, amending, if necessary, the Competition Act.

The second issue concerned the level of detail of the implementation. The CCA unveiled its first draft of the Damages Act in March 2016 for comments from other governmental bodies.<sup>4</sup> The original draft was totally

<sup>1</sup> 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).

<sup>2</sup> Act No. 98/2012 Coll., Civil Code.

<sup>3</sup> Act. No. 143/2001 Coll., on the protection of competition, as amended.

<sup>4</sup> This first draft is accessible (in Czech) at: <https://apps.odok.cz/veklep-history-version?pid=KORNA7XBHCNY> (13.03.2017).

different from the current proposal of the Damages Act. It was extremely short and implemented only those provisions of the Damages Directive which were clearly unknown or contrary to Czech legislation. For example, the rules on disclosure, currently making up the largest part of the Damages Act, were not covered at all.

This original draft ended up being heavily criticised by the Ministry of Justice<sup>5</sup> that insisted on a much more detailed transposition. The current version of the draft, which is being discussed at the moment in the Parliament, transposes the Damages Directive almost word-for-word. It includes provisions that are already part of the Czech legal order or introduces new names for legal concepts already defined (identically) by Czech law, despite under a different name. These inconsistencies and redundancies are covered later in the text.

Should the Damages Act be adopted in its current form, it shall enter into force the first day of the month following its publication,<sup>6</sup> which may realistically be at the earliest on 1 July 2017. In relation to this, it is important to note the proposed temporal applicability of the Damages Act: the procedural rules contained therein shall apply also in proceedings initiated after 25 December 2014.<sup>7</sup>

### III. Scope of the implementation

In line with the Damages Directive,<sup>8</sup> the Damages Act applies only to anticompetitive agreements and the abuse of dominance;<sup>9</sup> damages caused by other forms of anticompetitive conduct, e.g. implementation of mergers that had not been cleared or even breach of the state aid rules, are thus not covered.

Even though the Damages Directive is only concerned with breaches of EU competition law (or national law applied in parallel),<sup>10</sup> the Damages Act applies also to situations where the breach concerned solely Czech competition law.<sup>11</sup>

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<sup>5</sup> The Ministry was, at least formally, a co-author of the original draft.

<sup>6</sup> Damages Act, Sec. 38.

<sup>7</sup> Damages Act, Sec. 36.

<sup>8</sup> Damages Directive, Art. 1(2) and 2(1) and (3).

<sup>9</sup> Damages Act, Sec. 1.

<sup>10</sup> Damages Directive, Art. 2(3).

<sup>11</sup> Damages Act, Sec. 1.



Finally, as its name suggests, and in line with the Damages Directive,<sup>12</sup> the Damages Act governs only claims for damages – it does not cover other claims based on anticompetitive conduct (e.g. invalidity of contracts, unfair enrichment, restraining orders etc.).<sup>13</sup> Reportedly, there has been a discussion within the CCA whether other claims should not have been included as well, as the distinction between them for the purposes of competent courts, limitation periods etc. is difficult to justify. ‘Minimal’ implementation in line with the Damages Directive was nonetheless chosen in the end.

#### IV. Competent courts

Under the current rules, there are no courts designated to deal specifically with antitrust law. Decisions of the CCA are reviewed by the Regional Court in Brno,<sup>14</sup> the judgements of which may be appealed to the Supreme Administrative Court.<sup>15</sup> These are courts specialised in administrative law, not dealing with civil or criminal matters.

Civil court proceedings are generally governed by the Civil Procedure Code.<sup>16</sup> Concerning private enforcement, regional courts are empowered to hear private enforcement cases in the first instance.<sup>17</sup> Regional courts generally act as courts of appeal in civil jurisdiction and they have a first-instance-jurisdiction only in more complex cases, including, among others, antitrust, unfair competition or intellectual property rights. A single judge is in charge of handling and deciding such cases.<sup>18</sup> There are 8 regional courts in the Czech Republic.

Judgements of regional courts may be appealed to a superior court,<sup>19</sup> where the case is decided by a panel of three judges.<sup>20</sup> There are 2 superior courts in the Czech Republic. Under specific circumstances, judgements of superior courts may further be challenged using an extraordinary appeal mechanism before the Supreme Court of the Czech Republic.<sup>21</sup>

<sup>12</sup> Damages Directive, Art. 1(2).

<sup>13</sup> Damages Act, Sec. 1.

<sup>14</sup> Section 72 of Act. No. 150/2002 Coll., Code of Administrative Justice, as amended.

<sup>15</sup> Code of Administrative Justice, Sec. 102.

<sup>16</sup> Act. No. 99/1963 Coll. Civil Procedure Code, as amended.

<sup>17</sup> Civil Procedure Code, Sec. 9(2) (h).

<sup>18</sup> Civil Procedure Code, Sec. 36a(3).

<sup>19</sup> Civil Procedure Code, Sec. 10(2).

<sup>20</sup> Civil Procedure Code, Sec. 36b.

<sup>21</sup> Civil Procedure Code, Sec. 234 *et seq.*

This system shall be retained under the Damages Act.<sup>22</sup> Since the Damages Act allows for pre-trial disclosure of evidence (see below), the court to decide on these requests shall be the same as the one competent to decide the case on the merits.<sup>23</sup> The same court shall also decide on claims for damages caused by the misuse of the disclosed evidence.<sup>24</sup> Correspondingly, should the right to compensation among joint and severally liable infringers be decided before the courts, regional courts will be empowered to do so.<sup>25</sup>

While drafting the Damages Act, the Ministry of Justice favoured the appointment of only a single regional court responsible for antitrust damages claims, specifically the Regional Court in Brno. The CCA opposed this proposal, claiming that this court does not have any relevant experience with antitrust cases (the review of the CCAs decisions by this court belongs to its administrative agenda, which is separated from its civil agenda, where such claims would belong). Even more relevant was the claim that while there would be specialization in antitrust damages claim cases, other claims on competition law breaches (invalidity of contracts, unfair enrichment, restraining orders etc.) would be dealt with by all regional courts.

## V. Substantive law issues

Czech law was to a large extent in line with the substantive requirements of the Damages Directive even before the Damages Act was proposed. However, certain of its principles needed to be addressed concerning, in particular, limitation periods and some exemptions from joint and several liability.

### 1. Limitation periods

Czech Civil law distinguishes between two types of limitation periods: objective limitation periods, calculated from the facts themselves, i.e. when the relevant conduct or event actually took place, and subjective limitation periods, calculated from the moment the relevant person learned about these facts. According to general rules on damages, the objective limitation

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<sup>22</sup> Damages Act, Sec. 25.

<sup>23</sup> Damages Act, Sec. 11(1).

<sup>24</sup> Damages Act, Sec. 13(1).

<sup>25</sup> Damages Act, Sec. 33.

period is 10 years from the date of the offence, 15 years in case of intentional conduct.<sup>26</sup> The subjective limitation period is three years long<sup>27</sup> counted from the date the plaintiff became aware of the damage and the person responsible for it.<sup>28</sup>

This does not fully correspond with the Damages Directive's requirements.<sup>29</sup> The Czech Damages Act therefore stipulates that the objective limitation periods shall not apply at all, and that the subjective limitation period shall be 5 years long,<sup>30</sup> starting from the day the plaintiff became aware (or could have become aware) of the anticompetitive conduct, the person responsible for it and the harm sustained.<sup>31</sup> These criteria correspond in principle with those in the Damages Directive,<sup>32</sup> with the only exception that whereas the Directive requires knowledge of the identity of the infringer, the Act mentions the person liable to pay the damages. Under most circumstances these subjects would be the same, it may, however, happen that the 'infringer' would be the undertaking itself, consisting of several legal entities, whereas the liable 'person' would be a specific company within the entity.

The Damages Act also stipulates that the limitation period cannot start running before the infringement has ceased.<sup>33</sup> This is fully in line with the Damages Directive,<sup>34</sup> it does not, however, address the fact that according to administrative law, the infringement is (formally) separated into two distinct offences on the day of the initiation of formal proceedings. If an (identical) anticompetitive conduct continues, it shall be treated by the CCA as another offence (in detail, see Petr, 2016, p. 9), and there will be a separate 'pre-proceedings' limitation period for the 'first' part of the infringement and a 'post-proceedings' period for the 'rest'.

The limitation period does not run while the allegedly anticompetitive conduct is being investigated by competition authorities (whether as a preliminary investigation or formal proceedings), both Czech and from other EU member states, as well as a year thereafter.<sup>35</sup> The wording of the Damages Act is unclear in this regard, but according to the explanatory

<sup>26</sup> Civil Code, Sec. 636.

<sup>27</sup> Civil Code, Sec. 629(1).

<sup>28</sup> Civil Code, Sec. 620(1).

<sup>29</sup> Damages Directive, Art. 10.

<sup>30</sup> Damages Act, Sec. 9(1).

<sup>31</sup> Damages Act, Sec. 9(2).

<sup>32</sup> Damages Directive, Art. 10(2).

<sup>33</sup> Damages Act, Sec. 9(2).

<sup>34</sup> Damages Directive, Art. 10(2).

<sup>35</sup> Damages Act, Sec. 9(3).

memorandum to that Act, the final decision bringing the investigation to an end, is not the decision of the competition authority but – if appealed – the decision of the Supreme Administrative Court scrutinizing the judgement of the Regional Court in Brno.<sup>36</sup>

In addition, the limitation period elapses only one year after the claimant learns that compensation cannot be obtained from immunity recipients, small and medium-sized enterprises (hereinafter, ‘SMEs’) or a party that has reached a consensual settlement, because the rules of joint and several liability are limited for these entities (see below).<sup>37</sup>

Finally, the limitation periods are suspended as long as disclosure proceedings are in progress.<sup>38</sup>

## 2. Joint and several liability

According to general Czech civil law, joint and several liability applies in cases concerning multiple infringers.<sup>39</sup> A person who has the duty to provide compensation for damage jointly and severally with other infringers shall settle with them in proportion to their participation in causing the damage.<sup>40</sup> However, the Civil Code does not provide for any specific exemptions for leniency applicants or SMEs, as the Damages Directive requires. On the other hand, the Civil Code allows for the court to limit the liability of one of the infringers for reasons to be particularly considered.<sup>41</sup>

Specific provisions on joint and several liability were therefore included into the Czech Damages Act – its general principles are re-stated, but the power of the court to limit the extent of liability is excluded.<sup>42</sup>

In line with the Damages Directive,<sup>43</sup> immunity recipients are generally liable only to their direct and indirect purchasers and providers – other injured parties may claim damages from immunity recipients only if they cannot obtain compensation from other infringers.<sup>44</sup> Concerning compensation among co-infringers, contribution of immunity recipients

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<sup>36</sup> Explanatory Memorandum to the Damages Act, p. 63. The Explanatory Memorandum is an appendix to the Act’s proposal, and may be accessed at the same web site.

<sup>37</sup> Damages Act, Sec. 9(5).

<sup>38</sup> Damages Act, Sec. 9(4).

<sup>39</sup> Civil Code, Sec. 2915(1).

<sup>40</sup> Civil Code, Sec. 2916.

<sup>41</sup> Civil Code, Sec. 2915(2).

<sup>42</sup> Damages Act, Sec. 5.

<sup>43</sup> Damages Directive, Art. 11(4).

<sup>44</sup> Damages Act, Sec. 6(1).

shall not exceed the amount of harm they have caused to their direct and indirect purchasers and providers.<sup>45</sup>

Similar rules were adopted in line with the Damages Directive<sup>46</sup> for SMEs<sup>47</sup> the market share of which remains below 5% during the infringement, provided the application of the rules of joint and several liability would jeopardise their economic viability and on condition these SMEs have not led the infringement or coerced others to participate therein and that they have not previously infringed competition law.<sup>48</sup> According to the Damages Directive, such a SME is only liable to its direct and indirect purchasers.<sup>49</sup> According to the Damages Act, however, its liability shall be limited to its own purchasers as well as providers,<sup>50</sup> as is the case with immunity recipients (see above). This broadening of the Damages Act's scope is completely reasonable, and in my opinion, this provision was only unintentionally omitted by the Damages Directive. In addition, and even though the Damages Directive does not stipulate so, full joint and several liability also applies to SMEs in case other injured parties cannot obtain compensation from other co-infringers.<sup>51</sup> This rule was clearly inspired by the provisions on immunity recipients and is arguably in line with the Directive's requirement of full compensation.<sup>52</sup> In case of SMEs, general rules on compensation among co-infringers apply.

Finally, the rules on joint and several liability are limited as a consequence of consensual dispute resolution, as will be described below.

### 3. Quantification of harm

As has already been mentioned, the Czech Republic has no practical experience with the quantification of harm in antitrust cases since damages have never been awarded.

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<sup>45</sup> Damages Act, Sec. 6(3).

<sup>46</sup> Damages Directive, Art. 11(2).

<sup>47</sup> SMEs are defined in Act. No 47/2002 Coll.; without going into details, it needs to be observed that whereas SMEs are defined as undertakings in EU law, potentially composed of several persons, according to the Czech law, they are considered to be individual persons, without appreciating the links within a single economic entity.

<sup>48</sup> Damages Act, Sec. 7(1) and (2).

<sup>49</sup> Damages Directive, Art. 11(2).

<sup>50</sup> Damages Act, Sec. 7(1).

<sup>51</sup> Damages Act, Sec. 7(2)(c).

<sup>52</sup> Damages Directive, Art. 3.

In the Czech Republic in general, the most frequently used approaches or methods to quantify damages are not very sophisticated – no complex economic modelling is used. As regards the proof of an actual damage (*damnum emergens*), courts require an easy-to-follow explanation of the caused harm and its substantiation by empirical evidence. As regards the damages in the form of lost profit (*lucrum cessans*), the level of proof required by the Czech case-law is rather strict. No hypothetical calculations of theoretical profits are allowed. Court practice requires some form of a ‘comparator-based’ method to be employed by the claimant who has to aver (and submit corresponding evidence) that in the ordinary course of business it would have generated some profit (with practical certainty) and the only reason why it did not do so was an intervening event in the form of the illegal conduct of the offender.<sup>53</sup> Several antitrust cases where the plaintiff claimed lost profit due to abuse of dominance were thus dismissed as ‘hypothetical’.<sup>54</sup>

The possibility for national courts to ‘estimate’ the harm suffered is generally applicable in Czech law – such possibility is provided for in the Civil Procedure Code<sup>55</sup> and also in the Civil Code.<sup>56</sup> Pursuant to those provisions, the court may determine the amount (quantum) of a certain claim on the basis of its discretionary assessment, if that amount cannot be precisely determined or can be determined only with disproportionate difficulties. Those provisions may be of help when a claimant establishes that it suffered a loss as a consequence of the unlawful conduct of the defendant, but the exact amount of the loss suffered cannot be precisely established. Unfortunately, there are no reported private enforcement cases.

It must to be added that the court’s assessment needs to be based on the facts of the case at hand that allow the court to make certain (even though approximate) conclusions as regards the quantum of the pursued claim.<sup>57</sup> At the same time, the ‘estimation’ of the harm suffered may occur only when its precise calculation is practically impossible, and when its quantum cannot be calculated even with the assistance of a court expert.<sup>58</sup>

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<sup>53</sup> See e.g. the Judgement of the Supreme Court of 17.04.2012, Ref. No. 28 Cdo 1824/2010. For more details see commentary to sections 2988 and 2990 by: Kindl, 2016.

<sup>54</sup> See e.g. the Judgement of the Superior Court in Prague of 29.07.2015, Ref. No. 3 Cmo 316/2014.

<sup>55</sup> Civil Procedure Code, Sec. 136.

<sup>56</sup> Civil Code, Sec. 2955.

<sup>57</sup> See the Judgement of the Supreme Court of 21.02.2008, Ref. No. 32 Odo 871/2006.

<sup>58</sup> See the Judgement of the Supreme Court of 26.05.2010, Ref. No. 23 Cdo 1299/2008. For more details see commentary to section 2988 by: Kindl, 2016.

These general rules have not been fundamentally altered by the implementation of the Damages Directive. The Damages Act requires full compensation<sup>59</sup> and excludes the court's power to reduce the amount of compensation generally applicable in Czech damages proceedings.<sup>60</sup> Surprisingly, the Damages Act also stipulates (for the third time in the Czech legal order, see above) that the court may determine the amount of damages on the basis of its fair assessment of the particularities of the case, provided that amount cannot be precisely determined.<sup>61</sup> According to the explanatory memorandum to the Damages Act, this 'triplicity' should increase 'user comfort' of the Act's addressees.<sup>62</sup>

Moreover, a presumption that cartels cause damage was incorporated into Czech law.<sup>63</sup> Like in the Damages Directive,<sup>64</sup> this presumption does not apply to other forms of anticompetitive conduct.

Specific provisions on the possibility to claim interests from the time when the harm occurred until the time when compensation is paid,<sup>65</sup> uncommon under Czech law, were also included.<sup>66</sup>

Concerning the actual quantification of harm, no specific rules were included in the Damages Act.

#### 4. Passing-on of overcharges

Even though Czech law did not contain any explicit legal provisions concerning the passing-on defence, it was generally perceived as possible (see e.g. Kindl and Petr, 2012, p. 89). The Damages Act nonetheless explicitly confirms that the passing-on defence may be invoked.<sup>67</sup> In line with general rules on civil court proceedings, it would be for the defendant to submit evidence that the claimant actually passed on the overcharge. Hence, this provision of the Damages Directive<sup>68</sup> is not explicitly implemented.

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<sup>59</sup> Damages Act, Sec. 4(1).

<sup>60</sup> Civil Code, Sec. 2953.

<sup>61</sup> Damages Act, Sec. 4(4).

<sup>62</sup> Explanatory memorandum, p. 53.

<sup>63</sup> Damages Act, Sec. 3.

<sup>64</sup> Damages Directive, Art. 17(2).

<sup>65</sup> Damages Directive, Art. 3(2) and Recital (12).

<sup>66</sup> Damages Act, Sec. 4(2) and (3).

<sup>67</sup> Damages Act, Sec. 29.

<sup>68</sup> Damages Directive, Art. 13.

According to the Damages Directive, the national courts should have the power to estimate the share of any overcharge that was passed on.<sup>69</sup> This provision was not implemented into Czech law and it would presumably need to be interpreted as part of the courts' power to estimate the amount of harm (see above).

Before the Damages Act was formulated, there were no specific provisions concerning damages claims of indirect purchasers in Czech law. The view was however put forward by legal theory that indirect purchasers may claim damages if they are able to substantiate that the overcharge was passed on to them (see e.g. Kindl and Petr, 2012, p. 82).<sup>70</sup> The Damages Act introduced a rebuttable presumption that there was a passing-on to indirect purchaser (claimant) if the claimant is able to show that the defendant has committed an antitrust infringement, the latter resulted in an overcharge to the defendant's direct purchasers, and the claimant purchased the effected goods or services.<sup>71</sup>

The provisions on actions for damages by claimants from different levels in the supply chain were not subject to implementation,<sup>72</sup> and they are not even mentioned in the explanatory memorandum to the Damages Act. In the author's opinion, these requirements of the Damages Directive are already applicable in Czech law and no explicit implementation was therefore necessary. Similarly, there are no explicit implementation provisions concerning the requirement of full compensation and prohibition of overcompensation in relation to passing-on<sup>73</sup> – general principles will thus need to suffice.<sup>74</sup>

## V. Procedural issues

With the exemption of disclosure, the procedural requirements of the Damages Directive have mostly been included in Czech law even before the Damages Act. Conversely, despite the fact that the provisions on the binding

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<sup>69</sup> Damages Directive, Art. 12(5).

<sup>70</sup> It nonetheless needs to be submitted that the author is aware of a court resolution where indirect claims are in principle treated as inadmissible, even though the court did not rule specifically on that issue; see the Decision of the Regional Court in Ostrava of 7.01.2005, Ref. No. 1 Cm 221/2000.

<sup>71</sup> Damages Act, Sec. 30.

<sup>72</sup> Damages Directive, Art. 15.

<sup>73</sup> Damages Directive, Art. 12.

<sup>74</sup> Damages Act, Sec. 4(1).



effect of decisions rendered by competition authorities were in principle in line with the Damages Directive, they were ‘re-adopted’ in the Damages Act. The issue of collective redress was not covered by the Damages Directive and was therefore not covered by the Damages Act either.

## 1. Standing

Under Czech law, standing of the claimant is generally not limited in private litigation, including claims of indirect purchasers and co-infringers, and so Czech law is in line with the Damages Directive.<sup>75</sup>

Concerning indirect purchasers, it has already been mentioned that their right to claim damages is in principle guaranteed – the Damages Act has only included a rebuttable presumption that the overcharge was passed on to them (see above).

Concerning co-infringers, the Civil Code generally states that if harm has been incurred (or its magnitude has increased) also as a result of circumstances attributable to the victim, the infringer’s duty to compensate the damage shall be proportionately reduced, unless the victim’s role was negligible.<sup>76</sup> Co-infringers are thus in principle entitled to claim damages, typically in case of vertical agreements, there is however no case-law to that extent.

## 2. Disclosure of evidence

The rules on the disclosure of evidence are very detailed in the Damages Act and comprise almost half of the entire act. It is therefore surprising that in the original version of the draft, prepared by the CCA (see above), this issue was not covered at all. Correspondingly, this chapter is disproportionately long as well, and will therefore be divided into subsections.

### 2.1. Disclosure of evidence before the Damages Act

Disclosure of evidence comparable to the requirements of the Damages Directive is currently unknown under the Czech law, which only provides for “traditional” means to access evidence.

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<sup>75</sup> Damages Directive, Art. 3(1) and 12(1).

<sup>76</sup> Civil Code, Sec. 2918.

Concerning evidence in the CCA's file, any third party (i.e. not a party to the CCA's proceedings)<sup>77</sup> may currently be granted access to that file according to the Code of Administrative Procedure,<sup>78</sup> provided they are able to prove a sufficient legal interest thereupon, and provided that such access to the file will not violate rights of the parties to the CCA's proceedings or the public interest.<sup>79</sup> However, the CCA is rather strict in this regard and generally does not allow third parties to inspect its files even if they are alleged victims of anticompetitive behaviour. The Supreme Administrative Court held in a series of recent judgements that, in principle, alleged victims of (putative) anticompetitive conduct have sufficient legal interest that may warrant their access to CCA's files.<sup>80</sup> However, there has not yet been an observable change in the practice of the CCA. Even if granted access to the file, third parties (even victims of anti-competitive conduct) cannot be granted access to leniency and settlement applications and their accompanying documents.<sup>81</sup>

Concerning *inter partes* disclosure, it is generally not provided for under Czech law. Under the Civil Procedure Code,<sup>82</sup> the court is empowered to request anyone (including the defendants) to provide the court with specific information relevant to the case or hand-over a particular document which they have in their possession. If the requested party fails to comply with the court's request, it may be subject to both disciplinary<sup>83</sup> and ultimately criminal sanctions.<sup>84</sup> These provisions were however not deemed sufficient for antitrust litigation and the CCA admitted that the general 'legal framework in the Czech Republic may pose serious obstacles to potential plaintiffs'.<sup>85</sup> Detailed provisions on disclosure of evidence were therefore included in the Damages Act.

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<sup>77</sup> 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 2.10.2015, Ref. No. 4 As 150/2015.

<sup>78</sup> Act No. 500/2004 Coll., Code of Administrative Procedure, as amended.

<sup>79</sup> Code of Administrative Procedure, Sec. 38(2).

<sup>80</sup> See e.g. the judgments of the Supreme Administrative of 11.08.2015, Ref. No. 6 As 43/2015, of 9 April 2014, Ref. No. 9 Afs 73/2013, or of 10.04.2014, Ref. No. 7 As 20/2014.

<sup>81</sup> Competition Act, Sect 21c (3) and (4).

<sup>82</sup> Civil Procedure Code, Sec. 128 and 129(2).

<sup>83</sup> Pursuant to the Civil Procedure Code, Sec. 53, the court may impose a fine of up to CZK 50,000 (EUR 2 500).

<sup>84</sup> Pursuant to Section 336 of the Act. No. 40/2009 Coll., Criminal Code, as amended, a failure to comply with the court's order may constitute a crime.

<sup>85</sup> CCA's Position Paper regarding the White Paper on Damages actions for breach of the EC antitrust rules, par. 19. This document is available (in English) at: <http://www.uohs.cz/cs/hospodarska-soutez/metodiky-a-dokumenty.html> (accessed 13.03.2017).

## 2.2. Request for disclosure

The concept of disclosure is very broad under the Damages Act. First of all, it allows for pre-trial discovery, whereas the Damages Directive prescribes disclosure of evidence only after the proceedings concerning damages were initiated.<sup>86</sup> This broadening of the Directive's requirements, not substantiated at all in the explanatory memorandum,<sup>87</sup> was criticised by some legal practitioners, there was however no substantial discussion concerning its necessity. Disclosure may be requested also in the course of the proceedings on the merits under identical conditions as in the pre-trial phase.<sup>88</sup>

According to the Damages Directive, not only the claimant but also the infringers may request disclosure of evidence, in particular in connection with the issue of passing-on.<sup>89</sup> Such requests are also possible according to the Damages Act.<sup>90</sup>

The burden to disclose evidence falls on to two categories of addressees: first, those who control the relevant evidence,<sup>91</sup> which corresponds with the Damages Directive's requirements,<sup>92</sup> and second, those who used to have the evidence under their control.<sup>93</sup> With respect to the latter, it is presumed that any person who had an opportunity to make a copy of the evidence in question or was able to get acquainted with it falls within the second category.<sup>94</sup> Whereas those falling into the former category are obliged to disclose the evidence to the claimant, those falling into the second category have to inform the claimant wherefrom to obtain the evidence.<sup>95</sup> The second category is not covered by the Damages Directive and was only established by Czech legislation.

The request for disclosure needs to contain as precise as possible a description of the evidence requested.<sup>96</sup> It needs to be observed that

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<sup>86</sup> Damages Directive, Art. 5.

<sup>87</sup> The Explanatory Memorandum only mentions on page 64 that those provisions transpose Article 5 of the Damages Directive, which is clearly misleading as that Article relates to situations *in proceedings relating to an action for damages*, not before such action was initiated.

<sup>88</sup> Damages Act, Sec. 18.

<sup>89</sup> Damages Directive, Art. 13 and 14(1).

<sup>90</sup> Damages Act, Sec. 18(2) (b).

<sup>91</sup> Damages Act, Sec. 10(1) (a).

<sup>92</sup> Damages Act, Art. 5(1).

<sup>93</sup> Damages Act, Sec. 10(1) (b).

<sup>94</sup> Damages Act, Sec. 10(2).

<sup>95</sup> Damages Act, Sec. 10(1) and 14(1).

<sup>96</sup> Damages Act, Sec. 10(3).

the Damages Directive allows for disclosure of specific items of evidence as well as relevant categories of evidence,<sup>97</sup> as it may be excessively difficult for claimants to specify individual items. Still, such a ‘category’ needs to be identified by reference to common features of its constitutive elements such as nature, object or content of the documents the disclosure of which is requested or the time during which they were drawn up.<sup>98</sup> The Damages Act does not employ the notion of ‘categories of evidence’, and as this term is unknown in the Czech legal order, it may be questioned whether the implementation of the Directive’s requirements is sufficient in this regard.

The request for disclosure needs to be substantiated by reasonably available evidence, supporting the plausibility of the damages claim.<sup>99</sup> Parties to the disclosure proceedings are the claimant, the defendant in the proceedings on the merits (i.e. the infringer), and the one who shall disclose the evidence.<sup>100</sup>

The one who shall disclose the evidence has a right to be heard.<sup>101</sup> The court shall however decide without an oral hearing if the written submissions and evidence produced suffice for the decision.<sup>102</sup> The court shall also inform the competition authority competent to investigate the alleged anticompetitive conduct (i.e. not just the CCA, but any competent competition authority) and allow it to submit its observations to the request.<sup>103</sup>

### 2.3. Extent of disclosure and protection of confidential information

In order to retain proportionality when setting the extent of the disclosure, the court shall take into account to what an extent is the evidence relevant to the proceedings on the merits, the costs of the disclosure, and the need to protect confidential information, if it is to be disclosed.<sup>104</sup> This, in principle, corresponds with the requirements of the Damages Directive, which nonetheless also asks to take into account the extent to which the claim or defence is supported by available facts and documents.<sup>105</sup> Presumably,

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<sup>97</sup> Damages Directive, Art. 5(2).

<sup>98</sup> Damages Directive, Recitals (15) and (16).

<sup>99</sup> Damages Act, Sec. 10 (1).

<sup>100</sup> Damages Act, Sec. 11(2).

<sup>101</sup> Damages Act, Sec. 14(3).

<sup>102</sup> Damages Act, Sec. 11(4).

<sup>103</sup> Damages Act, Sec. 10(4).

<sup>104</sup> Damages Act, Sec. 14(2).

<sup>105</sup> Damages Directive, Art. 5(2).

this duty stems from the general rules of Czech civil court proceedings and does not have to be re-stated in the Damages Act.

As has already been mentioned, confidential information may also be disclosed. In this case the Damages Directive mandates the adoption of further unspecified ‘effective measures’ to protect such information.<sup>106</sup> The Damages Act provides here for special rules for damages claims in case the information disclosed (i.e. not only *confidential* information) was abused and a possibility to disclose such information only to a limited number of people.

The claimant requesting disclosure of evidence needs to pay an up-front guarantee of CZK 100 000 (EUR 4 000); this sum may be proportionately increased by the judge.<sup>107</sup> If those who have disclosed the evidence sustained harm as a result, they may claim damages from the requesting party. The damages claim needs to be submitted no later than six months after the evidence was disclosed.<sup>108</sup> The reasons for such a deadline are not evident from the explanatory memorandum, but it will definitely need to be explained further in order to avoid a possible – but clearly absurd – interpretation that should the evidence disclosed be abused later than 6 months after the disclosure, the damages thus sustained cannot be claimed. The guarantee is primarily used for compensating the harm<sup>109</sup> – if the evidence is not disclosed or the deadline for submitting the damage claim lapses, it shall be returned to the requesting party.<sup>110</sup>

Concerning specifically confidential information, the court may decide that it shall be disclosed only to a limited number of people.<sup>111</sup> According to the explanatory memorandum, this provision does not address impartial experts but persons associated with the claimant.<sup>112</sup> Alternatively, the court may appoint one or several impartial experts who will get acquainted with all the information and produce a report for the purposes of the claimant, not containing confidential information, whereby the claimant bears the costs of producing such a report.<sup>113</sup> Finally, the court may adopt ‘other appropriate measures’ in order to protect the confidentiality of the disclosed

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<sup>106</sup> Damages Directive, Art. 5(4).

<sup>107</sup> Damages Act, Sec. 12(1) and (2).

<sup>108</sup> Damages Act, Sec. 13(2).

<sup>109</sup> Damages Act, Sec. 13(1).

<sup>110</sup> Damages Act, Sec. 12(4).

<sup>111</sup> Damages Act, Sec. 17(1) (a).

<sup>112</sup> Explanatory Memorandum, p. 70.

<sup>113</sup> Damages Act, Sec. 17(1) (b) and (3).

information.<sup>114</sup> According to the explanatory memorandum, these may include erasing confidential information from the disclosed documents.<sup>115</sup>

Next to the protection of confidential information, confidentiality of legal professional privilege (hereinafter, 'LPP') needs to be guaranteed.<sup>116</sup> 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.<sup>117</sup> According to the Damages Act, the disclosure must not conflict with the professional secrecy of independent lawyers (advocates),<sup>118</sup> which is nonetheless not identical with the notion of LPP. It is obvious that complex provisions on LPP and its protection need to be adopted into Czech law.

Finally, there is a category of information that cannot be disclosed at all. According to the Damages Directive, these are leniency statements, excluding pre-existing information, and settlement submissions.<sup>119</sup> This requirement is fully transposed into the Damages Act,<sup>120</sup> including the procedure according to which the court may ascertain, if need be with the help of the CCA, whether the requested information is indeed the leniency statement or settlement submission.<sup>121</sup> In addition, information prepared specifically for the purposes of the competition authority's proceedings, information prepared by the competition authority and sent to the parties as well as settlement submissions that have been withdrawn may be disclosed only after the competition authority's proceedings have been closed.<sup>122</sup> The Damages Act transposes these provisions, but only with several modifications unaccounted for in the explanatory memorandum. First, whereas the Directive protects information *prepared* specifically for the proceedings' purposes (i.e. excluding pre-existing information), the Act protects information *submitted* in the proceedings. Second, the Directive protects the information prepared and *sent* by a competition authority, whereas according to the Czech 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

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<sup>114</sup> Damages Act, Sec. 17(1) (c).

<sup>115</sup> Explanatory Memorandum, p. 70.

<sup>116</sup> Damages Directive, Art. 5(6).

<sup>117</sup> See the Judgement of the Supreme Administrative Court of 29.05.2009, Ref. No. 5 Afs 95/2007.

<sup>118</sup> Damages Act, Sec. 14(4).

<sup>119</sup> Art. 6(6) and Art. 2(16), (17) and (18).

<sup>120</sup> Damages Act, Sec. 15(1) and Sec. 2(2) (a) and (b).

<sup>121</sup> Damages Act, Sec. 15(2) and (3).

<sup>122</sup> Damages Directive, Art. 6(5).

into force. Presumably therefore, should the investigation been concluded before a formal investigation was initiated, and thus without a decision, such information may never be disclosed.<sup>123</sup> The protection afforded by the Damages Act is thus significantly wider than that given by the Damages Directive. It is interesting to note in this regard that the Competition Act is to contain ‘mirror’ provisions of these concerning access to the file, which are fully in line with the Damages Directive.<sup>124</sup>

Special rules apply with regard to competition authorities. Concerning information contained in the competition authority’s file (but possibly also held by other parties, e.g. as a copy), the test of proportionality shall 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.<sup>125</sup> These requirements are more or less precisely contained in the Damages Act as well.<sup>126</sup>

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.<sup>127</sup>

#### 2.4. Use of disclosed information

Even though ‘hidden’ in the section dedicated to the protection of confidential information, it is probably a general rule that the disclosed information may only be used in relation to the damages claims, or for the purposes of further requests for disclosure.<sup>128</sup>

Information protected from disclosure (i.e. leniency statements and settlement requests) obtained from the competition authority’s file are inadmissible as evidence.<sup>129</sup> Correspondingly, information that can be disclosed only after the competition authority’s proceedings are closed may be used as evidence only thereafter;<sup>130</sup> the court may stay its proceedings

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<sup>123</sup> The same provision is nonetheless contained in Sec. 15(4) of the Damages Act, according to which such information may be disclosed also when preliminary investigation is concluded without opening formal investigation.

<sup>124</sup> Competition Act, Sec. 21ca.

<sup>125</sup> Damages Directive, Art. 6(4).

<sup>126</sup> Damages Act, Sec. 16(1) and (2).

<sup>127</sup> Damages Act, Sec. 15(5) and 16 (4).

<sup>128</sup> Damages Act, Sec. 17(5).

<sup>129</sup> Damages Act, Sec. 31(1).

<sup>130</sup> Damages Act, Sec. 31(2); all the discrepancies between the Damages Directive and the Damages Act described above apply to this provision as well.

until such a date.<sup>131</sup> Admissible evidence obtained from the competition authority's file may be used only by the person that had legally obtained it, or by its legal successor.<sup>132</sup>

Finally, inadmissibility of evidence due to the breach of confidentiality will be discussed below.

## 2.5. Sanctions for non-disclosure

In case 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.<sup>133</sup> The same fine may be imposed on those who make the fulfilment of such a duty impossible or more complicated;<sup>134</sup> this presumably applies to cases of destruction of relevant evidence.<sup>135</sup> For breaching the duty of protecting the confidentiality of the disclosed information, a fine of up to CZK 1 000 000 (EUR 40 000) may be imposed.<sup>136</sup>

Such fines may be imposed repeatedly,<sup>137</sup> within the period of five years after the obligation was breached.<sup>138</sup> All companies making up the undertaking as an economic entity are jointly and severally liable for the fine,<sup>139</sup> which is the first case of collective liability for fines in the Czech legal order.

In addition, 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.<sup>140</sup> Conversely, if the confidentiality of the disclosed information is breached, the court may decide that the evidence is inadmissible.<sup>141</sup>

Finally, the court may decide that the one who has failed to disclose the evidence, or has breached its confidentiality, shall bear all the costs of the disclosure proceedings.<sup>142</sup>

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<sup>131</sup> Damages Act, Sec. 31(4).

<sup>132</sup> Damages Act, Sec. 31(3).

<sup>133</sup> Damages Act, Sec. 20(1) and (2).

<sup>134</sup> Damages Act, Sec. 20(1) (b).

<sup>135</sup> Damages Directive, Art. 8(1)(a).

<sup>136</sup> Damages Act, Sec. 21(1).

<sup>137</sup> Damages Act, Sec. 23(2).

<sup>138</sup> Damages Act, Sec. 22(1).

<sup>139</sup> Damages Act, Sec. 22(3).

<sup>140</sup> Damages Act, Sec. 28(1).

<sup>141</sup> Damages Act, Sec. 28(2).

<sup>142</sup> Damages Act, Sec. 32.



### 3. Effect of national decisions

As a general rule, courts are bound by decisions of competent administrative authorities finding an infringement. The fact that there was an administrative offence and who the offender was can therefore not be disputed before a civil court if the administrative decision declared so. Conversely, should the administrative authority find that there was no infringement, the civil court may revisit the question and eventually come to a different conclusion.<sup>143</sup> Concerning specifically the CCA, its decisions declaring that competition law (both EU and Czech) was breached, as well as the identification of the undertaking responsible for the infringement, is binding on civil courts in their proceedings from the day the decision entered into force. On the other hand, the court would not be bound by the CCA's decision that there was no infringement – it would, however, have to take the CCA's decision into consideration.<sup>144</sup>

The Czech legal order was thus in line with the Damages Directive,<sup>145</sup> the Damages Act nonetheless repeats this provision specifically for the purposes of the CCA.<sup>146</sup> The Damages Act also extends this binding effect to the European Commission's decisions, for which there has not been any explicit provision before,<sup>147</sup> and also to judgments of other courts, which would presumably apply to cases where the same defendant is sued in multiple proceedings.

Concerning decisions of NCAs in other member states, they are arguably not covered by the general provisions on the binding effect of decisions of administrative authorities, as described above (see e.g. Kindl and Petr, 2012, p. 109). According to the Damages Act, such decisions constitute a rebuttable presumption that there was an infringement and who its perpetrator was.<sup>148</sup>

For the sake of completeness, it should be added that Czech courts are not obliged to stay proceedings if the CCA has initiated proceedings on the same matter, even though they are generally allowed to do so.<sup>149</sup> On one occasion, the appellate civil court ruled that staying the court proceedings by the first-instance

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<sup>143</sup> Civil Procedure Code, Sec. 135(1).

<sup>144</sup> Civil Procedure Code, Sec. 135(2).

<sup>145</sup> Damages Directive, Art. 9.

<sup>146</sup> Damages Act, Sec. 27(1).

<sup>147</sup> Even though it was generally agreed in legal theory that the binding effect of the Commission's decisions corresponds with those of the CCA.

<sup>148</sup> Damages Act, Sec. 27(2).

<sup>149</sup> Section 109 (2) (c) of the Civil Procedure Code.

court had been illegal. The case concerned an alleged abuse of dominance. The CCA initiated proceedings against the dominant company (which has not yet been concluded), while – practically at the same time – the civil court initiated proceedings based on a damages claim against the same undertaking concerning the same conduct. However, the plaintiff in the civil proceedings claimed not only the breach of competition law, but unfair competition law as well. The court decided to stay the proceedings until the decision of the CCA was rendered.<sup>150</sup> Upon appeal of the defendant, the Superior Court in Prague decided that the conditions for staying the proceedings were not met,<sup>151</sup> in particular because the CCA was empowered to decide only on one leg of the claim (abuse of dominance) and not the other (unfair competition). Thereafter, the Superior Court in Prague decided in a similar case that staying the court proceedings until the CCA's decision is not permissible.<sup>152</sup> It may thus be concluded that as a matter of principle, civil courts are to assess the question of competition law infringements themselves, without 'waiting' for the CCA.

The general rules on the binding effect of decisions rendered by administrative authorities also apply to court proceedings concerning compensation among joint and severally liable infringers.<sup>153</sup>

#### 4. Collective redress

At present, and despite the Commission's Recommendation,<sup>154</sup> Czech law does not contain any special rules concerning collective (or class) actions in antitrust matters (see e.g. Kindl and Petr, 2012, p. 116–117). The Damages Act does not address this topic at all.

This being said, there are various other instruments – applicable in all civil cases – that may lead to having multiple plaintiffs in single proceedings. First, nothing prevents several persons from bringing a joint action against the same defendant. If, however, the court considers such joining of actions inconvenient, it may decide to separate the cases. Second, the court may allow several proceedings to be joined for reasons of expediency, if they are factually connected or they involve the same participants.<sup>155</sup> Third,

<sup>150</sup> Resolution of the City Court in Prague of 6.04.2012, Ref. No. 41 Cm 13/2011.

<sup>151</sup> Resolution of the Superior Court in Prague of 16.08.2012, Ref. No. 3 Cmo 222/2012.

<sup>152</sup> Resolution of the Superior Court in Prague of 4.06.2013, Ref. No. 3 Cmo 126/2013.

<sup>153</sup> Damages Act, Sec. 33.

<sup>154</sup> Commission Recommendation of 11.06.2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violation of rights guaranteed under Union Law.

<sup>155</sup> Civil Procedure Code, Sec. 112(1).

the court may allow another claimant to enter the proceedings if the first claimant requests it and the entering claimant consents to it.<sup>156</sup> The Civil Procedure Code also recognizes the so-called interveners (side participants) who may join the proceedings to support a party to the dispute if they have a legal interest in the outcome of the case.<sup>157</sup>

## VI. Consensual dispute resolution

There is very limited experience with formalized consensual dispute resolution (CDR) mechanisms in the Czech Republic. There are no statistics as regards the types of disputes in which such mechanisms apply. As regards more complex commercial litigation (including potentially private competition litigation), settlements based on private negotiations between the parties happen in practice, especially given the excessive length of court proceedings in this kind of litigation, such cases are however not reported. The actual extent of consensual dispute resolution may nonetheless be demonstrated by the fact that out of the identified cases of private enforcement, almost half of the claims was withdrawn, and thus presumably settled (Petr and Zorková, 2016, p. I–VIII).

The Damages Directive addresses consensual dispute resolution on four levels: in relation to limitation periods, the possibility to stay court proceedings,<sup>158</sup> the level of fines imposed by competition authorities,<sup>159</sup> and the effect of CDR on subsequent actions for damages.<sup>160</sup>

The Damages Act implements some, but not all of these provisions.

Concerning the limitation periods, they ought to be suspended for the duration of any consensual dispute resolution process.<sup>161</sup> There is no such provision under Czech law.

Concerning court proceedings, the court shall suspend it for up to two years if it is informed by the parties that they are involved in CDR negotiations.<sup>162</sup>

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<sup>156</sup> Civil Procedure Code, Sec. 92(1).

<sup>157</sup> Civil Procedure Code, Sec. 93. The author is aware of only a single antitrust case where the intervention was asked for (essentially by indirect purchasers) and dismisses; see the Resolution of the Regional Court in Ostrava of 7.01.2005, Ref. No. 1 Cm 221/2000.

<sup>158</sup> Damages Directive, Art. 18(2).

<sup>159</sup> Damages Directive, Art. 18(3).

<sup>160</sup> Damages Directive, Art. 19.

<sup>161</sup> Damages Directive, Art. 18(1).

<sup>162</sup> Damages Act, Sec. 26.

There are no provisions on CDR's effects on fines. However, nothing prevents the CCA from taking it into account, and indeed, there is a provision, which was inserted into the Competition Act already in 2012, whereby the CCA shall consider to what an extent the infringer attempted to mitigate the negative effects of the infringement while setting the fine.<sup>163</sup>

Finally, there are specific rules concerning limiting joint and several liability of the infringers. In case the claimants have settled, the amount of their claim is reduced by the share of the co-infringer with whom he had settled. They cannot claim that amount from other joint and severally liable co-infringers, thus preventing overcompensation.<sup>164</sup> The co-infringer who has settled also does not need to compensate other co-infringers.<sup>165</sup>

## VII. Conclusions

The Damages Act has not yet been adopted, but we may presume that no significant changes will take place to the proposal currently discussed in the Parliament. This proposal addresses the requirements of the Damages Directive and transposes them into the Damages Act. Some of its provisions might not be necessary and some might have been omitted,<sup>166</sup> but overall, the proposed act seems to be a reasonable implementation of the Directive.

Taking into account the hitherto practice of private enforcement in the Czech Republic, it is questionable nonetheless whether these provisions are able to bring any substantial change. In my opinion, any attempt to boost private enforcement would need rules addressing not only damages, but also other claims stemming from competition law infringements. At the same time, and in order to stimulate claims from consumers and smaller undertakings, some form of collective actions will be necessary.

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<sup>163</sup> Competition Act, Sec. 22b(2).

<sup>164</sup> Damages Act, Sec. 8(1).

<sup>165</sup> Damages Act, Sec. 8(3).

<sup>166</sup> The only serious omission concerns in my opinion the suspension of limitation periods during consensual dispute resolution.

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## **I. Introduction**

The Directive 2014/104/EU (hereinafter, Directive) has not been implemented in Estonia yet, and will most probably not be transposed before mid-2017. Estonia has therefore not been able to meet the deadline set out in Article 21(1) of the Directive, that is, to implement the Directive by 27 December 2016. The officials of the Ministry of Justice<sup>1</sup> have prepared relevant legal acts and submitted them to the Parliament for a final reading<sup>2</sup> and, ultimately, adoption.

Comments made in this submission are based on the Draft Law as it stands on 24 February 2017 (hereinafter, Draft Law). It may happen, however, that the Draft Law is subject to further changes during its reading in the Parliament.

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<sup>1</sup> In charge of the harmonisation.

<sup>2</sup> The Estonian law-making process foresees three readings in the Parliament.

## II. Manner of implementing the Directive in Estonia

Estonian law makers have chosen to implement the rules and regulations set forth in the Directive by amending the Competition Act<sup>3</sup> (hereinafter, CA), the Code of Civil Procedure<sup>4</sup> (hereinafter, COCP) and the Code of Criminal Procedure<sup>5</sup> (hereinafter, CCP), no separate legal act will thus be adopted. Even though many of the principles referred to in the Directive already exist in Estonian legislation, some of its terms and rules are not provided by the national legal system, such as direct or indirect supplier or customer and the passing-on of overcharges.<sup>6</sup> These are either defined in the Draft Law or respectively explained in the explanatory notes attached to it. New and additional rules have been created or clarifications provided in the explanatory notes attached to the Draft Law with regard to joint and several liability as well as entering consensual settlements between the victim and the person causing damages. Limitation of liability receives special attention, as this has proven to be a problem in earlier relevant damages cases. Special rules have been created with regard to evidence collection in civil procedure and access to the file. Relevant changes have also been made concerning the Estonian competition authority – the Competition Board. First, its decisions will become binding on civil courts, and second, it will regain the right to perform administrative supervision, performed subject to the *economic unit principle*, over the activities of state or local government. No changes are foreseen regarding competent courts or dispute resolution. What is interesting to note, though, is the treatment of business secrets or otherwise confidential information. According to the Directive, such information must, on the one hand, be available in actions for damages but on the other, it needs to be appropriately protected. It is generally accepted that the Estonian legal system is lacking appropriate protective measures in this context. For these purposes, the makers of the Draft Law originally proposed a system of so-called *confidentiality clubs/*

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<sup>3</sup> 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).

<sup>4</sup> 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).

<sup>5</sup> 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).

<sup>6</sup> Although the principle as such is provided in civil procedural law.

*rings*. Unfortunately, the proposal met with such high resistance that the drafters decided to drop it.

According to the online draft laws database,<sup>7</sup> the relevant Draft Law, together with its explanatory notes and other appendices, was submitted by the Minister of Justice to the Government for approval on 24 January 2017.<sup>8</sup> The Draft Law contains only five sections, thus it is rather short. The first section contains the amendments to the CA, the second and third sections provide amendments to the CCP, the fourth and the fifth sections introduce changes to the COCP and the Code of Enforcement Procedure. If approved by the Government, draft laws are submitted to the Parliament where they must pass three readings before adoption. If adopted by the Parliament, a draft law must then be promulgated by the Estonian President<sup>9</sup> and published in the official gazette the *Riigi Teataja*. In general, laws enter into force on the tenth day following their publication in the *Riigi Teataja*. As of today, it is impossible to predict the date of the actual entry into force of the relevant legislation.

### III. Competent courts

In the Estonian system, no special courts are appointed to deal with competition law infringements. Moreover, a patchwork of procedures exist with regard to procedural rules applicable to competition law matters – depending on the subject of the dispute, provisions on administrative, misdemeanour, criminal or civil proceedings can be applied. Actions for damages due to competition law infringements are handled by civil courts in civil proceedings. Cartels, however, are a criminal offence in Estonia, subject to section 400 of the Estonian Penal Code. On the other hand, abuse of a dominant position is, as of 1 January 2015, merely a misdemeanour according to section 73<sup>5</sup> CA. In addition, the Competition Board monitors and performs state supervision, which is subject to administrative procedures under section 54 CA as well as under sub-section 28(1) of the Law Enforcement Act. In both cases, the Competition Board is entitled to issue

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<sup>7</sup> Draft Laws Information System (in Estonian: EIS) is a working environment recording the coordination of draft laws between authorities, filing of draft laws to the Government and to the Parliament as well as their public consultations.

<sup>8</sup> Last access on 4.03.2017.

<sup>9</sup> § 107 of the Constitution of the Republic of Estonia (in Estonian: Eesti Vabariigi põhiseadus, passed on 28.06.1992, entry into force on 3.07.1992. English version available at: <https://www.riigiteataja.ee/en/eli/521052015001/consolide> (4.03.2017).



injunctions and apply administrative coercive measures. Thus establishing a violation of competition law can take place under four different sets of procedural rules and their proceedings. The Estonian Bar Association, for example, is of the opinion that the fragmentation of national proceedings, as well as the fact that cartels are handled in rather complex criminal proceedings, may have led to the situation where the Competition Board is in fact adopting too few infringement decisions. From 2010 to 2016, the NCA adopted only five infringement decisions. In addition, there are few cartel related court decisions, most of which are the result of the application of settlement proceedings, where the court ruling does not describe the actual infringement. Thus, since cartel investigations are rare and complicated from the procedural viewpoint, the Directive may not have the anticipated impact in Estonia.

Many principles set out in the Directive are already part of the Estonian legal system, and so they are not repeated in the Draft Law. The Draft Law contains rules and principles that are either missing from current legislation or need to be specified or modified.

## IV. Substantive law issues

### 1. Limitation periods

Pursuant to currently applicable legislation, actions for damages are subject to general limitations periods, which is three years for both claims arising from transactions as well as from tort.<sup>10</sup> With regard to contractual relations, the limitation period of a claim begins when the claim is due, which is the moment the entitled person obtains the right to make a claim for performance corresponding to the claim.<sup>11</sup> In tort, the limitation period begins as of the moment when the entitled person became or should have become aware of the damage and of the person obligated to compensate that damage.<sup>12</sup> The limitation period is subject to suspension if an action for the fulfilment or recognition of a claim is filed with the court,<sup>13</sup> under the

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<sup>10</sup> § 146(1) and 150(1) of the General Part of the Civil Code Act (in Estonian: Tsiviilseadustiku üldosa seadus, passed on 27.02.2002, entry into force on 1.07.2002. English version available at: [https://www.riigiteataja.ee/en/eli/528082015004/consolide\(4.03.2017\)](https://www.riigiteataja.ee/en/eli/528082015004/consolide(4.03.2017))).

<sup>11</sup> § 147(2)–(3) of the General Part of the Civil Code Act.

<sup>12</sup> § 150(1) of the General Part of the Civil Code Act.

<sup>13</sup> § 160(1) of the General Part of the Civil Code Act.

arbitration procedure<sup>14</sup> or during negotiations.<sup>15</sup> It is, however, unclear at the moment if the limitation period starts from the moment the infringement ceased or is every infringement episode to be treated separately. The relatively short limitation period applicable to damages renders the exercise of the right to damages practically impossible, considering that the burden of proof is on the claimant.

The Draft Law introduces rules whereby the limitation period for actions for damages related to competition law infringements is five years as of the moment when the entitled person became or should have become aware of the damage and of the person obligated to compensate that damage, but not before the infringement has ceased. It is also prescribed that the limitation period shall be suspended if competent authorities (such as the Estonian Competition Board) take action to investigate the matter. The suspension ends one year after the infringement decision has become final or the termination of the relevant proceedings.

## 2. Joint and several liability

Joint and several liability is regulated in the Estonian Law of Obligations Act<sup>16</sup> (hereinafter, LOA). According to section 65 LOA, if several persons are to perform an obligation jointly and severally (solidary obligors), the obligee may require full or partial performance of the obligation from all the obligors collectively, from any one obligor or from some of the obligors separately. In relations between themselves, solidary obligors are liable for the performance of the obligation in equal shares, unless otherwise provided by the law, the contract or the nature of the obligation.<sup>17</sup> Pursuant to subsection 137(1) and (2) LOA, if several persons are liable, on the same or different grounds, to a third party for the same damage, they shall be jointly and severally liable for the payment of compensation. However, in relations between infringers, liability shall be divided taking into account all of the circumstances, in particular the gravity of the non-performance or the unlawful character of other conduct, and the degree of risk borne by each person.

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<sup>14</sup> § 161 of the General Part of the Civil Code Act.

<sup>15</sup> § 167 of the General Part of the Civil Code Act.

<sup>16</sup> 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\(4.03.2017\)](https://www.riigiteataja.ee/en/eli/524012017002/consolide(4.03.2017)).

<sup>17</sup> § 69(1) of the Law of Obligations Act.

The Draft Law implements almost word for word the rules set out in Article 11(2) and (3) of the Directive concerning joint and several liability of small and medium-sized companies. It is interesting to note, however, that in addition to rules provided in Article 11(2) and (3) of the Directive, the Draft Law excludes the exemption granted to SMEs if injured parties who are not direct or indirect purchasers of the SME cannot obtain full compensation from other undertakings involved in the infringement. According to the explanatory statements, this approach complies with the interpretation of Article 11(2) of the Directive by the Commission, since the said SME exemption should apply without prejudice to the right of full compensation of the injured parties.

With regard to immunity recipients as well as the recovery relationship between the infringers, the Draft Law follows the principles set out in Article 11(4)–(6) of the Directive.

### 3. Passing-on of overcharges

According to the general rule, the claimant shall prove the amount of the damage according to the general burden of proof rules set out in sub-section 230(1) COCP<sup>18</sup> and confirmed by the Supreme Court in its decision No 3-2-1-60-15. In addition, Estonia has legal acts containing rules the aim of which is to avoid overcompensation, such as sub-section 127(1) and (5) LOA. On this basis, the purpose of the compensation of damages is to place the injured person in a situation as near as possible to that in which that person would have been if the circumstances which are the basis for the damages claim had not occurred. Any gain received by the injured party as a result of the damage caused, particularly costs avoided by the injured party, shall be deducted from the compensation unless a deduction is contrary to the purpose of the compensation. As a result, courts cannot grant the payment of a higher compensation than what the victim actually suffered, and if the specific damages cannot be quantified, the court will estimate their amount as close as possible to the damage suffered.

In general, the claimant bears the burden of indicating the components and relevant amount of his/her damages claim so that the defendant can rebut them (as stated by the Supreme Court in decision No 3-2-1-19-13). If the fact that damages were caused was established in a proceeding, but

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<sup>18</sup> In Estonian: Tsiviilkohtumenetluse seadustik, passed on 20.04.2005, entry into force on 1.01.2006. English version available here: <https://www.riigiteataja.ee/en/eli/510012017004/consolide> (4.03.2017).

the exact amount of the damage cannot be established or its establishment would involve major difficulties or unreasonably high costs, including if the damage is non-patrimonial, the court decides on the amount of damage pursuant to sub-section 233(1) COCP according to its own conscience and taking account of all facts (as confirmed by the Supreme Court in decision No 3-2-1-38-15).

The term the *passing-on defence*, as provided in Article 13 of the Directive, is not used or defined in Estonian legislation. However, its principle is applied in Estonia as, under sub-section 127(1) LOA, the defendant is entitled to rebut the damages claim of the claimant.

According to the Estonian system, the purpose of the compensation of damages, the causal link within the meaning of *condition sine qua non*, as well as the difference hypothesis<sup>19</sup> are closely related to each other. The difference hypothesis seeks to establish the situation the insured person would have been in if the event leading to the damages had not occurred. Therefore, it indicates the causal consequences of the event leading to damages. If the analysis of these causal consequences reveals that the excessive purchase price, or the overly low supply price, has respectively been passed on to the next buyer or previous supplier, the claimant sustained no damages and has thus no claim. As mentioned already, according to sub-section 230(1) COCP, the claimant must prove the amount of damages, whereas the defendant has the right to object to such claim arguing that the overcharge has been passed on by the claimant to the next level in the supply chain. Since the general principles on the passing-on defence are already provided in Estonian civil procedural law, no separate section was introduced into the Draft Law.

Article 12(4) of the Directive requires Member States to ensure that the rules laid down with regard to the passing-on of overcharges apply accordingly where the competition law infringement relates to supplies provided to the infringer. The Draft Law provides in this context not only the definitions of direct and indirect purchasers but also those of direct and indirect suppliers. According to the Draft Law

- (a) a direct purchaser is a person who acquires from an infringer products subject to the infringement;
- (b) an indirect purchaser is a person who acquires from the direct purchaser or a following purchaser products subject to the infringement or products containing them or derived from them;

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<sup>19</sup> As provided in § 127(1) LOA.

- (c) a direct supplier is a person who sells products subject to the infringement to the infringer;
- (d) an indirect supplier is a person who sells products subject to the infringement or products containing them or derived from them to the direct supplier or previous supplier.

Provisions of the Draft Law corresponding to Article 14(2) of the Directive prescribe that the indirect purchaser or indirect supplier is assumed to have proven damages caused through the infringement if the indirect purchaser or indirect supplier proves that it has either acquired or sold products subject to the infringement, products containing them or derived from them.

Article 15(1)(a) of the Directive requires courts to take due account of actions for damages that are related to the same infringement, but are brought by claimants from other levels of the supply chain. Although the principle of joining claims is provided in the Estonian legal system, it enables courts to join cases only if the relevant claims are: of the same type and involve the same parties; or if they are filed by one plaintiff against different defendants; or by several plaintiffs against the same defendant, and are subject to concurrent court proceedings. The courts can join such cases provided the claims are legally related or they could have been filed by a single action, and joining them facilitates procedural efficiency.<sup>20</sup> The court can also consider suspending its proceedings if its judgment fully or partially depends on another proceeding conducted in another matter.<sup>21</sup> Both of these competences remain at the full discretion of the court.

According to Estonian civil procedural law, previous court judgements are considered written evidence that the court must evaluate from all perspectives, thoroughly and objectively, provided however that the relevant judgement has been filed by a party. It is explained by the authors of the Draft Law that Article 15(1)(b) of the Directive does not contradict the principle of adversarial proceedings, and so it is not required by the Directive for the court to take previous judgements into account on its own initiative.

Information in the public domain resulting from public enforcement of competition law is taken into account by the court in a damages case based on a competition law infringement only if submitted by the parties. The authors of the Draft Law claim that the principle of adversarial proceeding, on which the Estonian civil procedural law is based, does not permit for the court to be bound by such information, unless it is submitted by the parties.

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<sup>20</sup> § 374 COCP.

<sup>21</sup> § 356 COCP.

#### 4. Quantification of harm

The principle that the court can estimate the amount of harm, if the latter is difficult to quantify, is already provided by Estonian legislation.<sup>22</sup> Moreover, the possibility for the Competition Board to assist the court in quantifying damages is also provided.<sup>23</sup> Thus Article 17(1) and (3) of the Directive require no additional implementation into Estonian legislation. However, Estonian legislation currently lacks the presumption that cartel infringements cause harm, as set out in Article 17(2) of the Directive. As a result, the aforementioned presumption was established in the Draft Law, along with explanations of the term *cartel* and *infringement*. An *infringement* is defined as an act prohibited under Articles 101 and 102 TFEU. The term *cartel* is not used *expressis verbis*. However, the Draft Law provides the following rule: ‘it is assumed that an agreement or concerted practice between competitors, the aim of which is to coordinate their competitive behaviour on the market or influence relevant parameters of competition or anti-competitive actions against other competitors, is assumed to cause harm’. Thus, the presumption of harm caused by cartels attempts to also incorporate the meaning of the very concept of a cartel. Although this may not be a wrong approach, it raises questions which are not answered by the explanatory notes to the Draft Law. It is obvious that the term *infringement* is broader than the term *cartel*. According to the Draft Law, the Competition Board must describe in its rulings the establishment of an *infringement*. The question remains, however, of how and when and by whom is the cartel subject to the presumption of harm established?

The Draft Law provides a special provision (*lex specialis*) with regard to the general interest calculation rules set forth in section 113 LOA. According to the Draft Law, interest shall be counted beginning from the moment the claim is due, that is, from the moment the injured person files a claim for damages with the infringer or with the court. This, however, seems not in compliance with the explanation provided in clause 12 of the preamble to the Directive, whereby interest should be due from the time the harm has occurred until the time the compensation is paid. According to the Directive, interest should thus be paid for the period starting when the *infringement* commenced, rather than from the moment a claim for damages is filed.

<sup>22</sup> See for that purpose § 127(6) LOA and § 233(1)–(2) COCP.

<sup>23</sup> § 393(4) COCP.

## V. Procedural issues

### 1. Disclosure of evidence

Rules provided in chapter II of the Directive on the disclosure of evidence are not currently part of Estonian civil procedural law and must thus be established. Authors of the Draft Law decided to implement these provisions into the CA instead of the COCP. According to the explanations provided, the COCP keeps its position of *lex generalis*, and any special rules on civil procedure are to be prescribed in other relevant legal acts (*lex specialis*). Again this approach may not be wrong, it is merely a question of legal drafting, but considering that the national system foresees no special courts specialising on competition law matters, it may well be that generally trained judges will prove unable to apply these special rules.

Even though many principles provided in the Articles 5, 6, 7 and 8 of the Directive are already provided in Estonian civil procedural law, some amendments were necessary in this context.

The principles enshrined in Article 5 of the Directive are already in force and available under Estonian civil procedural law – if a claimant wishing to provide evidence is unable to do so, he/she may request the court to order the collection of evidence from another source. The claimant, however, must substantiate which facts relevant to the matter he/she wish to prove by providing the evidence on their own or requesting the access to evidence. The claimant must, *inter alia*, set out in the application for access to evidence any information which enables the collection of such evidence.<sup>24</sup>

The court accepts or organises the collection of evidence which has relevance to the matter. Evidence is considered not to be relevant if (i) the relevant fact does not need to be proved, among other, if the fact is not disputed, and (ii) enough evidence has already been provided, in the opinion of the court, to prove the fact.

With regard to proportionality, Estonian civil procedural law allows the court to refuse to accept a piece of evidence or refuse the request to disclose it if:<sup>25</sup>

- the evidence has been obtained by a criminal offence or unlawful violation of a fundamental right,

<sup>24</sup> § 236(2)–(3), § 238(1) COCP, Article 5(1)–(2) of the Directive

<sup>25</sup> § 238(3) COCP, Article 5 (3) a) and b) of the Directive.

- 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 to disclose it or other difficulties related thereto,
- the evidence is not provided or the request for evidence disclosure is not made in a timely manner,
- the need for providing or taking evidence is not substantiated,
- the participant in the proceeding requesting evidence disclosure fails to make an advance payment demanded by the court in order to cover the costs incurred upon the fulfilment of the disclosure request.

To a great extent, Estonian civil procedural law is thus in compliance with Article 5(3) of the Directive. Only with regard to its sub-clause (c), the Draft Law provides that the court may refuse to accept evidence or to take evidence which contains business secrets or confidential information, especially concerning third parties and when in the opinion of the court it is not proportionate *vis-a-vis* the evidence it is to prove. In general, Estonian civil procedural law enables the court to accept, organise the disclosure of and consider any evidence which has relevance to the matter, including those that contain confidential information. One should, however, note that civil procedure is adversarial in Estonia, and it is almost never the court that initiates evidence collection, it is always the parties who must either present relevant evidence or, if unable to do so, apply to the court with a request for evidence disclosure. General measures to protect confidential information are available, for example if a piece of evidence is highly voluminous and mainly includes facts not relevant to the proceeding, or if it contains information deemed to be a state or a business secret, or classified information of foreign states. If, for such or other similar reasons, the court finds that the submission of the document in its entirety is not reasonable, considering the danger of the document being lost or damaged, a certified excerpt of the document may be submitted, or the place identified where the court and the participants in the proceeding may examine the document.<sup>26</sup> According to relevant rules established in the Draft Law,<sup>27</sup> before the court decides on disclosure of evidence,<sup>28</sup> the court will have to ensure that those from whom disclosure is sought are provided an opportunity to be heard.

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<sup>26</sup> § 275(1) and § 238 COCP, Article 5(4) of the Directive.

<sup>27</sup> Article 5(7) of the Directive.

<sup>28</sup> According to § 239 COCP the court makes a special court ruling.



The measures currently available may be insufficient or even ineffective in protecting business secrets or confidential information in competition matters. To rectify that, the authors of the Draft Law originally proposed a system of confidentiality clubs/rings, which would have allowed the court to decide on access to such evidence. On this basis, only the legal representatives of the parties would have had full access, subject to a non-disclosure obligation. At the same time, claimants, defendants and other parties to the procedure would not have had access to such evidence. The aim of such a solution was to stop infringers hiding behind the defence of a business secret or confidentiality. However, the proposed measure was strongly opposed and so the Ministry of Justice decided not to add it to the Draft Law. Instead, it was decided to proceed with measures already available in Estonian legislation, even if they end up proving to be inefficient in damages claims based on competition law infringement.

With regard to professional privilege, the Estonian civil procedural law provides that legal representatives (including notaries) shall not be heard as witnesses, without the permission of the person in whose interests the duty to maintain confidentiality is imposed, with regard to facts which they have found out during the performance of their professional duties.<sup>29</sup> The authors of the Draft Law claim that the obligation set forth in Article 5(6) of the Directive is fulfilled by the abovementioned national civil procedural rule. However, this is in fact doubtful since the scope of the legal privilege principle is much wider in EU law than in Estonia, for instance, it applies also to documents emanating from the undertaking provided to an external lawyer, rather than only from external lawyers to the undertaking (Roth and Rose, 2008).

As to the disclosure of evidence included in the files of the Competition Board, the Estonian legal system already contains the principles provided in Article 6(4) of Directive, including the prohibition of ‘fishing expeditions’. The court can organise the collection of only such evidence which has relevance in the matter at hand.<sup>30</sup> If the need to provide or take certain evidence has not been substantiated by the relevant party, such evidence cannot be collected by the court.<sup>31</sup> When substantiating a disclosure request, the relevant party must indicate which facts relevant to the matter it wishes to prove with the particular piece of evidence requested.<sup>32</sup>

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<sup>29</sup> § 256 of the Code of Civil Procedure, Article 5(6) of the Directive.

<sup>30</sup> § 238(1) COCP.

<sup>31</sup> § 236(3), § 238(3(4)) COCP.

<sup>32</sup> *Ibid.*

The Estonian legal system lacks rules on the disclosure of evidence after the closure of relevant proceedings by the Estonian Competition Board, as set out in Article 6(5) of the Directive, as well as its limitations pursuant to Article 6(6). As a result, such provisions were created in the Draft Law following almost word for word the relevant rules in the Directive.

Requesting disclosure of evidence included in the file of the Estonian Competition Board, and asking for its views on the proportionality of such disclosure, is currently not regulated in Estonian legislation.<sup>33</sup> According to the Draft Law, the court requires the disclosure of evidence from the file of the Competition Board if that evidence is actually available in the file, and if it is impossible to take it from the other procedural party or third parties. The NCA is entitled to express its views on the disclosure of the relevant evidence.

Limits on the use of evidence obtained solely through access to the file of the Estonian Competition Board, as set out in Article 7 of the Directive, are not currently part of the national legal system and so they had to be established in the Draft Law. The relevant provisions follow the Directive almost word for word. Hence, evidence listed in Article 6(6) of the Directive is considered inadmissible, and if evidence listed in Article 6(5) is presented, the court refuses to accept it and returns it. Also, evidence obtained through access to the file of the Competition Board not listed in Article 6(5) and (6) can be accepted by the court.

Article 8(1) of the Directive foresees the provision of penalties in order to safeguard compliance with procedural rules and court resolutions. Member States shall ensure that the penalties imposed are effective, proportionate and dissuasive.<sup>34</sup> According to Estonian civil procedural rules, if a party must perform 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 as proven statements concerning the nature and content of the not submitted document made by the person who requested the evidence.<sup>35</sup> Additionally, the court can fine the relevant party subject to sections 46 and 279(3) COCP. It is, however, important to note that fines under the COCP can reach no more than 3200 EURO which may not be preventive

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<sup>33</sup> Article 6(10)–(11) of the Directive.

<sup>34</sup> Article 8(2) of the Directive.

<sup>35</sup> § 283(2) COCP.

enough, considering the economic dimension of the potential damages claim based on a competition law infringement. In fact, the fine may even be worth paying, rather than providing the requested evidence.

According to the authors of the Draft Law, there are additional measures for an injured person to safeguard evidence such as, for instance, pre-trial disclosure of evidence. If suspicion exists that a potential opponent may start destroying evidence, an injured person may apply for pre-trial collection of evidence subject to section 244 COCP. However, in the context of pre-trial evidence disclosure, the court organises the collection of evidence only if (i) a request has been made by the person seeking damages, and (ii) good reason exists for believing that the requested evidence could be lost, or that using the evidence at a later stage of the proceedings could involve difficulties. In the phase of pre-trial evidence disclosure, the court may also organise inspections, hear witnesses and request expert assessments.

## 2. Effect of national decisions

Based on the requirements of Article 9 of the Directive, the Draft Law provides first that a final decision of the Estonian Competition Board on an infringement of competition law is binding on the court that deals with the damages claim. The legal drafters explain the term 'binding' to mean that there is no obligation for the insured party to prove the infringement before a civil court, as this is considered proven. Additionally, the Draft Law requests the Estonian Competition Board to indicate in its decisions that it has detected an infringement of competition law.

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 competition law infringements. This solution is justified as a means of safeguarding the procedural rights of the infringer.

With regard to final decisions taken in another Member States to be presented at least as *prima facie* evidence, this is provided under sub-section 272(1)–(2) COCP, which accepts and allows the presentation as evidence of any document, containing information on facts relevant to the adjudication of the matter, in a written format or recorded by way of photography, video, audio, electronic or other data recording means.

### 3. Collective redress

The Estonian legal system does not regulate class actions, thus filing a class action is not currently possible. The debate on whether or not class actions should be regulated has not provided a clear answer. There are some legal experts who claim that class actions would be unconstitutional. The general understating, however, seems to be that class actions would not contradict the constitution, thus the question seems to be more of an issue of legal politics, rather than that of legal obstacles. Yet the authors of the Draft Law understand, and state as much in the explanatory notes, that making class actions possible would be important for damages claims based on competition law infringements. They also state that until class actions are incorporated into Estonian civil procedural law, the impact of implementing the Directive into Estonian legislation may not be that significant.

## VI. Consensual dispute resolution in antitrust enforcement

The principle that the limitation period is suspended for the duration of any consensual dispute resolution process<sup>36</sup> already exists in Estonian civil law,<sup>37</sup> provided the negotiations are between the entitled person and the obligated person, and concern the claim or circumstances from which a claim may arise.

The Draft Law introduces the right of national courts to suspend an action for damages related to a competition law infringement for up to two years, as set out in Article 18(2) of the Directive. According to its relevant provisions, the court will consider the application if it is made by both parties jointly.

The prevention of harmful consequences of the offence (such as compensating the damages caused), as well as assisting the victim immediately after the offence is committed, is considered a mitigating circumstance under Estonian criminal law,<sup>38</sup> applicable both to infringements of Articles 101 and 102 TFEU and their corresponding national provisions.

Pursuant to sub-section 137(3) LOA, if one of the persons obligated to compensate the damage has the right to set up defences which would preclude or restrict that person's liability to the person requiring the

<sup>36</sup> Article 18(1) of the Directive.

<sup>37</sup> See for that purposes § 167(1) GPCCA.

<sup>38</sup> § 57(1) of Penal Code.

compensation, the claim for compensation against other obligors shall be reduced by the extent of the share of the obligation which the person entitled to set up the defences bears in relations between the persons obligated to compensate the damage'. Applying this principle should, at least in theory, enable the infringer who has agreed to settle the damage through a consensual settlement, to claim a reduction of the claims that can be submitted against him/her as set out in Article 19(1) and (2) of the Directive. The Draft Law introduces into the Estonian legal system the principle provided in Article 19(3) of the Directive. Therefore, the settling injured party may turn his/her remaining claim against the settling infringer only if non-settling co-infringers fail to pay their part of the damage.

The rules on determining the amount of damages associated with specific co-infringers, contained in Article 19(4) of the Directive, are already regulated in sub-section 137(2) LOA. Thereby, liability among co-infringers is divided on the basis of all circumstances of the case, in particular the gravity of the non-performance or the unlawful character of other conduct and the degree of risk borne by each person.

## VII. Conclusion

Many legal principles provided in the Directive are already part of the Estonian legal system and thus require no implementation. Rules provided in the Directive which are currently not part of the national legal system, are in general well implemented by the Draft Law, from time to time even in a word for word manner. In that respect, Estonia is transposing the Directive in due course. Points of concern include, however, the relatively weakness of the Estonian Competition Board, fragmentation of legal proceedings concerning competition law infringements (as set out under section III above), and lack of specialisation of the courts. It is a fact that Estonia has merely a few cartel investigations, and even less infringement decisions rendered by courts, and so only a limited amount of decisional practice exists of the courts and the Estonian Competition Board. Considering the above, as well as the fact that class actions are also not possible, the impact of the Directive in Estonia may be smaller than expected and desired.

Last but not least, what is not fully clear with regard to the Directive, and from there also the Draft Law, is why a distinction is made with regard to the quantification<sup>39</sup> and presumption of harm associated with agreements

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<sup>39</sup> See for that purposes Article 17 of the Directive.

between competitors (horizontal agreement) as opposed to non-competitors (vertical agreements),<sup>40</sup> despite the fact that it is well known that vertical anti-competitive agreements (eg in which prices are fixed) can cause harm.

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<sup>40</sup> See for that purposes Article 2(14) of the Directive.



## I. Manner of implementing the Directive

### 1. General state of national law on damages

Some elements of Hungarian law were already consistent with the standards established by the European Parliament and Council Directive 2014/104/EU on antitrust damages actions issued on 26 November 2014 (hereinafter, Directive).

#### 1.1. Possibility of private enforcement

Private enforcement was theoretically possible in Hungary from the moment when anticompetitive agreements and the abuse of a dominant position became prohibited by the Hungarian Competition Act. This possibility was not originally based on competition law provisions. Instead, it was introduced by Hungarian Private Law which established the right for compensatory damages as a general right,<sup>1</sup> without further specifying the types of different illegal behaviours.<sup>2</sup> The notion of damages includes

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<sup>1</sup> Proving culpability is a crucial part of the litigation. However, 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 (s)he has not failed to meet the standards of behaviour that would generally be expected in the given situation.

<sup>2</sup> 'Anyone causing damages to another person by infringement of law shall compensate therefor. He is exempted from liability if he proves that he behaved as it is generally



both *damnum emergens* and *lucrum cessans* but punitive damages cannot be imposed. The theoretical possibility of private enforcement was concretised later by the Competition Act. Concerning the breach of Article 81 and 82 of the Rome Treaty, the possibility of private enforcement was declared by a 2003 amendment of the Competition Act<sup>3</sup> (which entered into force on the 1 May 2004). The possibility of civil law actions for damages on the basis of a breach of Hungarian competition law provisions on anticompetitive agreements and abuse of dominance was directly ensured by an amendment of the Competition Act in 2005.<sup>4</sup> Hungarian law has also recognised the possibility of both follow-on and stand-alone private actions for damages.<sup>5</sup>

While the courts were authorised to award damages in cases where an anticompetitive agreement or an abuse of a dominant position caused damages, there was a short period of time when Hungarian courts had no jurisdiction to decide on the lawfulness of the behaviour in question. The Hungarian Competition Authority (hereinafter, HCA) was the competent authority in this matter.<sup>6</sup> This situation has changed in the meantime. Hungarian courts are authorised to decide on the legality of the contested behaviour on the basis of European and/or Hungarian Competition Law since 1 November 2005. In practice, however, even until now such a decision is usually made by the HCA and has binding effect (see below in point 1.4.).

Not only did Hungarian law offer compensatory damages for competition law infringement even before adopting the Green Paper<sup>7</sup> and the White

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expected in the given situation' – Article 6:579 of the Civil Code establishes the general rule of liability in damages caused outside contractual relations.

<sup>3</sup> Act No LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices covers unfair competition and antitrust law and contains relevant procedural rules as well. The competence for these matters is separated. Unfair competition cases belong to the competence of regular civil courts; antitrust cases belong to the competence of the Hungarian Competition Authority.

<sup>4</sup> In 2005, a new Article 88/A was introduced into the Hungarian Competition Act which provided that 'the power of the Hungarian Competition Authority to proceed (...) and used to safeguard (...) the public interest, shall not prevent civil law claims, arising out of the infringement of the provisions (...) [on the unfair manipulation of business decisions, cartels and abuse of dominant position], from being enforced directly in court.' (Act LXVIII of 2005 entered into effect on 1 November 2005).

<sup>5</sup> Stand-alone private actions for damages were mentioned in the Competition Act for the first time as a result of its modification in 2005.

<sup>6</sup> See case Hungarian Supreme Court (Legfelsőbb Bíróság) Pf. IV 2000 24.909/2000/1 (BH 2004 151).

<sup>7</sup> Green Paper of 19.12.2005, COM 672.

Paper,<sup>8</sup> the content of some of its private law rules<sup>9</sup> was very close to those of the Directive as well. This similarity is well illustrated in the area of substantive law by the right to full compensation as well as the general rule of joint and several liability (see below in point 1.3.).

## 1.2. Elements of damage

The Hungarian Civil Code<sup>10</sup> provided and even today provides that compensation should cover actual loss and loss of profit. Costs for minimising the damage are the third element of damage in Hungarian Civil Code.<sup>11</sup> Interest, as part of the damage, is not mentioned directly by the text of the Hungarian Civil Code, but it is undisputed in legal literature that compensation must be paid immediately, otherwise an injured person has the right to ask for interest also.<sup>12</sup>

## 1.3. Joint and several liability

The Hungarian Civil Code stated that undertakings involved in a joint behaviour should be jointly and severally liable. Joint and several liability was – and remains until today – a general rule in Hungary, although some exceptions exist.<sup>13</sup>

## 1.4. Procedural law

Even before the transposition, Hungarian law already contained some procedural solutions equivalent to the requirements of the Directive, such as the binding effect of antitrust decisions for example. During a civil procedure for damages, courts do not have the right to change decisions made by the European Commission or by the HCA on the illegality of a given behaviour. Courts are bound by final decisions of the HCA if it

<sup>8</sup> White Paper of 2.04.2008, COM (2008) 165 final.

<sup>9</sup> These rules are generally very similar to private law rules in most of the Member State.

<sup>10</sup> The Civil Code: 2015: V. Act (Act V. of 2015), also as the new Civil Code. The earlier Civil Code was Act IV. of 1957.

<sup>11</sup> According to Article 6:522 of the Civil Code, full compensation comprises a) the loss of value of the property, b) loss of expected property gain, and c) the costs related to eliminating the detriment of property.

<sup>12</sup> Interest is awarded from the date the infringement occurred, upon request by the injured party. The level of interest is the base interest rate of the Hungarian National Bank valid on the last day of the half calendar year in which the delay begins to run.

<sup>13</sup> Article 6:524 § (2) of Civil Code.

establishes the existence of an infringement. The civil court had to, and continues to do so even today, suspend the procedure to wait for the decision of the HCA.<sup>14</sup>

With regard to the binding effect of antitrust decisions, it is important to mention commitments decisions issued by the HCA. In such a decision, the HCA does not establish the existence of an anticompetitive conduct. Commitments decisions of the HCA do not have a binding effect according to Hungarian court practice.<sup>15</sup>

The statute of limitation was suspended while an investigation conducted by the HCA<sup>16</sup> was ongoing.<sup>17</sup>

## 2. Amendments before the implementation of the Directive

Hungarian legislature took serious steps to handle antitrust damages during the preparatory works on the Directive. Even before the Directive was adopted, Hungary had already introduced several provisions meant to stimulate private enforcement of European and national competition rules. As a result of this legislative work, Hungarian law has become more claimant-friendly in recent years (for instance, the Hungarian Competition Act contains a presumption of a 10% price influence, see below in point IV.5.1.) and, at the same time, ensured the interests of successful leniency applicants.<sup>18</sup> Rules adopted at the early stage of the harmonisation process

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<sup>14</sup> Article 88/B (6) provides that when the GVH notifies the court hearing a case relating to competition rules that it has decided to start an investigation, the court shall stay its proceeding.

<sup>15</sup> In a case related to a car dealer dispute, following the reorganization of the distribution network, the HCA started an investigation but terminated it following the submission of commitments by the distributor meant to change the wording of its contracts. The Metropolitan Court refused to award damages to a former retailer who was excluded from the network. The courts explained that they were not bound by the HCA's commitment decision.

<sup>16</sup> This rule was established by the Act CCI of 2013 and came into force on 1.07.2014.

<sup>17</sup> As the result of the implementation of the Directive in 2016 the text is relevant – instead of HCA – to ‘European Union Competition Authority’ which means the HCA, also the Commission and – perhaps – competition authorities of the Member States. However, procedures initiated by competition authorities of other countries have no suspensive effect on the statute of limitation (Article 88/T (2) MCA – Article 10(4) of the Directive).

<sup>18</sup> The Hungarian Competition Act provided a special position for the immunity recipient (the successful leniency applicant) during the administrative procedure. This rule came into effect 1 November 2005. It was clear, that freedom from fines had to be strengthened

differ unfortunately from the final version of the Directive, a fact that has led to some consequences in Hungary (see below in point VII).

Neither the original Hungarian legal instruments nor the steps of its legislators taken during the preparatory works on the Directive were effective enough. There is no tradition of private litigation in the field of competition law in Hungary. One of the reasons may be that the outcome of judicial proceedings is often hard to predict, especially in antitrust cases. Antitrust damages actions were not successful in Hungary. After studying 16 cases dealing with antitrust damages actions between 2007 and 2012, Pál Szilágyi noted that ‘there was not a single private action which had stood the chance of succeeding’ (Szilágyi, 2013, p. 141). It was clear therefore that the legal framework for antitrust damages needed to be changed. The Hungarian legislator was open-minded and tried to implement the suggested European solutions. Hungarian legal literature unanimously urged for a change (Boytha, 2008; Hegymegi-Barakonyi and Horányi, 2013; Kuritár, 2013; Muzsnay, 2011; Szabó, 2015; Zavodnyik, 2016).

### 3. Level of the implementation

The question for the legislator was whether to create a new Act or to modify an existing one. Adopting a new Act is currently a frequently used method in Hungary. Yet here, in order to implement the Directive, the legislator opted for the amendment of an existing act, instead of adopting a new one.<sup>19</sup>

Two possibilities have arisen, namely an amendment of the Hungarian Civil Code<sup>20</sup> or an amendment of the Competition Act. The Directive is closely related both to the topic of damages compensation (and this field of law is regulated in the Civil Code), and to the topic of antitrust (regulated by the Competition Act). Theoretically, the rules of the Directive are closer to damages compensation than to antitrust, and there is a special chapter in the Civil Code on different types of liability. There was thus the option of adding a new subchapter to the Civil Code. The two main disadvantages of this solution were as follows: the length of the future legal framework on antitrust damages compensation as a special type of liability, as well

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in the area of liability, and so Hungarian legislation gave some protection for the immunity recipient (see below in point IV. 2.1.2.).

<sup>19</sup> Some Member State have adopted a new implementation act. The Legislative Decree No 3 of 19 January 2017 comes into force on 3 February 2017 in Italy, the act implementing the Antitrust Directive is effective as of 10 February 2017 in Netherlands.

<sup>20</sup> The new Civil Code: 2015: V. Act (Act V. of 2015).

as procedural problems. The Hungarian Civil Code contains only between one and five Articles about each special type of non-contractual liability, whereas the implementation of the Directive would take at least 20 new paragraphs. Moreover, the Civil Code does not contain a procedural part. Additionally, the Civil Code is a brand new piece of Hungarian legislation, so the legislature was reluctant to amend it.

As far as the Competition Act is concerned, neither the length nor the material and procedural character of the Directive caused any problems, because the larger part of the Hungarian Competition Act speaks of the administrative procedure conducted by the HCA and the resulting court procedure. The Competition Act is amended almost every year in Hungary<sup>21</sup>, so its modification is less problematic than changing the Civil Code. Moreover, the legislature intended to modify the merger procedure anyway. As a result, it was an opportune occasion to simultaneously implement the Directive through a modification of the Hungarian Competition Act. In addition, the Competition Act has already contained some related rules, which were adopted on the basis of the preparatory works on the Directive<sup>22</sup> (see in point I.2.). So the Ministry of Justice drafted a bill aimed to modify the Competition Act<sup>23</sup> on 12 September 2016.

#### 4. Legislative process

The draft Bill was approved by the Council of Ministers and sent to the Parliament on 28 October 2016 (about the content of the Bill see Tóth, 2016, p. 203–210). The text of the Bill (T/12718) was extended by two extra sentences<sup>24</sup> during the preparatory work in the Parliamentary, after which it was passed by the Parliament on 6 December 2016 as Act CLXI 2016 (hereinafter, Act). The Act entered into force on 16 December 2016, so the implementation process met the deadline of 27 December 2016.<sup>25</sup> The new Hungarian rules follow the model of the Directive, it can be stated that the modified Competition Act is adequate to the provisions of the Directive.

<sup>21</sup> Modifying acts: CXI Act of 2008, XIV Act of 2009, LVI Act of 2009, CLII Act of 2010, CLVIII Act of 2010, CXV Act of 2011, CLXXIV Act of 2011, CCI Act of 2013, LXXVIII Act of 2015.

<sup>22</sup> For example on the White Paper (2.4.8.), COM (2008) 165 final.

<sup>23</sup> The draft Bill also aimed to modify the Act on Unfair Commercial Practices Against Consumers.

<sup>24</sup> Definition of direct and indirect purchaser.

<sup>25</sup> Directive 2014/104/EU on antitrust damages actions was issued on 26 November 2014 and it was to be transposed by EU Member States by 27 December 2016.

## 5. General characteristics of the Act

The relevant part<sup>26</sup> of the Act consists of two Articles, although one of them is very long. The reason of such an unusual solution is that four Articles of the Competition Act had to be modified<sup>27</sup> and seventeen Articles<sup>28</sup> had to be added to the text of the Competition Act.

The Article 28 of the Act set out a lot of material and procedural rules,<sup>29</sup> technically in only one paragraph, but supplements the HCA with Articles 88/A-88/U. Another Article regulates the communication method between Hungarian courts and the European Commission.<sup>30</sup>

Article 29 also contains transitional provisions (such as date of entry into force) in relation to the changes.<sup>31</sup>

## 6. Relation to other codes

The Act amends neither the Civil Code, nor the Hungarian Code of Civil Procedure, because a new Civil Procedure Code was passed by the Parliament later than the said Act and came into force on 1 January 2017.

## 7. The modified Competition Act

The newly adopted text of the Modified Competition Act (hereinafter, MCA) is divided into two chapters. Chapter XIV/A regulates claims for damages caused by antitrust infringements. Chapter XIV/B is about damages caused by infringements of two types of unfair competition practices, namely

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<sup>26</sup> The Act contains rules on merges, as well as amends the Act on Unfair Commercial Practices Against Consumers.

<sup>27</sup> Article 88/A (1)–(3), Article 88/B (1)–(10), Article 88/C (1)–(5), Article 88/D (1)–(4).

<sup>28</sup> Article 88/E, Article 88/F (1)–(4), Article 88/G (1)–(7), Article 88/H (1)–(5), Article 88/I (1)–(4), Article 88/J (1)–(2), Article 88/K (1)–(2), Article 88/L (1)–(3), Article 88/M (1)–(2), Article 88/N (1)–(7), Article 88/O (1)–(5), Article 88/P (1)–(3), Article 88/Q (1)–(5), Article 88/R (1)–(2), Article 88/S (1)–(5), Article Article 88/T (1)–(3), Article 88/U (1)–(3).

<sup>29</sup> These rules govern claims and actions for damages under national law for infringements of competition law – both those required by the Damages Directive and some additional rules.

<sup>30</sup> Article 29 of the Act modified the former Article 91/H of the Competition Act. New rules – without repeating the detailed rules on the communication between Hungarian courts and the HCA – create a similar connection between Hungarian courts and the European Commission.

<sup>31</sup> Article 29 of the Act.

misleading purchasers and restriction purchasers in the freedom of their decision-making process. These rules are similar to the UCP Directive,<sup>32</sup> but refer to purchasers other than consumers.

## II. Scope of the implementation

### 1. Action for damages – or more

The relevant part of the new MCA does not restrict its scope to ‘actions for damages’, as the Directive does.<sup>33</sup> Instead, the MCA refers to ‘private law remedies’, rather than to ‘actions for damages under national law’, as stated in the Directive.<sup>34</sup> Hence, the MCA provides not only a sword but also shield. The majority of the rules in the MCA are related to compensatory relief (claims for damage compensation by an applicant). However, some rules can be applied to declaratory relief (for instance, the automatic nullity of an agreement, a decision of an association of undertakings or a practice).

The MCA goes beyond actions (claims) for damages. Thus Hungarian legislation introduced a broader scope of the application of the principles embodied in the Directive.

### 2. Infringement of competition law

Pursuant to Article 2 point 1 of the Directive, ‘infringement of competition law’ means an infringement of Article 101 or 102 TFEU or of national competition law. Article 2 point 3 of the Directive stipulates that ‘national competition law means provisions of national law that predominantly pursue the same objective as Articles 101<sup>35</sup> and 102<sup>36</sup> TFEU and that are applied to the same case and in parallel to EU competition law (...)’.

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<sup>32</sup> Directive 2005/29/EC.

<sup>33</sup> It is fair to say that even the scope of the application of the Directive is larger than actions for damages, e.g. the passing-on defence is a useful tool for defendants.

<sup>34</sup> The Directive only takes into account actions for damages as defined in Article 2(4). Action for damages means ‘an action under national law by which a claim for damages is brought before a national court (...)’. Pursuant to Article 2(5), a claim for damages means a claim for compensation for harm caused by an infringement of competition law.

<sup>35</sup> Agreements, decisions by associations of undertakings or concerted practices (Article 101 TFEU and equivalent national provisions).

<sup>36</sup> Abuses of a dominant position (Article 102 TFEU and equivalent national provisions).

The MCA goes beyond the two types of infringements covered by the Directive. Although most of the rules<sup>37</sup> of the MCA are relevant only to anticompetitive agreements and the abuse of a dominant position, it also contains some rules<sup>38</sup> for a separate group of behaviours, regulated by chapter III of the MCA. These behaviours are similar to unfair commercial practices committed against consumers, but here the potential applicants are non-consumers. From this point of view, Hungary belongs to those Member States (like Portugal and Spain) who opted for the enlargement of the scope of the transposing provisions.

### 3. EU and/or national antitrust infringements?

The MCA does not limit the scope of the rules exclusively to infringements with an effect on EU trade.<sup>39</sup> Article 88/A (1) MCA contains a list of competition rules which includes Chapter IV (anticompetitive agreements) and Chapter V (abuse of dominance) of the MCA as well as Article 101 and 102 TFEU. Infringements of solely Hungarian antitrust prohibitions open the door to actions for damages before the courts, even if the behaviour does not infringe Article 101 and 102 TFEU.<sup>40</sup> Rules in Chapter XIV/A affect actions for damages with respect to infringements of national competition law, which do not affect trade between Member States within the meaning of Article 101 or 102 TFEU. So from this point of view, Hungarian and European antitrust rules are independent from each other, because an applicant can bring an action for damages due to an infringement of Hungarian antitrust provisions even in cases without an 'European dimension'. This is a practical solution as it avoids creating a double

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<sup>37</sup> Chapter XIV/A contains provisions on claims for damages caused by antitrust infringements.

<sup>38</sup> Chapter XIV/B.

<sup>39</sup> One can argue that such a limitation would have been correct, because the Directive does not require Member States to take the pattern from the Directive with regard to the latter; albeit they are free to do so. Recital (10) of the Preamble stating as follows: 'This Directive should not affect actions for damages in respect of infringements of national competition law which do not affect trade between Member States within the meaning of Article 101 or 102 TFEU'. The Directive distinguishes between infringements which may affect EU trade and those without effect on EU trade (with a purely national scope).

<sup>40</sup> In Hungary, infringements with an effect on EU trade are not so rare, the HCA applies Article 101 TFEU and the provisions of Chapter IV MCA, and Article 102 TFEU and the provisions of Chapter V MCA together in a lot of cases, and usually finds infringements of European and national rules.



standard with respect to two different types of infringements (namely European and Hungarian). This solution was developed in 2003–2005 (see in point I./1.), so it is not a result of the harmonisation process of 2016.

The wording of the MCA<sup>41</sup> is ambiguous on the matter whether the MCA is also applicable to an infringement of, only, the national competition law of another EEA Member State, or whether it applies solely to those which infringe EU competition law at the same time.

#### 4. Liability of the parent company for its subsidiaries

Both Hungarian Private and Competition Law are based on the single legal entity theory, instead of the single economic entity theory of EU competition law. Under EU law, it is relatively easy to conclude that a parent company is liable for an infringement of EU competition law committed by a subsidiary, even if the parent company has not been directly involved in the infringement of EU competition law. Hungarian competition law contains rules which create the legal basis for the liability of a parent company for its subsidiaries for fines imposed by public enforcers. Moreover, Hungarian company law<sup>42</sup> used to contain rules which, in some cases, provided a legal basis for the civil liability of an owner (member or shareholder) of a company, having at least 75% of the votes, for the debts of the company (such as damages).<sup>43</sup> This liability was based on a court decision. The new Hungarian Civil Code regulates companies and contains the liability of an owner (member or shareholder) of a company, having at least 75% of the votes. This liability comes directly from the Act (without the need of a prior court decision).<sup>44</sup>

These liabilities are indirect ones under Hungarian law, which means that the debtor company has to pay the fines and debts in the first place. A parent company with 75% or more of the votes is liable only if its

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<sup>41</sup> Article 88/C (2) MCA.

<sup>42</sup> Hungarian insolvency law also provides for the same possibility.

<sup>43</sup> The Hungarian Company Act provided an indirect liability of the owner (member or shareholder) of a company, who had minimum 75% of the votes, for debts of the company in a case when this company is liquidated. This liability was not an automatic one, it could be decided by the court. [Section 54 (2) of the Hungarian Company Act]

<sup>44</sup> Article 3:324 (3) of new Civil Code (the Act V. 2013) states that if the company is dissolved without legal succession, at the request of the creditors the owner of the qualifying holding shall cover any claim for which no satisfaction had been provided, provided that dissolution without succession was brought about in consequence of poor business decisions of the owner of the qualifying holding.

subsidiary has failed to pay its debts and a certain activity of the parent company had caused this situation,<sup>45</sup> or in the case of a group of companies created by the parent company and its subsidiaries.<sup>46</sup>

### III. Competent courts

#### 1. Hungarian court system

The Directive stipulates that national courts shall be entrusted with the private enforcement of EU competition law. Concerning the definition of national courts, Article 2(9) refers to Article 267 TFEU. Thus Member States may uphold the *status quo* of their civil court system or change it.

In Hungary, the *status quo* is that district courts (in Hungarian ‘*járásbíróság*’) are competent to handle damages compensation claims of up to HUF 30.000.000 (approx. 100.000 EUR), while regional courts (in Hungarian ‘*törvényszék*’) handle all remaining damages claims. Thus, in Hungary both district and regional courts act as courts of 1<sup>st</sup> instance. Appeals against judgements of district courts are, however, heard by regional courts. Appeals from judgements of regional courts are heard by one of the five regional courts of appeal (in Hungarian ‘*tábla*’). The Supreme Court in Hungary is called the Curia.<sup>47</sup> In the 1<sup>st</sup> instance (both before a district or a regional court), the case is adjudicated by a single professional judge. In the 2<sup>nd</sup> instance, courts hear appeals only in three-judge panels.

According to Article 88/A(3) MCA, regional courts acting as courts of 1<sup>st</sup> instance shall have exclusive authority over actions for antitrust damages (they already enjoy similar authority in relation to all unfair competition claims). So the competence of the courts is now independent from the value of the case (amount of the damage).<sup>48</sup> Hungary does not have a specialised court for antitrust damage actions.

<sup>45</sup> Article 3:324 (3) of new Civil Code.

<sup>46</sup> Article 3:50 (3) of new Civil Code states that the control contract shall provide for the protection of the rights of the other owners (member or shareholder) of the controlled company and for the protection of creditors’ interests.

<sup>47</sup> Generally the civil procedure follows the two-stage model, namely district courts and regional court, or regional court and regional court of appeal. If the value of the claim exceeds a certain level and legal issues of high importance are raised, parties can turn to the Curia as well.

<sup>48</sup> According to Article 88(3) MCA, a regional court as a court of 1<sup>st</sup> instance shall have exclusive authority over claims based on infringements of unfair competition rules.

## 2. Relationship and co-operation between courts and the Competition Authority

The HCA may act as *amicus curiae* in antitrust damages cases, just like the European Commission. In these actions, the HCA helps to interpret EU or Hungarian competition rules.

According to Article 88/B (1) MCA, the court shall notify the HCA without delay if in a private lawsuit, involving anticompetitive agreements or the abuse of a dominant position, the need arises to apply the provisions laid down in Chapters IV to V of this Act. Failure to comply with this procedural rule may lead to the annulment of the judgment.<sup>49</sup>

The HCA may decide to act as *amicus curiae* according to paragraphs (3)–(5) of the Article 88/B, or initiate a new procedure to conduct its own competition supervision proceedings according to paragraph (6) of the Article 88/B.

There is a separate provision in the MCA regulating the application of EU antitrust rules. Article 91/H(2) MCA stipulates the same notification rule as regards Articles 101 or 102 TFEU. The only difference is that the court shall notify not only the HCA but also the EU Commission.

Article 91/H MCA includes an obligation for the judge to send his/her decision to the Minister of Justice in order to inform the EU Commission. The HCA should receive the decision from the Minister as well.

Under the modified Article 88/B(7) MCA, the judge is obliged to suspend his/her civil procedure till the HCA has come to a conclusion in the public enforcement process.

## IV. Substantive law issues

### 1. Limitation periods

#### 1.1. Regulation before the transposition of the Directive

##### 1.1.1. General rules

In a civil procedure, based on a breach of Hungarian or EU competition rules on anticompetitive agreements or the abuse of dominance, damages may be awarded in accordance with the general rules of civil law.<sup>50</sup>

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One of the potential legal consequences which can be granted by the regional court is damages compensation.

<sup>49</sup> Judgment of the Tribunal of Debrecen, BDT2010.2367.

<sup>50</sup> Article 339–360 of the Civil Code, Article 6:518–6:563 of the new Civil Code.

- i. The limitation periods are five years. Limitation periods may be longer if the illegal behaviour is a crime, such as a public procurement cartel.
- ii. As a general rule, the five years period starts on the day the damage occurs. However, a person who is not in a position to submit the claim due to excusable reasons (for instance, it is not aware of the damage caused) is entitled to submit the claim within one year of becoming aware of the loss or damage, even if less than one year is left until the end of the initial five-year period.
- iii. If it is important to know the result of another proceeding (such as that conducted by a competition authority commenced on the basis of the same infringement), the limitation period is suspended until a final and binding conclusion of this procedure occurs – for example, the proceedings before the competition authority and their eventual judicial review – plus one year.

### 1.1.2. Alternative dispute resolution (ADR)

Hungarian Law did not previously contain rules<sup>51</sup> equivalent to Article 18(1) of the Directive, new rules had thus to be adopted in order to transpose the Directive.

## 1.2. Current state of law after the transposition of the Directive

### 1.2.1. General rules

There has been no change in the duration of limitation periods but the starting date has been changed.

The Act modified the starting point of the limitation periods in case of damages stemming from competition law infringements. As a result, there is now a difference between the aforementioned general rule (contained in the Civil Code) and the specific one applicable in private enforcement of competition law (found in the MCA). For the latter, the limitation period starts only if the injured party is aware of the antitrust infringement, the damage sustained and the identity of the infringer.

The text of Article 88/T(1) MCA differs from the text of Article 10(2) of the Directive. The Hungarian text listing the scope of the injured party's knowledge<sup>52</sup> is shorter than the relevant list in the Directive. Instead of 'the fact that the infringement caused harm to him', the Hungarian text mentions 'damage caused by infringement'. To know the fact of harm is

<sup>51</sup> ADR did not belong to the procedures mentioned in point 1.1.1. iii.

<sup>52</sup> Hungarian text – similarly to the Directive – contains a phrase: '...an injured party knows, or can reasonably be expected to have knowledge of...'

not the same as to know the amount of the damages incurred, because the precise amount of the damage becomes clear sometimes only during the judiciary procedure, especially if documents containing business secret are considered. There is a risk that the solution used in Article 88/T(1) will cause some legal uncertainty in Hungary, mainly because the injured party can believe that (s)he has a longer time to bring an action than (s)he really has on the basis of the Directive.

There is also a problem of interpretation. The definition of ‘the identity of the infringer who caused such harm’ is rather vague.<sup>53</sup> It is yet to be settled whether it is enough for the injured person to know some members of the cartel, or must the plaintiff know the identity of all of the members? In light of joint and several liability (see point 2.2.), a potential plaintiff can claim that it is important to know all of the potential defendants.

There is a conflict of interest in these cases. The interest of the potential plaintiff is to bring an action knowing all relevant information. At the same time, the passage of a longer period of time between the infringement and the judicial proceedings may be detrimental to the interests of the potential defendant, because it makes their defence more difficult. On the other hand, limiting legal uncertainty and improving the position of the injured person, thus protecting competition, lies in the common interest.

### 1.2.2. ADR

The new Hungarian Law is similar to Article 18(1) of the Directive. The duration of the suspension is limited to a maximum of two years, similarly to Article 18(2). Parties who are involved or represented in consensual dispute resolution have to apply for the suspension, and the suspension of the limitation period is applied only with regard to them.

## 2. Joint and several liability

### 2.1. Regulation before the transposition of the Directive

#### 2.1.1. General rule

According to the Civil Code<sup>54</sup>, if two or more persons jointly cause the damage, they are jointly and severally liable for the harm. The same would apply to co-infringers of domestic or EU competition law.

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<sup>53</sup> Text of Article 88/T (1) MCA and text of Article 10 (2) of the Directive are in this point of view equivalent.

<sup>54</sup> Article 344(1) of the Civil Code and Article 6:524(1) of the new Civil Code.

### 2.1.2. Situation of the immunity recipient

While implementing national leniency rules<sup>55</sup>, the Hungarian legislator realized that there is a conflict between the rules of competition and private law. Namely, not even full immunity from antitrust fines would stimulate the use of the leniency procedures, if the successful applicant has to reimburse all of the damages caused because of joint and several liability. In order to avoid this problem, the Hungarian legislator created an exception to joint and several liability. According to Article 88/D of the Competition Act before its most recent amendment, a leniency applicant who received full immunity could refuse to pay damages provided the claim could be recovered from other cartel members. This rule was without prejudice to the possibility of bringing a joint action against every infringing party.<sup>56</sup> Lawsuits, initiated to pursue claims against those infringers who were previously granted immunity, had to be stayed until the date when the judgment becomes legally binding which is adopted in the administrative review process of the decision of the HCA establishing the infringement.

Courts were prohibited from using Article 344(3)<sup>57</sup> of the Civil Code in the case of the immunity recipient.

### 2.1.3. Liability of SMEs

Hungarian Law did not previously contain rules similar to Article 11(2) and (3) of the Directive, it was therefore necessary to adopt new rules in this regard.

### 2.1.4. Effect of consensual settlements on subsequent actions for damages

Hungarian Law did not previously contain rules equivalent to Article 19 of the Directive, new rules had thus to be adopted.

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<sup>55</sup> Leniency rules of Act XIV. of 2009. came into force on 1 July 2009.

<sup>56</sup> 'Any person who was exempted from being fined under Article 78/A shall have the right to refuse to provide compensation for any damage caused by his conduct in violation Article 11 of this Act or Article 81 of the EC Treaty insofar as it may be recovered from the other infringer implicated in the same offense.' (Article 88/D of the Competition Act was in force between 1.06.2009 and 1.16.2016.)

<sup>57</sup> The court shall be entitled to put aside a declaration of joint and several liability and condemn the persons having caused the damage in proportion to their respective contribution, if:

- i. doing so does not jeopardize or considerably delay compensation for damage, or
- ii. the aggrieved person has himself contributed to the occurrence of the damage or has procrastinated in enforcing his claim without any excusable reason.

### 2.1.5. Tortfeasors liability to each other

According to Article 6:524(3) of the new Civil Code, liability for damages shall be borne by the tortfeasors involved, consistent with the degree of their culpability, or – if this cannot be determined – in proportion to their respective involvements. If the degree of involvement cannot be verified, tortfeasors shall cover the damages equally.

## 2.2. Current state of law after the transposition of the Directive

### 2.2.1. General rule

The general rule on joint and several liability has not changed.

Among the newly adopted rules on liability, the most important are the limitations of joint and several liability of the following types of infringers: immunity recipients, as well as small- and medium-sized (hereinafter, SMEs) infringers.

### 2.2.2. Liability of the immunity recipient

Hungarian law has dropped the former solution<sup>58</sup> and has followed the rules of the Directive. According to the new rules, undertakings that received immunity from fines as a result of a leniency application are only liable towards their own business partners. Article 88/I (1)–(3) MCA follows Article 11 (4)–(6) of the Directive.

Courts are prohibited from using Article 6:524(2)<sup>59</sup> of the new Civil Code in the case of the immunity recipient.

### 2.2.3. Liability of SMEs

Small- and medium-sized infringers are now, in certain circumstances, only liable towards their own direct and indirect purchasers.<sup>60</sup> Article 88/H(2)–(5)

<sup>58</sup> The situation of the immunity recipient (the successful leniency applicant) was to some extent different under the former Hungarian competition law, and under the rules of the Directive (see 2.1.1.).

<sup>59</sup> The court shall be entitled to put aside a declaration of joint and several liability and condemn the persons having caused the damage in proportion to their respective contribution.

<sup>60</sup> Content of Article 88/H(3) and (4) MCA is equivalent of Article 11(2) and (3) of the Directive, and sometimes even more detailed, e.g. instead of the Directive's text whereby 'the SME has previously been found to have infringed competition law' (Article 11(3)b) of the Directive), Hungarian rules state that 'the SME has previously been found to have infringed competition law by the HCA, or national competition authority of a Member

MCA follows Article 11(2)–(3) of the Directive. To the elements of the definition of SMEs, the Hungarian legislator added that the infringing enterprise must comply with the requirements of a SME during the whole duration of the unlawful behaviour.

#### 2.2.4. Effect of consensual settlements on subsequent actions for damages

The MCA introduces rules identical to Article 19. Undertakings paying damages on the basis of out-of-court settlements are only liable in accordance with the settlement.

#### 2.2.5. Tortfeasors liability to each other

Undertakings that received immunity from fines as a result of a leniency application are only liable towards their own business partners. Section 88/I(1)(2)<sup>61</sup> MCA follows Article 11(5)–(6) of the Directive.

Undertakings paying damages on the basis of out-of-court settlements are in a better position, than earlier.<sup>62</sup>

### 3. Quantification of harm

#### 3.1. Regulation before the transposition of the Directive

Hungarian courts generally established the amount of the compensation based on a report of a court appointed expert<sup>63</sup> or on other pieces of evidence; otherwise, the judge was free to set the damages amount considering all the circumstances of the case.<sup>64</sup> Court-appointed ‘official’ experts play an important role in quantifying the damage of an unlawful action. The expert can apply whatever method (s)he considers appropriate to the facts of the case.

Article 88/C of the Competition Act 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

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State, or the Commission or by a court’. The decision must be legally binding and executable. The Hungarian text of MCA is clearer than the Directive.

<sup>61</sup> Article 88/I (3) MCA, as a new text, must be interpreted by the courts.

<sup>62</sup> Article 88/F(4) MCA follows Article 19(3)–(4) of the Directive.

<sup>63</sup> Judicial experts are court appointed. They are picked from a list of approved official judicial experts.

<sup>64</sup> Article 206(3) of the Civil Procedure Act.



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' (Nagy Csongor, 2016, p. 447–457). This provision was introduced 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. The amended Competition Act after 1 June 2009 required the claimant to prove the causal link between the infringement and the damage suffered. Henceforth however, the quantification of that damage is rendered much easier.

If the amount of the damage cannot be calculated precisely, judges can also estimate their amount in order to achieve the aim of full compensation.<sup>65</sup>

### 3.2. Current state of law after the transposition of the Directive

The implementation of Articles 3(1) and 12(1) of the Directive did not require fundamental changes to the Hungarian legal system. The aforementioned situation did not change significantly after the transposition of the Directive, except that Article 12(1) of the Directive is more detailed than former Hungarian rules.

It is likely that an expert would take into consideration the *Practical Guide on quantifying damage* issued by the European Commission.

In Tihamér Tóth's opinion (Tóth, 2016, point 16) concerning the rules of Article 17 of the Directive '[t]he rule on rebuttable cartel harm is not likely to change the situation, since the MCA stipulates a similar, even stronger rule about a 10% price increase presumption'.<sup>66</sup>

## 4. Passing-on of overcharges

### 4.1. Regulation before the transposition of the Directive

The issue of the passing-on defence was considered in legal literature, but it was not regulated by Hungarian legislation. Only one relevant such case can be mentioned in Hungarian court practice.<sup>67</sup>

<sup>65</sup> Article 359 of the Civil Code and Article 6:531 of the new Civil Code.

<sup>66</sup> 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.

<sup>67</sup> The court did take passing-on into account in a litigation relating to road construction cartels. The court argued that there was no standing for the plaintiff since the public

## 4.2. Situation after transposing the Directive

Article 13 of the Directive has affected the former situation, since it has clarified a so far unregulated issue. The Act introduced two legal presumptions with respect to liability: first, in case of hard-core infringements the occurrence of damages is presumed; second, it is presumed that undertakings paying a cartelised price had passed-on the increased prices to their own purchasers. Article 88/G(2) MCA follows Article 13 of the Directive connecting the passing-on defence and the burden of proof. Hungarian courts have the power to estimate the share of any overcharge that was passed on.<sup>68</sup>

## V. Procedural issues

### 1. Standing

#### 1.1. Regulation before the transposition of the Directive

A claim for damages may be brought before a national court by:

- i. an alleged injured party<sup>69</sup>,
- ii. successor of the alleged injured party,
- iii. a civil law claim can be brought on behalf of consumers by (see below in point V.4.)
  - the National Authority for Consumer Protection and
  - consumer associations (unfortunately Hungary does not have strong consumer associations which could bring actions on behalf of consumers),
  - the public prosecutor, and
  - the HCA.

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company organizing the tenders must have passed on any damage to the State who owns the infrastructure; judgment of the Curia of 29.01.2013 in Gfv.30284, appeal against the Metropolitan Regional Court of Appeal judgment No 14.Gf.40.088/2012/11.

<sup>68</sup> Article 88/G (2) MCA follows Article 12(5) of the Directive.

<sup>69</sup> Any natural and legal person who suffered harm caused by an infringement of competition law is entitled to obtain full compensation. Indirect purchasers also have standing. The theoretical right to sue does not mean that all of the aggrieved natural or legal person are able to become plaintiffs. Following the HCA decision in the motorway cartel case, publicly owned companies responsible for the organization of road construction tenders sued some of the corporations fined by the HCA. The courts stated that the plaintiff lacked legal standing: instead of the public company organizing the construction tenders, the State itself has suffered the damages. Judgment of the Curia of 29.01.2013 in Gfv.30284, appeal against the Metropolitan Court of Appeal judgment of No. 14.Gf.40.088/2012/11. The Metropolitan Court noted that even if the plaintiff suffered some damage, it was ultimately passed on to the State.

## 1.2. Situation after transposing the Directive

The transposition of the Directive has not resulted in changes to the aforementioned solution. The list mentioned in point 1.1. remains the same.

## 1.3. Situation after adopting the new Civil Procedure Act

Although the Hungarian Civil Procedure Act (Act CXXX of 2016, hereinafter, HCPA) provides an opt-in class action that can be used in the interest of consumers, this instrument cannot be used in case of damages caused by competition law infringements.

## 2. Disclosure of evidence

### 2.1. Former situation

Hungarian private law stated, and continues to do so even today, that a behaviour that causes damage is illegal. According to the general rule on the burden of proof, the person who suffered damage must prove the fact that damage was sustained and the amount of that damage (injury) as well as the causal link between the active or passive behaviour and the damage. The person who caused the damage may exculpate him/herself by proving that (s)he acted in a manner that can be generally expected in the given situation.

Parties could suggest to the court only the provision of witnesses testimonies,<sup>70</sup> or getting documents from different organisations (such as the HCA).<sup>71</sup> Both the plaintiff and the defendant had to do their task without co-operation with the other, except in some cases.<sup>72</sup> Even the HCA did not have the right to disclose to somebody else the content of a business

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<sup>70</sup> If certain documents are necessary to prove one's case, the person in possession of these documents can be summoned by the court as a witness to produce the documents in her/his possession [Article 190 § (3) of the Hungarian Civil Procedure Act (HCPA)]. According to Article 170(1)e) of the HCPA, the witness may refuse to answer questions relating to his/her business secrets.

<sup>71</sup> Interested third parties could have been granted access to the file of the HCA if they were able to prove that access was necessary to enforce their rights provided by the law. (Article 55 of the Competition Act) The HCA were entitled to refuse to give access if this would jeopardize its enforcement activities (leniency applications were mentioned expressly in the Competition Act).

<sup>72</sup> If the party is not aware of the identity of the would-be witness, the court can oblige the opposing party to provide information about the name and the address of the witness, if substantiated that the latter party knows or should know the witness. At the request

secret. Documents containing business secrets were not disclosed to other parties to the competition proceedings, except where the owner of the business secret waived the confidentiality obligation.<sup>73</sup>

Discovery was not an instrument of Hungarian civil procedural law.

## 2.2. Changes

The most important change in Hungary's procedural rules is the introduction of evidence disclosure. In its course, litigating parties may request the court to order the opposing party to disclose evidence. An important novelty lies in the fact that a court order for evidence disclosure may refer not only to specific documents, but also to a range or category of documents, evidence or data required.

Hungarian legislation introduced fines in this context which are meant to make certain that courts are able to ensure the disclosure of relevant evidence. Article 88/Q(1) MCA follows Article 8(1)1 of the Directive. The list of prohibited acts and omissions is the same as in the Directive, but the maximum amount of the resulting fine is only 50.000.000 HUF<sup>74</sup> (160.000 Euro). Court practice will provide the answer whether this is, in fact, an effective method within the meaning of Article 8(1) of the Directive. An equally important change is that 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.<sup>75</sup> The preventing effect of this rule is much more serious than the potential fine. Only limited exceptions apply to evidence disclosure, including leniency statements, settlement submissions or legally privileged documents.

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of one of the parties, the judge may also decide to order the other party to produce one or more documents, sometimes even categories of documents.

<sup>73</sup> The judge will not disclose the document if it is considered to be a business secret and the person (undertaking) does not waive the confidentiality obligation. On the other hand, court appointed experts do have access even to business secrets, so they could use them to calculate the amount of the damage. According to Article 88/B (9) of the Hungarian Competition Act, both leniency applications and settlement submissions were considered business secrets for the purpose of follow-on civil litigations. These documents could be accessed only upon the consent of the undertaking concerned. According to Article 192 (3) HCPA, the judge invites the person entitled to waive the protection of the business secret whether (s)he would consent to grant access to the information. If (s)he refuses to give access, the document cannot be used as evidence. Lack of response should be considered as consent.

<sup>74</sup> Article 88/Q(1) and (2) MCA.

<sup>75</sup> Article 88/Q(5) MCA.

Dealing with confidential information depends upon the source of that information. If the business secret belongs to a third party, the judge may request the submission of that information. However, if the third party is reluctant to give access to that information to the parties involved in the original litigation, that piece of evidence can be accessed only by the judge. On the other hand, if the confidential information belongs to one of the parties involved in the litigation, the judge usually manages to persuade that party to submit the information. The other party will have access after signing a non-disclosure agreement.

### 3. Effect of national decisions

#### 3.1. Former situation

##### 3.1.1. Original state of Hungarian law

Neither the decision of an NCA of another Member State nor judgments of other courts used to bind Hungarian courts. They might have had persuasive powers nonetheless.

Moreover, according to a judgment of the Curia,<sup>76</sup> a decision of the HCA would have been binding only in those cases where the court stayed its proceedings to await the final decision of the HCA. Consequently, a decision of the HCA, even if it was upheld by administrative judges, would not have been binding on civil court judges hearing a follow-on damages claim against cartel members.

##### 3.1.2. Situation from July 2014

A revised rule entered into force in July 2014, correcting the effects of earlier jurisprudence. Article 88/B(6) of the Competition Act regulated the link between public and private enforcement by stipulating that ‘...the statement on the existence or absence of an infringement, made in the decision of the HCA against which no action has been filed or in the decision of the review court, shall be binding on the court hearing the lawsuit.’ The law made no distinction between the various parts of a decision of the HCA making it highly probable that courts would rely not only on the operative part but also on the reasoning of the HCA. Decisions establishing an infringement, with or without imposing sanctions, were thus

<sup>76</sup> Gfv.IX.30.152/2011/10, published as *EBH 2012.G.1*. The same approach was followed in case Gfv.IX.30.202/2012/9.

binding on courts in follow-on litigation. The same would be true if the HCA adopted a non-infringement decision.<sup>77</sup>

After the amendment of the Competition Act entered into force in July 2014, the basic content of these rules and their goal remained the same: judgements rendered in private lawsuits should not contradict the decisions of the HCA as to the existence or non-existence of a competition law infringement.<sup>78</sup>

It should be noted that this binding effect of the HCA decision is a unique phenomenon in the Hungarian legal system. As a rule, according to the principles of civil procedure, a court is never bound by the decisions of an administrative authority.<sup>79</sup>

Having said that, a commitment decision continues to have no binding effect on courts.<sup>80</sup>

Article 9 of the Directive had still to be implemented in order to recognize the effect of decisions adopted by competition authorities of other EU Member States.

### 3.2. Situation after transposing the Directive

Decisions of the HCA and the Commission finding an infringement are binding on courts adjudicating damages claims. The text of Article 88/R(1) MCA follows the wording of Article 9(1) of the Directive.

Considering these most recent changes, the current text of Article 88/R(1) MCA differs from its predecessor. Hungarian courts are now bound only by infringement decisions. MCA – following the wording of the Directive – does not mention statements on the absence of an infringement<sup>81</sup> made in the decision of the HCA or the European Commission. This change

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<sup>77</sup> This kind of decision is rather rare though. If the HCA is not convinced of the existence of an unlawful action, it prefers to terminate the procedure for lack of evidence rather than declaring the action as clearly lawful.

<sup>78</sup> See Article 88/B(6a).

<sup>79</sup> Article 4 of the Act on Civil Procedures.

<sup>80</sup> Yet, the only successful follow-on action so far involved a case like the following. Even though courts emphasized that they were not bound by the HCA decision terminating the procedure in light of the commitments offered by the association of undertakings, judges did consider the HCA procedure as serious evidence of an actual anti-competitive behaviour. Even if this was regarded as of minor importance by the HCA, being satisfied with changing the conduct of the association, the courts established the infringement of section 11 of the Competition Act (the equivalent of Article 101 TFEU) after a fairly short reasoning.

<sup>81</sup> So-called negative decisions.

looks like a step back, which is contrary to the intent of the most recent rules, namely to increase the role of competition authorities.

The content of section 88/R(2) MCA is similar – but not identical – to the text of Article 9(2) of the Directive. According to the Hungarian rule, infringements of competition law found by a final decision of a national competition authority or by a review court in another Member State ‘must be accepted as a fact’, rather than using the exact wording of the Directive that speaks of ‘prima facie evidence’.

## 4. Collective redress

### 4.1. Former situation

Certain types of collective actions were available in Hungary.

#### 4.1.1. Traditional joint action

Two or more plaintiffs may initiate a joint action if (i) the subject-matter of the lawsuit is a joint right or obligation that can be judged only uniformly, or if the judgement would affect the joint plaintiffs irrespective of one of the plaintiffs’ absence from the procedure, (ii) the plaintiffs’ claims are based on the same legal relationship, or (iii) the plaintiffs’ claims have similar legal and factual bases and the same court has jurisdiction for all defendants.<sup>82</sup>

#### 4.1.2. Representative actions

Hungary has designated representative entities to bring representative actions, namely the HCA, the Consumer Protection Authority,<sup>83</sup> the public prosecutor, consumer associations and authorised organisations in the European Economic Area.

- i. The HCA is authorized by the Competition Act<sup>84</sup> to file a representative action to enforce civil law claims of consumers where unlawful practices belonging to the competence of the authority concern a large group of consumers that can be defined on the basis of the circumstances of the

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<sup>82</sup> Article 51–53 of the Civil Procedural Act.

<sup>83</sup> The name of the Consumer Protection Authority has changed from the General Inspectorate of Consumer Protection, to the National Authority for the Consumer Protection.

<sup>84</sup> Article 92(1) of the Competition Act.

- infringement. The HCA is authorised to file the action only where it has already commenced a competition supervision proceeding.
- ii. The National Authority for the Consumer Protection and consumer associations can bring a civil law claim<sup>85</sup> on behalf of consumers against anyone who harms a large number of consumers or causes significant harm to consumers as a result of its behaviour, which is illegal under section 45/A of the Consumer Protection Act.<sup>86</sup> This is a ‘follow-on’ civil procedure, because the illegality of the behaviour must first be established by the National Authority for the Consumer Protection before such action can be lodged. An action can be brought even if the harmed consumers cannot be identified, but when it is possible to determine the circle of those harmed. In its award, the court may authorise the plaintiff to publish the court’s judgement in a national daily newspaper at the infringer’s cost. The infringer must perform its obligation towards consumers in accordance with the judgement. Furthermore, consumers may bring related civil law claims in a separate lawsuit.
  - iii. The public prosecutor, consumer associations and authorised organisations in the European Economic Area can bring a civil law claim<sup>87</sup> on behalf of consumers against anyone who harms a large number of consumers or causes significant harm to consumers as a result of an illegal activity. All kinds of illegal activities can serve as a basis of such lawsuit. An action can be brought even if the harmed consumers cannot be identified, but when it is possible to determine the circle of those harmed. In its award, the court may empower the plaintiff to publish the court’s judgement in a national daily newspaper at the infringer’s cost. The infringer must perform its obligation towards consumers in accordance with the judgement. Furthermore, consumers may bring related civil law claims in a separate lawsuit.

Unfortunately, the aforementioned proceedings do not facilitate access to justice regarding all rights granted by European Union law. Instead, they only relate to the rights of consumers and employees as well as the right to certain damages connected with environmental protection.<sup>88</sup> They exclude, however, damages caused by infringements of competition law.<sup>89</sup>

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<sup>85</sup> Article 38 of the Consumer Protection Act (Act CLV 1997).

<sup>86</sup> Article 45/A of the Consumer Protection Act lists 12 different areas. The claim must be related to them.

<sup>87</sup> Article 39 of the Consumer Protection Act.

<sup>88</sup> Article 583(2) of the Act on Hungarian Civil Procedure.

<sup>89</sup> An action mentioned in point i. can be brought by the HCA only if the harmed consumers can be identified. So actions of the HCA are rare.



#### **4.2. Situation after transposing the Directive**

The transposition of the Directive has not resulted in changes to the aforementioned solution. The same types of collective actions continue to exist in Hungary now.

#### **4.3. Situation after adopting the Civil Procedure Act**

The HCPA regulates an opt-in class action. Unfortunately, this procedure cannot be used for damages in antitrust infringement cases, even if it was so planned originally.

### **VI. Consensual dispute resolution in antitrust enforcement**

#### **1. Forums for alternative dispute resolution**

Within the alternative dispute resolution (hereinafter, ADR) mechanisms, there are official ‘conciliation boards’, well known in the field of consumer protection (not considering arbitration courts as part of this system) regulated by the Consumer protection Act No CLV of 1997. These boards are organized at each county and municipal level of the chamber of trade and industry. The board seated in the capital city has exclusive competence to deal with disputes relating to cross-border online transactions. According to rules that entered into force in September 2015, companies that do not appear before the board can be fined. These boards deal only with disputes between a consumer and an undertaking.

There is a Financial Conciliation Board (member of the European-wide FIN-Net) established and regulated by Act No CXXXIX of 2013 on the National Bank of Hungary. Each year the board deals with more than 4000 complaints involving contractual disputes with financial service providers.

The procedures of both the general and the financial mediation boards are fast and free of charge for consumers.

There are also qualified experts who provide mediation services, helping parties to reconcile their disputes (in this context, both parties can be undertakings). Act No LV of 2002 regulates the mediation procedure. Parties can invite an expert mediator choosing from persons registered by the Ministry of Justice. If they reach an agreement, the latter amounts to a civil law contract. They are not precluded from bringing their case to a court either.

There is no collective ADR or settlements available in Hungary in the strict sense of principles 25 to 28 of Recommendation 2013/396/EU.

The main advantage of ADR mechanisms is that they are relatively fast, as well as free of charge if consumers act as plaintiffs. For these reasons, these features should be widely promoted. Furthermore, it would be important to ensure for competition law experts to be involved in the decisions (the current boards do not deal with antitrust infringements because they are not allowed).

It is widely doubted whether the introduction of more sophisticated procedural rules on ADR, favouring antitrust damages litigation, would lead to an increase in the number of [civil competition law] cases before Hungarian courts (Szilágyi and Tóth, 2014).

## **2. Rules on liability of a settling co-infringer before transposing the Directive**

There were previously no rules in Hungarian Law similar to Article 19 of the Directive, thus new rules had to be adopted.

## **3. Rules on liability of a settling co-infringer after transposing the Directive**

The content of the text of Article 88/F(4) MCA is similar to the text of Article 19 of the Directive. Undertakings paying damages on the basis of out-of-court settlements are only liable in accordance with the settlement. The wording of Article 88/F(4) MCA and Article 19(4) of the Directive is not clear enough when it only mentions ‘damages paid pursuant to a prior consensual settlement’ instead of ‘relative responsibility of the settling co-infringer for the harm caused by the infringement of competition law’.

## **VII. Summary**

Confronted with the need for harmonisation, national legislators are facing difficulties in transposing the Directive’s substantive and procedural provisions into their domestic legal systems, considering that the latter reflect various legal traditions and cultures. Preparations for the transposition of the Directive started very early in Hungary. In fact, they commenced before the final text of the Directive was actually adopted by the Parliament and Council. This made the harmonisation process easier, on the one hand at

least. On the other hand, however, it caused some unusual results. The Hungarian Competition Act was modified several times on the basis of the Green Paper and the White Paper. Some of these earlier amendments resulted in greater changes than the national legislators were ultimately 'forced' to do by the Directive. Hence, in December 2016, Hungarian legislation took a step back concerning joint and several liability of the successful immunity recipient.

Some elements of Hungarian law were already consistent with the standards established by the Directive before its transposition. Hungarian legislature took serious steps to handle antitrust damages during the preparatory works on the Directive. Even before the Directive was adopted, Hungary had already introduced several provisions with a view to stimulate private enforcement of European and national competition rules. As a result of this legislative work, Hungarian law has become more claimant-friendly in recent years.

The legislator has implemented the Directive through a modification of the Hungarian Competition Act. The transposition was timely. The Modified Competition Act (MCA) is divided into two chapters. Chapter XIV/A regulates claims for damages caused by antitrust infringements. Chapter XIV/B concerns damages caused by infringements of two types of unfair competition, namely misleading purchasers and the restriction of the freedom of purchasers in their decision-making process.

The MCA does not restrict its scope to 'actions for damages' only, as the Directive does. The MCA refers to 'private law remedies', instead of 'actions for damages under national law', as stated in the Directive.

Hungary opted for the enlargement of the scope of its transposing provisions. An applicant can bring an action for damages in the case of an infringement of Hungarian antitrust provisions without 'European dimension'.

The quality of the harmonisation work was high. It can be stated that the MCA is adequate to the provisions of the Directive. This was not a 'narrow' transposition of the Directive, certain extra rules were added by the Hungarian legislator when that was considered necessary and useful.<sup>90</sup>

There are some special problems Hungarian law enforcers are facing:

- i. The situation of the immunity recipient has changed and its liability – based on the Directive – has been extended, compared to former Hungarian rules. The reason for this strange (perhaps unique in Europe)

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<sup>90</sup> E.g. section 88/D (3), 88/E (4), 88/H (3), 88/H (4b), 88/H (5), 88/I (4), 88/J (1a), 88/L, 88/M (1)–(2), 88/N (3), 88/O (2), 88/T (1).

situation is that liability rules for the immunity recipient have changed in Hungary on the basis of the *White Paper on Damages actions for breach of the EC antitrust rules* (Brussels, 2.4. 2008.), and the draft versions of the Directive. The scope of the liability of the immunity recipient was more restricted on the basis of former Hungarian law than it is now on the basis of current provisions that follow the final version of the Directive. This ‘step back’ can be detrimental to the leniency programme in Hungary.

- ii. According to Hungarian law (both the former version of the Competition Act and the law currently in force) it shall be presumed that the infringement caused a 10% price increase, for example, the cartel-price is higher than the competitive market price and the difference between them is 10%. It is doubtful whether this presumption is in accordance with point 47 of the Preamble of the Directive.<sup>91</sup>
- iii. The text of Article 88/R(1) MCA on the effect of national decisions differs from its predecessor. Courts are now only bound by infringement decisions. The law in force – following the wording of the Directive – does not mention statements on the absence of an infringement made in a decision of the HCA or the European Commission.<sup>92</sup> This change looks like a step back also.

Answers to the following questions are only to be found in the future:

- i. How can the content of the *Practical Guide on quantifying harm* be used by Hungarian courts without being mentioning by the MCA?
- ii. How is the new system of disclosure of relevant evidence going to work in legal practice?
- iii. Will the fine of up to 50.000.000 HUF be effective in practice?
- iv. The Hungarian Parliament adopted the new Hungarian Civil Procedure Act in December 2016. It is yet to be settled whether, and if so, how may

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<sup>91</sup> 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, it is appropriate to presume that cartel infringements result in harm, in particular via an effect on prices. Depending on the facts of the case, cartels result in a price rise, or prevent a price decrease which would otherwise have occurred but for the cartel. This presumption should not cover the concrete amount of harm. Infringers should be allowed to rebut this presumption. It is appropriate to limit this rebuttable presumption to cartels, given their secret nature, which increases information asymmetry and makes it more difficult for claimants to obtain the evidence necessary to prove their harm.

<sup>92</sup> So-called negative decisions.

its disclosure rules and its provisions on class action be used together with the procedural rules of the MCA?

This national report aimed to describe in detail how the Directive was implemented into Hungarian law. While it is apparent that question marks<sup>93</sup> and problems<sup>94</sup> remain, the task has been basically completed. The next – and bigger – question is how the new legal solutions will be applied in practice. It is yet to be seen and concluded whether private antitrust enforcement will become as efficient of a tool as the European legislator intended it to be.

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<sup>93</sup> A difference in the injured party's knowledge for bringing an action between the MCA and the Directive.

<sup>94</sup> Differences between the effects of decisions of different Member States's competition authorities.

## I. Manner of implementing the Directive

As of the date of this publication,<sup>1</sup> Latvia has only implemented the provisions of Article 17(2) of the Directive.<sup>2</sup> Even though the transposition was due by 27 December 2016, the rest of the provisions of the Directive remain not transposed into the Latvian legal system.

The relevant legal acts which specify the procedure for damages actions are the Latvian Competition Law (hereinafter, **Competition Law**) and the Latvian Civil Procedure Law<sup>3</sup> (hereinafter, **CPL**). Therefore, the Ministry of Economics has drafted new amendments to the Competition Law<sup>4</sup> (hereinafter, **Draft Competition Law**) as well as amendments to the CPL<sup>5</sup> (hereinafter, **Draft CPL** and collectively referred to as the **Amendments**). The Amendments were not, however, submitted to the Latvian Parliament (in Latvian: *Saeima*). As a result, the Amendments are not expected to be passed until autumn 2017, unless an expedited procedure is chosen.

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<sup>1</sup> 13.03.2017.

<sup>2</sup> The latest amendments to the Latvian Competition Law (in Latvian: *Konkurences likums*), which implemented the Damages Directive in relation to the provisions of its Art. 17(2), were initiated on 25.05.2015 (preparation of the draft).

<sup>3</sup> In Latvian: *Civilprocesa likums*.

<sup>4</sup> Draft law No VSS-441, approved by the Meeting of State Secretaries on 8.09.2016.

<sup>5</sup> Draft law No VSS-866, approved by the Meeting of State Secretaries on 8.09.2016.

Furthermore, given that historically amendments to the Competition Law attract the attention of many stakeholders, the debates in the Parliament are expected to last at least one-two months between each reading (the laws are normally passed in three readings), which may delay the adoption of the Amendments even further.

The Amendments are supplemented with an Annotation which explains the reasoning behind the Amendments and describes the intended application and interpretation thereof (hereinafter, Annotation).<sup>6</sup> The Amendments aspire to transpose the provisions of the Directive through amendments to six provisions of the Competition Law and seven provisions of the CPL.

## II. Scope of the implementation

Latvia seems to have opted for the implementation of the entire scope of the Directive. The Draft Competition Law does not, however, go significantly beyond the clear requirements of the Directive.

First, the Amendments provide claimants with the right to claim full compensation (that is, compensation for actual loss, loss of profit, and payment of interest from the day when the harm occurred until the day when compensation is paid). By so doing, claimants are to be placed in the position in which they would have been had the infringement of competition law not been committed.<sup>7</sup>

Second, the Directive refers to ‘infringements of the competition law provisions’, but the provisions of the Directive are initially drafted to address the consequences of infringements of Article 101 or 102 TFEU or of respective national competition law provisions.<sup>8</sup> Neither the Directive nor the Draft Competition Law address the issue of compensation for harm caused by a failure to comply with other competition law provisions. Latvian law will go further and include a more general reference to a violation

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<sup>6</sup> Annotations, according to Latvian law, must always accompany draft laws and give reasons for the amendments to the relevant law, its intended application, and other relevant considerations. Annotations are customarily used by authorities and courts in order to clarify the intention of the legislature.

<sup>7</sup> Part 2 of Art. 21 of the Draft Competition Law.

<sup>8</sup> Art. 2(3) of the Directive provides that ‘national competition law means provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union competition law (...)’.

of any provision of the Competition Law. Unlike the Directive, the Draft Competition Law will therefore also cover unfair competition provisions. At the same time, similar to the Directive, the Draft Competition Law does not cover damages actions pursuant to a violation of state aid rules. Hence, the Draft Competition Law covers damages caused by violations of Articles 101 and/or 102 TFEU as well as violations of any other provision of the Competition Law.<sup>9</sup>

Third, the Draft Competition Law goes beyond the minimum requirements of the Directive. The latter applies to damages claims based on both TFEU and national law provisions. At the same time, Article 2(3) of the Directive defines national competition law very narrowly stating that: ‘This Directive should not affect actions for damages in respect of infringements of national competition law which do not affect trade between Member States within the meaning of Article 101 or 102 TFEU’.<sup>10</sup> In contrast with the restrictive scope of the Directive, the Draft Competition Law refers to any violation of the Competition Law and so the Draft Competition Law is not exclusively limited to violations of national law affecting trade between EU Member States. This is a logical and expected approach as the Latvian Competition Council predominately enforces national competition law. In fact, since 2004, the Competition Council issued only three decisions establishing a violation of Article 101 TFEU (plus 17 negative decisions), and three decisions establishing a violation of Article 102 TFEU (plus 14 negative decisions). This is a small number if compared to, respectively, 143 national prohibited agreements cases and 61 national abuse of dominance cases.

### III. Competent courts

Currently, all damages actions should be brought before district city courts (first instance general jurisdiction courts, in Latvian: *rajona tiesa*) determined by the location of the defendant. There were disputes on the interpretation of the term ‘court’ in the Competition Law. Its Article 20 stated that ‘a court’, concurrently with the Competition Council, may also determine a violation of the Competition Law. Therefore, there were attempts to bring damages actions to arbitration.<sup>11</sup> While Riga Regional court ruled that such claims may be heard by arbitration, the Supreme Court

<sup>9</sup> Point 6.1 of Art. 1 of the Draft Competition Law.

<sup>10</sup> See Recital (10) of the Preamble to the Directive.

<sup>11</sup> In Latvian the name for ‘arbitration’ is ‘the court of settlement’.



has, however, clarified that general jurisdiction courts are the only forum available for the claimant to bring a case, even if the claim is based on a contract which refers to arbitration as the contractual dispute settlement forum.<sup>12</sup>

The Draft Competition Law seeks to avoid the recurrence of the abovementioned forum shopping, and thus established a quasi-specialised court – the Riga city Latgale district court.<sup>13</sup> Hence, the Riga city Latgale district court will provide for a number of specialised judges who will hear damages cases in the first instance. While the Amendments provide for specialised district courts, they do not require for such cases to be heard by a higher number of judges. Therefore, standard rules apply and the panel will consist of one judge only. The judges of the Latgale district court are not experienced yet in hearing such cases. They are thus currently being trained on both general competition law matters and issues related to competition damages actions.

The cases will, however, go to the Riga Regional court if appealed (and to the Supreme Court in cassation) but there are currently no plans to train specialised judges who would be hearing competition cases.

Given the lack of experience and knowledge of general jurisdiction courts, it is expected that, in foreseeable future, Latvia will not become a preferred jurisdiction for damages actions. The case law as it stands at the moment of this publication is rather discouraging, mostly due to the strict civil law approach preferred by judges and the reluctance to accept the very idea that competition law violations may result in substantial harm being caused. Last but not least, competition law remains *terra incognita* in the Latvian legal system: the vast majority of lawyers lack even the basic understanding of competition law. Up to date, competition law questions have never been part of the standard ‘minimum package’ which lawyers, attorneys or judges are tested on in their qualification exams. This *status quo* is gradually changing as it took over ten years for administrative courts to issue their first quality judgments resulting from appeals of decisions issued by the Latvian Competition Council. It is likely that several more years are required for a comparable level of expertise to emerge in general jurisdiction courts.

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<sup>12</sup> Judgment of the Riga Regional court, dated 26.01.2010 in case No C04293109 and judgment of the Civil Department of the Supreme Court, dated 13.05.2010.

<sup>13</sup> Art. 250 (65) of CPL, as per the Draft CPL.

## IV. Substantive law issues

### 1. Limitation periods

Latvia has chosen to apply its general limitation period to damages claims based on competition law: according to the Annotation, Article 1895 of the Civil Law<sup>14</sup> applies. Accordingly, all claims are subject to a general period of limitation of ten years, unless a shorter limitation period is provided for in specialised laws. The Draft Competition law does not, however, provide a reference to Article 1895 of the Civil Law, and does not deal with the issue of the conflict between the provisions of the Civil Law and the provisions of the Commercial Law.<sup>15</sup> The Commercial Law provides that in relation to claims arising from commercial contracts, the limitation period is three years, which is substantially shorter than the five year period provided for in Article 10(3) of the Directive.<sup>16</sup> It follows that Latvia should amend the Draft Competition Law and clearly state that the limitation period for all competition law damages actions is always ten years, even if a commercial transaction exists between the relevant legal entities. The Draft Competition Law should also clarify that the limitation period stated in the Commercial Law does not apply with respect to such claims.

The Amendments provide that the limitation period does not start until the infringer has stopped the violation of competition rules, unless the claimant knows or could have known that: (a) the behaviour of the infringer has taken place and that such behaviour constitutes an infringement of competition law; (b) the competition law violation has caused damages to the claimant; and (c) the identity of the infringer.

The limitation period is suspended for the whole period of the investigation (of the respective breach) conducted by the competition authority.<sup>17</sup> The suspension stops and the limitation period restarts one year after the decision of the authorities comes into force.<sup>18</sup>

The limitation period is suspended also for the duration of settlement negotiations (if the court proceedings have already been initiated then the suspension cannot last more than two years).<sup>19</sup>

<sup>14</sup> In Latvian: *Civillikums*.

<sup>15</sup> In Latvian: *Komerclikums*.

<sup>16</sup> Art. 406 of the Commercial Law.

<sup>17</sup> Part 8 of Art. 214 of the Draft CPL.

<sup>18</sup> The decision comes into force if it is not appealed or, if the decision is appealed, after the last judgment in the case has come into force (or settlement was entered into).

<sup>19</sup> Part 7 of Art. 214 of the Draft CPL.

## 2. Joint and several liability

Even though the Draft Competition law has opted for a straight-forward transposition of the Directive's provisions on liability, the framework of 'liability sharing' by multiple infringers is left for the courts to resolve.

The Draft Competition Law provides that in a situation where the market participants have jointly committed a competition law violation, the claimant may bring an action requesting that the infringers are jointly and severally liable for the harm they had caused.

The Draft Competition Law accurately transposes all the exceptions to joint and several liability as provided for under the provisions of Article 11 of the Directive. These provisions have literally been copied and pasted into the text of the Latvian law.

The Draft Competition Law provides that an infringer who has compensated the injured party may claim from other co-infringers that they compensate the share of the compensation amount which exceeds the relative share of the liability of the infringer who has compensated the injured party. Such a claim may only be brought against co-infringers who are jointly and severally liable together with the infringer who has compensated the injured party.<sup>20</sup>

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.

## 3. Quantification of harm

The general principle of assessing the size of damages (*damnum emergens*) is set by the Civil Law. Article 1786 of the Civil Law states that besides the actual value of the property, the resulting loss and lost profit has also to be considered.

Latvian law provides for the compensation of damages actually caused. Once the harm is quantified, the claimant may claim actual compensation to be performed in the form of a return of specific property in kind. Furthermore, the judgment may impose an obligation upon the defendant to

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<sup>20</sup> Part 7 of Art. 21 of the Draft Competition Law.

perform certain activities or refrain from others. There are no other forms of liability envisaged (for example, disqualification of directors or similar).

The Draft Competition Law follows the general logic of the Civil Law and provides that the actual decrease of the value of the property, consequential loss and lost profit can be claimed. Furthermore, interest may be calculated for the period between the moment when the harm was initially inflicted and until the date of the compensation of such harm.

According to procedural rules, courts evaluate the evidence submitted by the parties. No evidence submitted by either of the parties has predetermined evidentiary strength, and the success of a given claim or defence depends on the ability of the judges to understand and accurately evaluate the evidence submitted. In relation to the quantification of damages, the European Commission is suggesting a number of econometric techniques that can be used by the parties. However, Latvian judges may refuse to accept assumptions-based calculations in the first place (although the Commission admits that the non-infringement scenario will always be based on assumptions and approximations). Most of those methods require the involvement of economists, but documents prepared upon the request of one party will, naturally, have the same procedural strength as opinions prepared upon the request of the opposing party. The court may also request that an independent expert issues an opinion. Such an expert opinion would then be considered to be a more objective and reliable piece of evidence. At the same time, the CPL is not sufficiently flexible with respect to the types of expertise that the court may order and the types of tasks which the courts may ask the experts to perform. It is expected that courts will be reluctant to order expert opinions and will face substantial difficulties in formulating their tasks and choosing the appropriate techniques to be followed. Last but not least, Latvia suffers from a striking lack of experts that may serve these purposes and who would be able to professionally quantify damages in a given competition case. It therefore seems that even where evidence exists and the claimant is capable of quantifying damages, the courts may face a substantial hurdle in evaluating the position and argumentation of the claimant. It is unfortunate that the Amendments fail to address these questions and do not require courts to be more proactive in evaluating existing, or ordering additional econometric analyses.

Furthermore, the courts have the discretionary competence to estimate the compensation amount. This provision is, however, problematic when applied by the courts. The very idea of civil procedure laws is that courts evaluate the submitted claims and may refuse to satisfy a claim in full, but may not introduce their own considerations into the evaluation of the quantification of harm.

The provision on the discretionary competence of the courts to estimate damages is not only controversial as a philosophical concept for civil courts. This provision must also be read so that the claimant is obliged to specifically request for the court to decide to 'estimate damages at its discretion'. Article 192 of the CPL precludes courts from deciding by themselves on such estimate, if they were not specifically asked to do so by the claimant. This means that a court that finds the calculations of the damages amount to be unsatisfactory, cannot on its own initiative substitute the quantification provided by the claimant with its own estimate. The claimant is precluded, as it follows from established Latvian case law, from submitting alternative claims. Hence, the strategic decision has to be taken before the submission of the claim on (1) whether the claimant will submit its own calculations; or (2) ask the court to estimate the damages by itself. One could only wish that the draft would specify this issue so that the court is allowed to give an estimate of the damages, even if not initially asked to do so by the claimant and/or explicitly allow the claimants to submit alternative claims in competition cases.

Lost profit is defined in Latvian case law as a benefit which was not received or the profit which was actually lost.<sup>21</sup> However, this definition, as well as the definition contained in the Civil Law, does not give clear guidance on the calculation of such profit. Hence, disputes arise on the costs that need to be deducted from the turnover gained from the sales of goods or services. One definition suggested by the courts is that 'the actual profit of a company is the difference between actual sales volume and actual costs, where the lost profit is the difference between the hypothetical and actual profit'.<sup>22</sup> A definition given in another case states that: 'to determine the lost profit, one should take into account all costs related to the provision of the service'.<sup>23</sup> Such explanations are hardly sufficient and will not be useful in competition law damages cases, especially where the claimant is not at ease with costs qualification and explanations.

At the same time, the Civil Law imposes a high burden of proof on the party claiming lost profit. Namely, Article 1787 of Civil Law 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.'

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<sup>21</sup> Judgment of the Supreme court of Latvia, dated 15.01.2014 in case No SKC-12/2014.

<sup>22</sup> Judgment of the Kurzeme regional court, dated 25.02.2015 in case No C40128313.

<sup>23</sup> Judgment of the Supreme Court, dated 31.03.2016 in case No C04293109.

It follows from the above that in order to prove lost profit, the claimant will be forced to prove that the specific violation by the infringer was the only credible explanation for the fact that the claimant has lost that profit. It seems that such proof will rarely be possible, and the claimants would be forced to ask for the courts to give, at their discretion, an estimate of the amount of the lost profit. Hence, even where the claimant calculates the amount of the actual decrease of the value of the property at stake, it is feasible to trust a judge's estimate as far as the lost profit is concerned, in order not to lose that part of the claim altogether. Alternatively, the Draft Competition Law should be amended by the Parliament and special rules on lost profit calculation and burden of proof should be introduced with respect to competition law damages claims.

Finally, the Competition Law provides that in the case of a cartel agreement there is a rebuttable presumption that the cartel resulted in a price increase of 10%. It should be noted with respect to this presumption that the final text of the Amendments may include further changes therein since a proposal was considered during earlier parliamentary debates where a similar rebuttable presumption would apply in that an abuse of a dominant position and any other prohibited agreement also result in a price increase of 10%. This proposal was initially accepted but later deleted with the comment from the members of the Parliament that the issue should be discussed again when the Competition Law is amended next in order to transpose the provisions of the Directive.

#### **4. Passing-on of overcharges**

The Draft Competition Law states that if the defendant, in response to an action, invokes the fact that the claimant has passed on the whole or part of the overcharge resulting from the competition law infringement, the burden of proof rests with the infringer. To prove the fact that passing-on took place, the indirect purchaser should prove that the infringer has committed an infringement of competition law, where such an infringement has resulted in an overcharge of the direct purchaser by the defendant. Finally, the indirect purchaser must prove that he has purchased goods that were the object of the infringement, or has purchased goods derived from them or containing them. This rule does not apply where the defendant can provide the court with a credible demonstration that the overcharge was not, or was not entirely, passed on to the indirect purchaser.

The Draft Competition Law also aims to avoid situations where actions for damages submitted by claimants from different levels in the supply chain lead to multiple liability situations or to the absence of the liability of the infringer. Therefore, to assess whether the burden of proof criteria is satisfied, the following needs to be assessed: 1) actions for damages that are related to the same competition law infringement but that have been brought by claimants from other levels in the supply chain; 2) judgements resulting from actions for damages; 3) relevant information in the public domain resulting from public enforcement of competition law.

## V. Procedural law issues

### 1. Standing

Any natural or legal person, including foreign ones, can be a party to civil proceedings in Latvia.<sup>24</sup> There are no special rules on standing in relation to competition law damages claims at the moment, and it will remain so after the Amendments as well. The standard criterion for determining jurisdiction of Latvian courts is the place of residence or seat of the defendant. Parties from other EU Member States may bring an action in Latvian courts (or become defendants) where this is provided for under Latvian or EU standard jurisdictional rules.

The implementation of the Directive would be more efficient if certain issues were to be clarified. Damages actions will be heard, as already mentioned, by general jurisdiction courts. It seems, however, that the drafters of the Amendments did not take into account the differences in the approach to the interpretation of legal acts by civil and administrative courts. The Directive is clear that the right to compensation is recognised for any natural or legal person – consumers, undertakings and public authorities alike – irrespective of the existence of a direct contractual relationship with the infringer.<sup>25</sup> Suppliers and market participants, active on different levels of the distribution chain, are mentioned in Draft Competition Law, but its wording and context is predominantly concerned with claims that will potentially be brought by consumers or purchasers against direct or indirect sellers. It would be better if the law proactively explained that injured parties may act on any level of the production or distribution

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<sup>24</sup> Art. 74 CPL.

<sup>25</sup> Point 13 of the Preamble to the Directive.

chain, and that the type of relationship between the injured party and the infringer is irrelevant. The focus on purchasers and consumers should not result in a narrow interpretation of the law, and thus less favourable substantive and procedural rights of injured competitors or suppliers where they are not explicitly mentioned in the text of the law. This issue will, admittedly, be resolved in the course of the interpretation and application of the Amendments, but good practice of legal drafting generally implies that law should not be drafted in an overly vague manner.

The Amendments place special emphasis on the rights of indirect purchasers to bring claims against competition law infringers. The definition of indirect purchasers is copied from the Directive, and it is specifically noted that no direct contractual relationship is required to prove standing against the infringer.

While the issue with indirect purchaser is solved efficiently, it is desirable that certain clarifications are made to the Draft Competition Law so that competitors, suppliers and other injured parties are not excluded from successful actions. The Draft Law specifically mentions the possibility of the absence of a direct contract between the injurer and the indirect purchaser, yet fails to do the same with respect to other potential injured parties. In fact, damages may be caused to a competitor, supplier or other market participant (also having no contractual relationship with the infringer) which cannot be qualified as a purchaser. The Draft Competition Law defines a ‘violation of competition law’ as any violation of the Latvian Competition Law or that of Articles 101 and 102 TFEU. The very idea of both the Competition Law and the respective articles of the TFEU is that no contractual relationship is required. However, this conclusion requires initial understanding of the basics of the Competition Law, which unnecessarily complicates the argumentation on standing. This issue should be resolved on the legislative level to avoid the foreseeable resistance of civil courts to apply notions and ideas not expressly mentioned in the law.

Public interest litigation in Latvia is not subject to a specific procedure. There are no provisions that preclude such claims from being submitted. However, the classic reading of Latvian procedural rules means that a claim not explicitly provided for under any law, is not admissible. The Amendments do not mention public interest litigation, and so it is not expected that the courts will be willing to accept such cases.

The CPL provides that any action may be brought by multiple claimants against a single defendant.<sup>26</sup> This does not mean, however, that class action

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<sup>26</sup> Art. 75 CPL.



is allowed under Latvian law. In fact, each claimant is formally acting independently and her/his actions are not binding upon other claimants, unless they unequivocally join the relevant procedural action or line of argumentation. However, all of the claimants may appoint a single representative. The decision of the court, irrespective of course of the action chosen by the claimants, will specify the outcome of the case separately for each claimant and will decide if the judgment applies individually or if the right of recovery is a joint one.<sup>27</sup>

Furthermore, each claimant must be identified and no claim can be brought on behalf of an identifiable, but not participating person or entity. The legal culture and general attitude of the Latvian society towards class actions is negative. There are also no plans to change the current approach in a foreseeable future.

Should the claimants bring separate claims, each will be heard in separate proceedings, unless the judge decides to join the proceedings. The CPL provides that if the same court has numerous claims against the same defendant, it may join such cases (but the judge is not obliged to do so). It remains to be seen how the Riga city Latgale district court will act in such situations.

## 2. Disclosure of evidence

In civil litigation, the disclosure of evidence that is in the possession of the defendant or an authority is limited.

Latvian administrative procedure is subject to the principle of objective examination and the administrative courts are free to intervene and independently decide on the types of evidence that need to be received, even where the parties are not skilful in formulating a clear request. By contrast, the principle of objective examination is not applicable in civil procedure, which is based on an adversarial litigation model in Latvia. The law thus precludes the judge in civil proceedings from accepting evidence which is not available to all parties in the dispute. Moreover, the judge is precluded from giving her/his own evaluation of facts and circumstances that are not raised and interpreted by the parties. Therefore, even if commercially sensitive data would be allowed in the case file, the judge would face procedural difficulties in basing her/his opinion on evidence which is not available to the claimant.

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<sup>27</sup> Art. 198 CPL.

The classic application of the adversarial model is generally questionable with respect to competition damages cases. Indeed, there can be no adversary principle without equality of the parties in the proceedings. Yet competition cases are hardly equal when one party (defendant) possesses all of the relevant data and evidence, while the other party (claimant) has no knowledge of such data and evidence.

The 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.<sup>28</sup>

The CPL provides that access to 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'.<sup>29</sup> In practice, this provision is interpreted so that a sufficiently precise name and description of the contents of such evidence 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 conforming with the description provided by the claimant exist. If 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 grant the disclosure request or deny the motion.

The Amendments aim to change this situation with respect to competition damages actions. In contrast to the aforementioned standard rules, Article 250 of the Draft CPL<sup>66</sup> provides that, to ease the process of the provision of evidence, the claimant is relieved from the obligation to precisely name the pieces of evidence that need to be requested from the defendant or an authority.

The Draft CPL states that disclosure request 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 *prima facie* proof of the existence of the harm caused by the defendant. If the evidence request is formulated in such a manner that it covers an entire category of evidentiary material, then such a category must be described with sufficient detail and precision so as to enable the

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<sup>28</sup> Art. 149 CPL.

<sup>29</sup> Part 2 of Art. 112 of the Latvian Civil Procedure Law.

other party and the court to identify the type of evidence falling within the said category. Furthermore, the claimant needs to indicate the possible characteristics, subject and contents, as well as time period when the said evidence was created.

The Draft Competition Law provides also additional guidance on the process of requesting evidence contained in the case files of the Latvian Competition Council or the European Commission.

Following the provisions of the Directive, separate attention is given to the evidence that is contained in the case files of the competition authorities, but which refers to a 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 the interests of other parties to the cases.

Previous practice suggests that it was in fact the interest of the claimants that needed additional protection and clear provisions, imposing an obligation on the court to actually request the case file (where the request fulfils minimum requirements). The courts have so far mostly failed to take such requests seriously. Moreover, even if a vague reference to the commercial secrets of any market participant was made, both the Latvian Competition Council and courts took the side of protecting such commercial interests. It remains to be seen if and how the courts will ensure access to crucial evidence for the claimant or her/his representatives. The Draft Competition Law fully follows the text of the Directive in this respect, and yet to change the attitude of the courts and the competition authority, it is not sufficient to make a mere reference to the right of the court to give access to sensitive documents. The legislative language used should be more certain 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.

Furthermore, a judge upon receipt of a motivated 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.<sup>30</sup> The possibility to participate and issue opinions by – respectively – the European Commission and the Latvian Competition Council is provided by both Regulation 1/2003 and the Competition Law.<sup>31</sup> However, Latvian

<sup>30</sup> Art. 89 CPL.

<sup>31</sup> 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 the authority to issue opinions on the compliance of the conduct by market participants with the rules of competition laws.

general jurisdiction courts are rather reluctant to invite the competition authorities. This may be explained by the fact that general jurisdiction courts are generally not obliged to follow any type of evidence submitted, even if it has the form of an expert opinion. Still, expert opinions tend to be followed in practice.

While the opinions of the European Commission or the Latvian Competition Council must not be treated as binding, there seems to be a need for further clarification of the status of such interventions. Once, addressing a request by the claimant to invite the European Commission to issue its opinion, a Latvian judge denied the request rather emotionally, noting that a Latvian court is independent in making its judgement and neither European nor Latvian authorities need to be invited to educate the judges.<sup>32</sup>

The Draft Competition Law provides that in case the court is not able to independently assess 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 gives an evaluation of the relevance of specific evidence for the case. It seems, however, that the Amendments would be more effective if the courts were to be obliged to ask for such an opinion under specific circumstances. Hence, 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 her/his objective observations on the substance and relevance of that 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 the general jurisdiction courts feel more confident to make the relevant evaluations by themselves.

An unfortunate solution applies to the enforcement of court decisions on the submission of evidence – if a party fails to comply with the court order to submit specific documents, the court may impose a fine of up to EUR 40. This amount is hardly sufficient to motivate the infringer to assist the claimant in proving her/his case. 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. Still, the claimant may refer in such a case to the rules of the CPL, which allow the claimant to presume that the facts, which needed to be proven by the undisclosed evidence, are true and accurate. This solution is not without

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<sup>32</sup> Case reference available upon request.

its own problem, since it can only be used where other, indirect evidence of the relevant facts exists. The legislature should therefore reconsider the attitude towards the enforcement of court orders in competition law damages claims and provide for the opportunity to increase the liability of infringers. Should the approach stay unchanged, defendants are better off paying the EUR 40 fine during each court session, especially where there is the potential of a multimillion claim being satisfied against them.

### 3. Effect of national decisions

Currently the CPL only relieves the parties of the obligation to prove the facts and circumstances established in another civil case. It follows from Article 96 CPL that the claimant is not relieved from the duty to prove facts already established by an administrative act (whether it is a decision of the Latvian Competition Council or that of the European Commission). Furthermore, even facts established in a judgment of an administrative court (which has entered into force) may not be considered in civil proceedings as proven.

There were not many cases in the Latvian legal history when parties claimed damages arising from competition law violations.<sup>33</sup> The best known of such cases was brought by AS 'PKL Flote' as a consequence of the decision of the Latvian Competition Council establishing an abuse of a dominant position by the Riga Free Port administration. The case can generally be considered as the biggest failure in Latvian competition law enforcement practice. The Riga Free Port administration blatantly ignored the first, as well as the second and third decision issued by the Latvian Competition Council (all decisions concerned almost identical factual circumstances), with only the fourth procedure closing successfully.<sup>34</sup> Not only did public enforcement fail, but any resulting private action became almost anecdotal

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<sup>33</sup> There is, to the knowledge of the author, one currently unresolved dispute related to an unfair competition case, and one unresolved dispute raised by an abuse of a dominant position. A third damages action was settled by the parties.

<sup>34</sup> The first decision was adopted on 24.03.2009, the second on 29.04.2010, the third decision was adopted on 29.04.2011. In addition to these three decisions, a final procedure regarding the same violation was initiated in 2013. The Competition Council agreed, however, to close the proceedings with a settlement agreement, signed on 10.06.2015, whereby the Riga Free Port administration agreed to terminate the saga of its violation of the Competition Law and pay a fine in the amount of EUR 622363,40. Thus the total amount of fines imposed on the infringer totalled EUR 850023.

highlighting the most problematic issues of private actions for damages in Latvia.

The first damages judgment in this case was favourable to the defendant. The court decided that the claimant is not entitled to refer to the facts and circumstances established in the decision of the Latvian Competition Council. Instead, the claimant should independently prove all the requisite elements of an abuse of a dominant position. The Supreme Court did overturn the said judgment and confirmed that the decisions of the Latvian Competition Council could indeed be referred to in civil proceedings. It took the claimant five years (and three different courts) to get to the first judgment whereby he was awarded damages, albeit only 3% of the amount claimed. Hence, this case is still not closed. However, at least the right of claimants to refer to the decisions of the Latvian Competition Council is no longer questioned.<sup>35</sup>

To resolve the abovementioned issue, and to bring Latvian procedural laws in line with the Directive and the case law of the Supreme Court, the Draft CPL contains the relevant amendments and deals, in a satisfactory manner, with the status of the decisions issued by competition authorities.

Article 9 of the Directive provides that a final decision of the national authority (in relation to the finding of a violation of competition law) is 'deemed to be irrefutably established'. At the same time, a relevant decision taken in another Member State is 'presented before their national courts as at least *prima facie* evidence that an infringement of competition law has occurred'. The Draft CPL explicitly states that a competition law violation does not have to be proven if it is established in a final decision of the Latvian Competition Council.<sup>36</sup> Competition law violations established by a decision of a competition authority of another EU Member State are not treated as *prima facie* evidence, but the law introduces a rebuttable presumption that such violations have indeed occurred.<sup>37</sup>

Decisions issued by competition authorities address the establishment of competition law violations and methods of dealing with their consequences. Neither the decisions of national competition authorities nor those issued by the European Commission deal with the issue of damages.

The Draft Competition Law does not address the applicability of the classic criteria of damages to competition cases. Hence, the Civil Law

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<sup>35</sup> Case C04293109. See judgment of the Riga Regional court, dated 6.12.2010, judgment of the Supreme Court, dated 18.02.2013. The case is currently being considered by the Riga District court once again.

<sup>36</sup> Part 1 of Art. 250 (68).

<sup>37</sup> Part 2 of Art 250 (68) of the Draft CPL.

requires that the claimant proves the following criteria: the illegal action or illegal lack of action, existence of losses and causal link between them. It is necessary to prove that any losses were incurred as a result of illegal activities, that is, the fault of the infringer. However, the Latvian Competition Council customarily does not in its decisions address, or even mention, issues related to the fault of the infringer. No analysis of negligence or intent is expressly revealed in such decisions. Hence, they fail to fulfil the Civil Law requirement whereby fault needs to be established.

Furthermore, the decisions of the competition authorities do not deal with the issue of harm caused to other market participants. Most violations of competition law do not require that effects (existing or potential) of the illegal activity are analysed. Moreover, many rules of competition law do not even require 'intent' to be present. Instead, many cases deal with so-called form based rules, where the authority describes the factual circumstances, compares those against the legal test, and considers this as sufficient to find a competition law violation. For example, discrimination as a form of abuse of dominance does not require authorities to prove either effect or intent.

Even where the interests of third parties are clearly affected, the Latvian Competition Council tends to address these issues only in general terms. In fact, some claimants may face the problem that they are not identifiable as injured parties in the decision. Others may have difficulties proving the extent to which their injury was actually analysed by the Latvian Competition Council.

For example, in one damages claim, the Air Baltic Corporation AS was named in the decision as a market participant whom the Riga International Airport discriminated against in comparison to Ryanair.<sup>38</sup> The decision did not go beyond the analysis of the actions of Riga International Airport and did not address the possible harm caused to the Air Baltic Corporation AS. Therefore, whilst the abuse of a dominant position was established, the aim of the proceedings was to establish if discrimination occurred, given that the case did not require proof of either intent or effects. The decision was therefore not sufficient in itself to prove specific harm, even where it did mention the harm caused to the Air Baltic Corporation AS.

As a result, most claimants would objectively need to prepare independent proof of a competition law infringement, irrespective of the existence of administrative decisions establishing such violations, because the evidentiary minimum threshold is substantially higher with respect to the private claimants than in administrative competition law proceedings.

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<sup>38</sup> The Latvian Competition Council Decision No E02-12 (Prot. No. 9, paragraph 4) of 10.02.2012.

## VI. Consensual dispute resolution in antitrust enforcement

Settlement of disputes is generally encouraged by authorities. It is highlighted in the Annotation as the preferred mechanism for the resolution of damages actions, and it is one of the tasks of the courts to motivate the parties to settle.

Point 49 of the Preamble to the Directive notes that the limitation periods for bringing an action for damages could not be sufficient for the parties to reach a settlement in damages actions, as a settlement in such complicated cases may be subject to lengthy negotiations. Therefore, the Directive invites the Member States to foresee that the limitation periods are suspended to provide the parties with an effective opportunity to settle the case.

Latvia opted for the suspension of limitation periods irrespective of the status of the dispute. Therefore, the suspension starts both prior to the bringing of an action and during the court proceedings.<sup>39</sup> The Draft Competition Law provides, however, that the suspension is applicable only to the parties involved in the dispute settlement procedure.<sup>40</sup> The Draft CPL provides that court proceedings are also suspended where settlement negotiations are ongoing between the parties.<sup>41</sup> However, the Draft CPL fails to clarify whether suspension is possible if not all of the infringers are engaged in the settlement procedure – the Draft CPL provides for the obligation to suspend the proceedings where settlement is initiated ‘between the parties’.<sup>42</sup>

Given that the limitation period is only suspended with respect to the settling parties, the question remains open whether the relevant court proceedings should continue with respect to all of the infringers, or whether they should be divided, with the dispute between the settling parties being separated into a different case.

A formal reading of the Draft CPL and Draft Competition Law suggests that unless all infringers are involved in the settlement, the parties may be forced to simultaneously continue the court case at full speed. This is hardly a fortunate solution and unless the judge is sympathetic and willing to suspend the proceedings on other grounds, there may be decreased

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<sup>39</sup> Part 1 of Art. 21.3 of the Draft Competition Law.

<sup>40</sup> *Ibidem*.

<sup>41</sup> According to Part 9 of Clause 216 of the Draft CPL, the suspension cannot last longer than two years.

<sup>42</sup> Part 7 of Art. 214 of the Draft CPL.



motivation for the parties to settle in cases where at least one, if not several co-infringers prove uninterested in the settlement talks.

Point 51 of the Preamble to the Directive explains that for settlement to be a viable option, the laws should provide that the conclusion of a settlement should not result in having the legal position of the settling infringer worsen *vis-à-vis* its co-infringers, when compared to the situation without a settlement. These rules may be relevant if the settlement would not exempt the settling infringer from potential joint and several liability with its co-infringers. Therefore, joint and several liability should end with respect to all settling infringers.

To achieve that, settlements should identify the relative share of liability that falls upon the settling infringer, and so the compensation claimed in the case should be reduced. The Draft Competition Law provides therefore that the claim of the settling injured party must be reduced by the settling co-infringer's share of the harm that the infringement inflicted upon the settling injured party.<sup>43</sup>

It remains to be seen in what way the identification of the relative share of responsibility will be carried out in practice. The Amendments are silent on this matter, although it would be practicable to try to resolve these issues beforehand including, for example, a rebuttable presumption of equal share of liability. Absent such a presumption, it is also not clear which party to the proceedings should address these questions. When bringing the claim, the claimant may generally rely on joint and several liability. It is, however, not clear what is the obligation of the claimant upon signing a settlement with only one, or some of the infringers, where the proceedings continue with respect to the remaining infringers. The Draft Competition Law prescribes only that the claim should be reduced by the relative share of the liability of the settling party. This supposedly means that the settlement must specify the relative share of the settling infringer. Since this part of the settlement necessarily influences the rights and interests of the remaining infringers, the competence (or its lack) of the court to question the determination of the relative share of liability should be specified. It is also not clear if the settlement will be approved in case the relative share of liability is not defined at all in the agreement. Finally, the obligation of the claimant to defend the quantification of the relative share of liability, as per settlement agreement, is not specified. Claimants would suffer if the jurisprudence ends up placing the obligation to deal with the relative share of liability of numerous infringers on the

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<sup>43</sup> Part 2 of Art. 21.3 of the Draft Competition Law.

claimant, especially with respect to infringers acting on different levels of the distribution chain. This would result in a situation where a settlement may substantially raise the burden of proof placed on a claimant who settles his dispute but only with some of the co-infringers. It must be noted that in civil procedure cases, the claimant is generally under the obligation to prove all aspects of the case, unless she/he is expressly relieved from this obligation by the provisions of legal acts. Since the Amendments do not explicitly relieve the claimant from the obligation to prove the relative distribution of liability between different co-infringers, it will be up for the courts to decide on burden of proof questions.

Next, the Draft Competition Law provides that the settling infringer is no longer liable for any share of the compensation awarded in this case brought by the settling injured party.<sup>44</sup>

The Draft Competition Law provides that irrespective of the settlement, the settling infringer may still be potentially liable for the remaining claim (claim reduced by her/his share of the harm and directed towards non-settling infringers). Where the non-settling infringers are not able to compensate the harm caused, the claim may be directed towards the settling infringer. To avoid liability for the remaining share of the claim, the settling infringer must ensure that the terms of the settlement agreement expressly exclude her/his liability.<sup>45</sup> The Amendments provide that the co-infringers are entitled to the right of recourse in the share of compensation paid to the injured parties, provided that share exceeded their relative share of liability.

## VII. Summary

Since the transposition process of the Directive is still ongoing, with the most active discussions expected in the Parliament, it is premature to assess the impact of the Directive in Latvia. Some of the issues highlighted in this report may get resolved during the adoption process as numerous stakeholders will voice their concerns. It is not an unlikely scenario, however, that a substantial number of these issues will remain without specific clarification, leaving them to the discretion of the courts. Although one can assume that the Directive will be implemented in full, the challenge of litigating competition cases in Latvian courts will therefore continue.

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<sup>44</sup> Part 3 of Art. 21.3 of the Draft Competition Law.

<sup>45</sup> Part 4 of Art. 21.3 of the Draft Competition Law.

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## I. Private enforcement in Lithuania before the implementation: *status quo*

Lithuanian law was familiar with private enforcement of competition law already before Lithuania's entry into the European Union in the year 2004. Private enforcement was governed by the Law on Competition of Lithuania (hereinafter, Law on Competition),<sup>1</sup> the Civil Code of Lithuania (hereinafter, Civil Code)<sup>2</sup> and the Code of Civil Procedure of Lithuania (hereinafter, Code of Civil Procedure).<sup>3</sup>

Specifically, the Law on Competition, adopted in 1999, established a general right for injured persons to bring a damages compensation claim before national court. However, before Lithuania's entry into the European

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<sup>1</sup> 23.03.1999, No VIII-1099 (O.G., 1999, No. 30-856; 2012, No. 42-2041) (with subsequent amendments).

<sup>2</sup> 18.07.2000, No VIII-1864 (O.G. 2000, No. 74-2262) (with subsequent amendments).

<sup>3</sup> 28.02.2002, No IX-743 (O.G. 2002, No. 36-1340) (with subsequent amendments).

Union, this right was limited only to those undertakings which were harmed by a competition law infringement.

Furthermore, the Civil Code, effective from 1 July 2001, established the principle of general delict (Article 6.263 of the Civil Code). In order to establish grounds for damages compensation, four cumulative elements of civil liability have to be established: (i) unlawfulness (infringement of competition law); (ii) damage; (iii) causal link between the infringement and the damage and; (iv) fault (rebuttable presumption applies) (Articles 6.246–6.248 of the Civil Code). Following the Civil Code, the court shall estimate the quantum of damages in case the claimant cannot prove their precise amount (Article 6.249(1) of the Civil Code). The Civil Code also established the principle of full compensation of damages (*restitutio in integrum*) (Article 6.263(2) of the Civil Code). Hence those, and certain other provisions equivalent to respective provisions under the Damages Directive, have already been introduced into Lithuanian law since 2001. In addition, agreements infringing competition law can be declared null and void by a court based on the norms of the Civil Code, whereas the Law on Competition also empowered courts to terminate the violation of competition law based on the claim of the injured person.<sup>4</sup>

Following the Code of Civil Procedure, the burden of proof of civil liability for the infringement of competition law was placed on the claimant (except for the fault which is presumed). While the Code on Civil Procedure does not define the standard of proof, it is generally accepted that a claim is proven if there are no reasonable doubts as to whether the available evidence is substantial, relevant or admissible. Such evidence must point to a reasonable conclusion of the existence of the circumstances in question (Laužikas, Mikelėnas and Nekrošius, 2003, p. 416<sup>5</sup>). Since 1 January 2015, new and more detailed rules related to collective redress under the Code of Civil Procedure came into effect following the European Commission Recommendation on Collective Redress adopted in 2013.<sup>6</sup>

Therefore, a certain legal framework and tools, both of substantive and procedural law, existed that applied to private enforcement in Lithuania before the implementation of the Damages Directive. However, private antitrust enforcement in Lithuania remains quite rare. There have only been up to 10 private enforcement cases since 2003 (both standalone and

<sup>4</sup> However, this national report shall concentrate on antitrust damages claims only.

<sup>5</sup> In Lithuanian.

<sup>6</sup> Recommendation on common principles for injunctive and compensatory collective redress mechanisms concerning violations of rights granted under Union law, OJ L 201, 26.07.2013, p. 60.

follow-on cases, no cartel-related private enforcement cases). However, there have been quite a few, and quite successful cases for damages compensation resulting from actions of unfair competition<sup>7</sup> with respect to competitors (their legal basis lies in Article 15 of the Law on Competition). No collective actions have been initiated yet in the courts.

So far, there have only been a few partially successful antitrust damages cases for a breach of Article 101 or Article 102 TFEU (or equivalent national competition law). Other damages cases were unsuccessful being dismissed due to the absence of causality or unlawful actions.

In brief, in the civil case *Šiauliy tara v. Stumbras*, both the court of first instance and the Court of Appeal stated that *Šiauliy tara* was entitled to only partial compensation of damages from the defendant. The damages claimed by *Šiauliy tara* were the loss of its income due to the application of discriminating marketing fees by *Stumbras*, who held a dominant position in the supply of spirits. In addition, as *Šiauliy tara* was placed at a competitive disadvantage in the selling of alcohol beverages, due to lower or even no marketing fees, *Šiauliy tara* claimed the loss of income related to its lost market share. The court of first instance acknowledged both types of damages claimed by *Šiauliy tara*. However, the amount of damages awarded was almost 6 times lower than what was demanded by *Šiauliy tara* (namely € 145 thousand instead of the € 830 thousand claimed). The Court of Appeal, however, did not regard damages related to the loss of market shares as realistic (even though their quantification was performed by auditors of one of the Big4 audit companies); it noted that the calculation of the loss of income related to lost market shares may not be based on the loss of other income, as it would contradict the principles of fairness, justice and reasonability under the Civil Code. Therefore, the Court of Appeal reduced even further the awarded amount to € 87 thousand. Consequently, the defendant succeeded to settle two subsequent damages claims brought by other retailers *Palink* and *Belvedere prekyba* for an undisclosed amount.

In the recent decision in the civil case *FlyLAL-Lithuanian Airlines v. AirBaltic and Airport Riga*, the court of first instance has also only partially satisfied the damages claim for a breach of Article 101 and Article 102 TFEU (and equivalent national competition law).<sup>8</sup> Specifically, the claimant alleged

<sup>7</sup> For instance, the company claims for 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.

<sup>8</sup> Access to the Lithuanian version of the Vilnius Regional Court notice: [http://www.vat.lt/lt/vilniaus-apygardos-teismas/naujienos\\_208/paskelbtas-sprendimas-bankrutavusio-32b1.html](http://www.vat.lt/lt/vilniaus-apygardos-teismas/naujienos_208/paskelbtas-sprendimas-bankrutavusio-32b1.html) (6.03.2017).

that *AirBaltic* had received significant illegal discounts from *Airport Riga*, for its services fees in the Riga International Airport, which allowed *AirBaltic* to apply predatory pricing in the Vilnius International Airport and to expel its competitor *FlyLAL* from the market. This is the first case in Lithuania with an international element, including the fact that the claim was based on a decision of the Latvian competition authority adopted in 2006 whereby the discount system applied by *Airport Riga* was recognised as discriminatory under Article 102 TFEU. In other words, no infringement of competition law by *AirBaltic* was established. However, since the discount system had been implemented following binding Latvian law, no liability was applied to *Airport Riga*. This state of affairs was only partially acknowledged by the Lithuanian court of first instance, since the latter awarded damages of € 16 million only from *AirBaltic*, although *FlyLAL* claimed damages amounting to € 58 million jointly and severally from both co-defendants. As the decision of the court of first instance continued to raise questions, *inter alia* with respect to its compliance with EU and national competition law, the judgment was appealed to the Court of Appeal. The Court of Appeal decided to suspend the case and refer it to the Court of Justice for a preliminary ruling regarding the interpretation of the Brussels I Regulation.

Among others, the main obstacles and reasons for the lack of more frequent and more developed private antitrust enforcement in Lithuania are as follows: (i) difficulties in proving the conditions of civil liability (causation and the quantum of damages in particular, as well as the illegal actions in standalone cases); (ii) difficult and long litigation process (in practice, there are cases which have lasted over 8 years and are still pending); (iii) difficulty in collecting evidence related to the infringement and the amount of damages, especially in standalone cases; (iv) short limitation period for damages compensation claims (only 3 years under the Civil Code); (v) huge litigation expenses and limited award of litigation costs (since fees for legal representation in courts in civil cases is subject to recommended upper ceilings set by the Ministry of Justice<sup>9</sup> and national court practice); (vi) ineffective regulation of collective redress.

Hence, it is expected that the novelties introduced by the Damages Directive will tackle the aforementioned issues and will change the landscape of private enforcement in Lithuania. The national report for Lithuania will focus on the novelties and challenges to be met in the implementation of those novelties and enhancing private enforcement in Lithuania.

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<sup>9</sup> Order of the Minister of Justice No 1R-85 dated 2.04.2004 (O.G. 2004, No. 54-1845; TAR, 2015-03-19, No. 2015-03968).

## II. Manner and scope of the implementation

The Ministry of the Economy of Lithuania was appointed in charge of implementing the Damages Directive in Lithuania. The implementation process started in March 2015 when the Ministry established a Working Group for that purpose. The Working Group consisted of academics and practitioners in the fields of competition law, civil law and civil procedure as well as representatives of competent state authorities such as the Lithuanian Competition Council, the European Law Department under Ministry of Justice, the Ministry of Economy itself and others.

One of the Working Group's very first tasks was to decide on the most appropriate form for the implementation of the Damages Directive. As both the substantive and the procedural law of Lithuania are codified, the main discussions centred on whether the Civil Code and/or Code of Civil Procedure should be amended, respectively in order to implement the Damages Directive. The above Working Group, as well as the working groups for the review of the Civil Code and the Code of Civil Procedure under the Ministry of Justice of Lithuania, have considered this question and reached a common decision not to make any amendments to the Civil Code or the Code of Civil Procedure. It was decided that all the amendments and supplements, both substantive and procedural, should be made solely in Lithuania's Law on Competition. One of the main arguments which had led to such a decision was that a fragmented implementation of the Damages Directive into the Codes, e.g. provisions related to access to evidence in private antitrust cases or binding effect of infringement decisions of the Competition Council, would affect the integrity and consistency of the Codes.

Therefore, all of the main provisions related to the implementation of the Damages Directive were transposed into a new separate Chapter 6 Part 2 of the new version of the Law on Competition. The new provisions stipulate the peculiarities of civil liability and procedural rules in case of an infringement of Article 101 and Article 102 of TFEU as well as the equivalent provisions of Article 5 and Article 7 of the Law on Competition. Chapter 6 Part 2 of the new version of the Law on Competition encompasses both substantive and procedural rules related to private enforcement. Certain provisions related to the implementation of the Directive were inserted into other, more suitable chapters of the Law on Competition as well.

After finalising the text of the draft Law on Competition, the draft was submitted to the Parliament of Lithuania (Seimas) in March 2016. The



draft Law on Competition was then revised and supplemented several more times, including changes to other aspects of national competition law. The new Law on Competition<sup>10</sup> was ultimately adopted in January 2017 and is in effect since 1 February 2017.

The Law on Competition shall be regarded as *lex specialis* with respect to the Civil Code and the Code of Civil Procedure as well as other laws. If no special provisions exist under the Law on Competition, the provisions of the Civil Code and the Code of Civil Procedure will apply. They include the procedure for collective redress, rules for award of litigation expenses, causation, standard of proof, procedural time limits, etc. Therefore, the Law on Competition will be systematically applied together with the Civil Code and the Code of Civil Procedure.

### III. Competent courts

The Law on Competition establishes an exclusive competence of the Vilnius Regional Court as the first instance general court to hear private antitrust cases both related to damages compensation caused by the breach of Article 101 and 102 TFEU (and equivalent national provisions) and the termination of such illegal actions. The Vilnius Regional Court was selected as the only court of first instance already in May 2004, when Lithuania joined the EU. Therefore, this court already has certain experience in the hearing of private enforcement cases. The reason for choosing the Vilnius Regional Court is that this court has an exclusive competence to deal with certain other complex and specific legal areas, such as patent and trademark regulation.

However, as recent case law shows, Lithuanian courts do not recognise the exclusive competence of the Vilnius Regional Court in all of the aforementioned cases. For instance, in 2016 the basketball club *Krepšinio rytas* submitted a claim to the Vilnius Regional Court against the association *Lithuanian Basketball Federation* in order to terminate the latter party's illegal actions infringing Article 101 TFEU and the equivalent Article 5 of the Law on Competition. The claim regarded a decision of that association that restricted competition with respect to Lithuanian basketball clubs (including the claimant). The claimant requested therefore for the court to annul the validity of the contested decision. The Vilnius Regional Court had doubts regarding its jurisdiction to hear this case due to the

<sup>10</sup> 12.01.2017, TAR, 2017-01-18, No. 2017-01075.

administrative nature of the relationship between the association and its member (claimant). Lithuanian procedural law provides that jurisdiction depends on the nature of the legal relationship connected to the dispute concerned (whether it is civil or administrative) and in the case of a mixed relationship, the prevailing relationship will be decisive in the selection of correct jurisdiction. Following the Code of Civil Procedure, the Vilnius Regional Court applied therefore to the special judicial panel consisting of judges from both the Supreme Court of Lithuania and the Supreme Administrative Court of Lithuania, in order to decide on the nature of the legal relationships at hand and, consequently, regarding the correct jurisdiction of this case.<sup>11</sup>

On 5 October 2016, the indicated judicial panel decided that administrative courts are competent to hear the aforementioned case due to: the administrative nature of the relationship between the association (which adopted the contested decision) and the basketball clubs (including the claimant), and because the decision established general rules applicable to all basketball clubs concerned. The case should thus be heard by administrative courts following Article 17(1)(11) of the Law on Administrative Cases Proceedings of Lithuania. The judicial panel also indicated that the mere fact that the claim is related to an infringement of Article 101 TFEU and the equivalent Article 5 of the Law on Competition, cannot change the jurisdiction of the whole dispute.<sup>12</sup>

In the opinion of the authors of this report, such legal interpretation and application of the priority principle is debatable. The Law on Competition and its rules on exclusive jurisdiction should be regarded as *lex specialis* with respect of other laws, including the Law on Administrative Cases Proceedings, since the nature and legal basis of the infringement, rather than the nature of the defendant or actions to be terminated (decision of an association), should be decisive in choosing the correct jurisdiction of the case. It is also debatable whether the juridical board would have reached the same decision if the claimant requested both the termination of the illegal actions and the compensation of related damages.

Precision in the determination of the legal relationships and the application of jurisdiction rules is crucial in this context due to specific procedural rules under the Law on Administrative Cases Proceedings and their interpretation by the courts. Recent case law of the Supreme Administrative

<sup>11</sup> Resolution of the Vilnius Regional Court dated 2.11.2016 in civil case No. e2-5364-653/2016.

<sup>12</sup> Resolution of the Supreme Administrative Court dated 6.10.2016 in administrative case No. eI-27-858/2016.

Court shows that the decisions of the association *Lithuanian Basketball Federation*, establishing general norms applicable to all its members, shall be regarded as a general act. Hence, following Article 112(1) of the Law on Administrative Cases Proceedings, only a limited number of authorised persons indicated in that law (e.g. prosecutors, State Control Office, etc.) has the exclusive competence to apply to the Supreme Administrative Court requesting the annulment of such decisions.<sup>13</sup> In other words, a member of the association itself can not apply to the administrative court directly asking for the termination of the illegal acts (in the form of a decision having effect on all members in general) of the association. A member of the association can only ask the court hearing the individual case to refer a request to the Supreme Administrative Court to decide on the legality and validity of the decision of the association (for instance in case of a dispute for the non-compliance of a basketball club with the aforementioned decision of the association, if such a dispute is practically possible at all). Such interpretation of the nature of such decisions of an association is debatable, and might be regarded as inconsistent with other case law of the Supreme Administrative Court with regard to the interpretation of the nature of similar decisions. In addition, such application of the laws might also undermine the goals, effectiveness and equivalence of private enforcement under Article 4 of the Damages Directive, especially where the injured party intended to claim both the termination of the illegal actions and damages compensation.

Questions concerning competent courts might also be raised in damages cases where one of the defendants is a state or municipal authority, which encouraged an infringement of Article 101 or 102 TFEU. The general rule under Lithuanian law is that a case regarding the compensation of damages caused by the acts or omissions of state or municipal authorities are heard by administrative courts. This rule is established in Article 17(1)(3) of the Law on Administrative Cases Proceedings. However, there might be damages cases where the illegal actions of both state authorities and companies have caused the damage. As a practical example, such a situation took place when the Competition Council of Lithuania found that an infringement of Article 101 TFEU had occurred in that orthopaedic companies and their association concluded agreements concerning prices and quantities of orthopaedic production as well as sharing of funds allocated by the Compulsory Health

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<sup>13</sup> Resolution of the Supreme Administrative Court in the administrative case No. eI-27-858/2016, dated 6.10.2016.

Insurance Fund.<sup>14</sup> Furthermore, the Competition Council recognised that the state authority responsible for the administration of the Compulsory Health Insurance Fund infringed Article 4(1) of the Law on Competition by encouraging the conclusion of that cartel and by failing to safeguard fair competition. As recognised by the Competition Council, such infringements caused damages both to the aforementioned Fund and to the patients due to the resulting price increase. In practice, however, no private antitrust cases were initiated within the limitation period.

Nevertheless, the aforementioned example is a good illustration of the theoretical and practical problem of choosing the correct jurisdiction for damages compensation claims against both the cartelists and the state authority (as in the aforementioned instance) as co-defendants. On the one hand, the case would concern the civil liability of the cartelists due to their infringement of Article 101 TFEU – the Vilnius Regional Court would thus have an exclusive jurisdiction here. On the other hand, the damages were caused not only due to the breach of Article 101 TFEU (or equivalent Article 5 of Lithuanian Law on Competition) but also due to the infringement of Article 4 of the Law on Competition. The latter does not establish exclusive jurisdiction of the Vilnius Regional Court, and so other substantive and procedural provisions of the new Law on Competition implementing the Damages Directive would not apply. Furthermore, the infringement of Article 4 of the Law on Competition usually relates to administrative actions of a state authority and the Law on Administrative Cases Proceedings directly establishes that administrative court shall hear cases for damages compensation caused due to illegal actions of (omissions by) state authorities. Therefore, the involvement of the aforementioned special judicial panel would most likely be necessary in deciding on the jurisdiction of such a case.

In the opinion of the authors of this report, following the principle of absorption, the Vilnius Regional Court should be competent to hear the aforementioned damages compensation cases, provided that the role of the state authority in the cartel was supplementary and damages compensation were mostly related to the cartel. In any case, the jurisdiction of cases with mixed legal relationships should be decided on a case-by-case basis, and the prevailing legal relationship should be determined very carefully. The mere fact that the illegal actions are related to administrative acts of a state authority should not be decisive in finding which court would have jurisdiction. In any event, procedural rules established in the Law

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<sup>14</sup> Infringement decision No 2S-2 of the Competition Council, dated 20.01.2011.

on Competition (related to the collection of evidence, effectiveness of the decision of the competition authority, etc.) should be applicable irrespective of whether a general or an administrative court hears the damages compensation case.

When the Vilnius Regional Court hears the damages compensation case as the court of first instance, its judgment can be appealed to the Court of Appeal of Lithuania. Afterwards, the second instance judgment can be reviewed by way of a cassation procedure before the Supreme Court of Lithuania as the final instance, if the requirements under the Code of Civil Procedure are met. Where, however, administrative courts have jurisdiction to hear certain private enforcement cases, their first instance judgements shall be reviewed by the Supreme Administrative Court only.

It should finally be emphasized that since 2012 arbitration courts are also entitled to resolve commercial disputes related to competition law, including private enforcement cases. Although there is no official statistics about private antitrust cases in arbitration courts, case law related to interim measures shows that at least some antitrust damages claims have been initiated in arbitration courts.<sup>15</sup>

## IV. Novelties in substantive law

### 1. General remarks

As already mentioned, certain requirements established under the Damages Directive (such as full compensation of damages, joint and several liability, court's discretion to quantify damages where their exact amount is unclear) were already introduced into Lithuanian law and have been effective since 2001. However, as Lithuanian case law shows, these substantive law rules were not among the factors to enhance the development of private enforcement in Lithuania.

The Damages Directive introduced additional novelties into the Law on Competition which were unfamiliar to Lithuanian law. These novelties are expected to enhance private enforcement in Lithuania at least to a certain extent.

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<sup>15</sup> E.g. resolution of the Appeal Court of Lithuania in civil case No. 2-989/2014 *Elektra visiems, Elektros energijos prekyba v. Litgrid*, dated 10.06.2014.

## 2. Limitation period

Rules related to limitation periods are crucial in order to ensure the possibility to claim damages without strict time constraints. Until the implementation of the Damages Directive, rules on the beginning, duration and suspension of the limitation period in damages cases under Lithuanian law were quite strict, case law related to the application of limitation periods had not been developed and so did not enhance private enforcement.

Article 1.125(1) of the Civil Code established a general limitation period of 10 years, which is applicable *inter alia* to the declaration that a restrictive agreements violating competition law is null and void. However, under Article 1.125(8) of the Civil Code a shorter limitation period of 3 years has been established to damages cases, including antitrust damages cases. Pursuant to the Civil Code, the limitation period started once the breach was discovered, or should have been discovered by the claimant. Article 1.129 of the Civil Code established a suspension of the limitation period, but the limitation period would not have been suspended due to an infringement investigation procedure of the Competition Council or the juridical review of its infringement decisions.

The application of the limitation periods has not been developed or clarified with relation to follow-on antitrust damages cases. Firstly, questions were posed related to the beginning of the limitation period, that is, what constituted the beginning of the limitation period: awareness of the alleged breach by the injured party, initiating investigations by the Competition Council, or the adoption by the Competition Council of its infringement decisions. Secondly, if the infringement decision was to be regarded as the moment when the injured person became aware or should have been aware of the breach of competition law, the following question arose concerning those infringement decisions which have been appealed before administrative courts (in practice, most infringement decisions have been appealed<sup>16</sup>) – whether the limitation period should not start running until the adoption of a final court decision.

In Lithuanian case law similar to private antitrust cases,<sup>17</sup> the Supreme Administrative Court (the only instance court for such cases) recognised

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<sup>16</sup> For more information see the link: <http://kt.gov.lt/en/publications-1/annual-reports-1> (6.03.2017).

<sup>17</sup> Under Lithuanian law, the state and other authorities have a statutory duty to ensure fair competition and are prohibited from granting privileges or discriminating undertakings. In case of a breach, damages compensation cases may be brought against them in administrative courts.

that the limitation period starts once the court decision acknowledging the breach of competition rules by the defendant has been adopted.<sup>18</sup>

Hence the Supreme Administrative Court acknowledged in the case *Pieno žvaigždės v. Republic of Lithuania* that the limitation period did not begin until the infringement decision is known to the injured person. Nevertheless, the Court did not accept the claimant's (*Pieno žvaigždės*) arguments that the limitation period cannot start until the claimant is aware of the way how to calculate the damages related to the breach (the claimant based its calculation of damages on the final court decision in another damage compensation case for the same breach of statutory law). Hence, the Court dismissed the aforementioned damages compensation claim of *Pieno žvaigždės* due to the expiry of the 3 year limitation period.<sup>19</sup>

However, in the aforementioned case (see above), there was no infringement decision of the Competition Council and the injured persons might not have even been aware of the infringement until the court decision establishing the infringement was adopted and publicly announced. Most likely, the general court would regard the awareness of the findings of an infringement decision (even if it is not yet final) as sufficient circumstances for the start of the limitation period.

Practice shows that injured persons usually postponed their decisions whether to initiate or not an antitrust damages cases until the final court decision upholding the infringement decision was adopted (even though a procedural possibility existed to initiate antitrust damage cases based on the infringement decision and, following Article 163 or 164 of the Code of Civil Procedure, to request the court to suspend the case until the final court decision upholding the infringement decision is adopted). In practice, administrative court proceedings in both instances might last up to 2–3 years or even longer.<sup>20</sup> As a result, potential claimants did not, in practice, risk the initiation of antitrust damages claims due to the expiry of the limitation period, or because of the overly short term granted to them in order to decide and prepare for a damages case before the expiry of the limitation period (for instance, if the final court decision was to be adopted several months before the expiry of the limitation period).

Following Article 1.126 of the Civil Code, the expiry of the limitation period is not a legal ground for the court not to accept the claim. Nevertheless,

<sup>18</sup> Supreme Administrative Court decision in administrative case No. A-756-1329-10 *Pieno žvaigždės v. Republic of Lithuania*, dated 2.11.2010.

<sup>19</sup> *Ibid.*

<sup>20</sup> For more information see the link: <http://kt.gov.lt/en/publications-1/annual-reports-1> (6.03.2017).

the court can dismiss the claim upon request of the defendant based merely on the expiry of the limitation period, unless the limitation period was missed due to important reasons and then renewed by the court. In practice, however, there have not been any antitrust damages cases where such renewal of the limitation period would have been discussed and applied.

The situation with respect to the regulation and application of limitation periods significantly changed after the Damages Directive was implemented in Lithuania. Firstly, following Article 49(2) of the new Law on Competition, the limitation period for damages claims was significantly extended – up to 5 years. However, the extended limitation period shall not apply where the damages were caused due to a violation of, for example, merger clearance commitments. It should be noted that the aforementioned extended limitation periods will apply to cases where the limitation period started to run after 1 February 2017, or started to run before the indicated term but the earlier 3 year period has not yet expired. In the latter case, the part of the limitation period which has already passed shall be calculated into the extended 5 year period. For instance, if the limitation period started to run on 1 March 2014 it shall be extended and will expire only on 1 March 2019, unless it is suspended.

Secondly, the start of the limitation period was clarified and is now subject to the same conditions as those specified in Article 10(2) of the Damages Directive, namely (i) the infringement of competition law has ceased and (ii) the claimant knows or can reasonably be expected to know the circumstances and facts related to the infringement, damages and infringer.

Thirdly, the situation of claimants has improved by the introduction of new rules introduced under Article 10(4) of the Damages Directive regarding the suspension of the limitation period. Namely, the limitation period shall be suspended due to the commencement of infringement investigation procedures by the competition authority; it shall be renewed one year after the infringement decision or court decision regarding the infringement becomes final and binding. Following Article 49(3)(1) of the Law on Competition, the suspension will apply with respect to the infringement investigations and court proceeding related to the review of infringement decisions of the Competition Council and national courts as well as those issue by the European Commission or other national competition authorities and court of other EU Member State. Furthermore, the limitation period shall be suspended due to consensual dispute resolution, even though only for the term of the negotiations on consensual dispute resolution and only with respect to those involved in such negotiations.



The aforementioned changes in the application of limitation periods are thus likely to significantly facilitate private enforcement in Lithuania. Nevertheless, these changes, including the extension of the limitation period, shall not be applicable to other damages cases and so they create an unequal situation with respect to other damages cases.

### 3. Attribution of liability

Following the new Law on Competition, an injured person may claim damages compensation from the infringer or infringers irrespective of whether the injured person had any direct or indirect contractual relationship with any of the infringers. The only exemptions with regard to such broad attribution of liability are provided with respect to joint and several liability in certain cases.<sup>21</sup>

The new Law on Competition does not directly indicate the possibility to bring an ‘umbrella damage’ claim in case of a cartel, that is, to claim compensation of damages from cartelists caused by a price rise resulting from the cartel and the payment of such increased prices by the victims to non-cartel members. However, following the systematic interpretation of the new Law on Competition, such claims may be brought against members of the cartel,<sup>22</sup> and liability may be attributed to those infringers, provided that the causal link between the infringement and the damages, as well as other cumulative elements of civil liability (if not presumed or established by an infringement decision), have to be proven.

The new Law on Competition is also silent on the question whether civil liability may be attributed to a parent company for damages caused by its subsidiary where the latter breached competition rules. Moreover, the Law does not define the term ‘infringer’ as the Damages Directive does. Following Article 2(2) of the Damages Directive, the term ‘infringer’ means an undertaking or association of undertakings which has committed an infringement of competition law. Parental liability is well-known in EU competition law since the *Akzo Nobel and Others v Commission* case.<sup>23</sup> The Court of Justice held that the Commission only needs to prove that the parent company (i) has the ability to exercise decisive influence over the

<sup>21</sup> See Section *Joint and several liability*.

<sup>22</sup> Article 46 (3) of the new Law on Competition provides that damages may be caused to injured persons other than direct or indirect purchasers or suppliers of the joint infringers of competition law.

<sup>23</sup> Case C-97/08.

behaviour of the subsidiary and (ii) did not in fact exercise such influence during the period of the infringement.

The Civil Code, as *lex generalis*, establishes the general principle of the separation of legal persons and their shareholders. As a general rule, a parent company shall not be liable for damages caused by its subsidiary and *vice versa*, except for cases established by the law or corporate documents (Article 2.50 (2) of the Civil Code). However, if the subsidiary fails to compensate damages due to actions taken in bad faith by its parent company, the latter shall, in a subsidiary manner, be obliged to compensate them pursuant to Article 2.50(3) of the Civil Code. In addition, a parent company will also be held jointly and severally liable with its subsidiary if the damages were caused by its subsidiary acting under the instructions of the parent company (Article 6.265(1) of the Civil Code). Therefore, unlike parental liability for an antitrust infringement committed by a subsidiary under EU competition law, in order to attribute joint and several liability of the parent company in Lithuania, it is necessary to show that it took ‘active’ measures (instructions, orders, etc.) in the infringement, rather than merely remained aware of the infringement committed by its subsidiary.

#### 4. Joint and several liability

The right to claim damages from several infringers jointly and severally was introduced into Lithuanian civil law in 2001 and has been effective ever since. Article 6.279(1) of the Civil Code establishes a general rule that a person, who has suffered harm due to joint actions of several persons, may claim joint and several liability of such persons. Nevertheless, the injured person may not claim more from all liable persons than he/she could claim if only one person was liable. The only exemption to joint and several liability occurs when the damage may have resulted from different actions performed by several persons, and other persons prove that the damage could not have resulted from the event (actions) for which they themselves are liable. In order to determine the extent of each jointly and severally liable person in reciprocal claims, the different degree of gravity of their respective fault shall be taken into consideration.

Meanwhile, the new Law on Competition narrows the application of joint and several liability in antitrust damages cases as the law transposes the exemptions established under Article 11 of the Damages Directive, namely the limitation of joint and several liability: (i) for small or medium-sized enterprises (hereinafter, SMEs), as defined in Commission Recommendation

2003/361/EC (with certain exceptions) and; (ii) for immunity recipients.<sup>24</sup> It might be debatable whether those exemptions are necessary and can be justified based on the principles of justice, reasonableness and good faith.

Article 46 of the new Law on Competition also establishes a deviation from the general principle established under the Civil Code with regard to the attribution of liability of jointly and severally liable persons in their reciprocal claims. Accordingly, liability of an immunity recipient shall not exceed the damages caused by the immunity recipient to its own direct and indirect purchasers or suppliers. However, the aforementioned restriction shall not apply if the damages were caused by the jointly and severally liable persons to persons other than the infringers' direct and indirect purchasers or suppliers. In that case the general rule under the Civil Code shall apply for the attribution of civil liability of jointly and severally liable persons in reciprocal claims.

## 5. Quantification of damages

Until the implementation of the Damages Directive, the claimant carried the burden to prove both the fact of the damages (as a mandatory element of civil liability) as well as determine the quantum of such damages. However, Article 6.249(1) of the Civil Code empowered the court to estimate the amount of damages if the claimant could prove that he has suffered damages but could not prove their exact amount.

As Lithuanian case law shows,<sup>25</sup> proving the occurrence of damages and the quantification of such damages has been quite challenging and courts were not willing to satisfy damages claims to their full extent.

The new Law on Competition transposed the provisions of the Damages Directive, which Lithuanian civil law has not been familiar with so far, as well as introduced certain other specific provisions related to the quantification of damages.

First, one of the most significant novelties introduced into Lithuanian law is the presumption that cartel infringements cause damages (Article 44(3) of the Law on Competition). Before the implementation of the Damages Directive, Article 6.248 (1) of the Civil Code only presumed 'fault',

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<sup>24</sup> It should be noted that unlike in the EU and other Member States, under the Law on Competition the leniency programme applies not only to cartels, and so immunity may be granted to both participants in a cartel and participants (non-competitors) in vertical resale maintenance (Article 38 (1)).

<sup>25</sup> See Section I. *Private Enforcement in Lithuania before the Implementation: Status Quo*.

as a cumulative element for the application of civil liability. After the implementation, the claimant shall be relieved from both the duty to prove 'fault' and the fact that he suffered damages due to the cartel. This presumption is rebuttable, that is, the defendant shall have the right to prove that no damages have in fact been caused due to the cartel. Moreover, this presumption is not applicable to cases of damages suffered due to other restrictive agreements (not cartels) and the abuse of a dominant position.

Second, even though the principle of full compensation of damages (*restitution in integrum*)<sup>26</sup> exists in Lithuanian civil law already since 2001, and full compensation shall cover compensation of direct and indirect (loss of profit) damages<sup>27</sup> as well as interest, the new Law on Competition reiterates those rules and additionally introduces a novelty with regard to the calculation of interest.

Article 44(2) of the new Law on Competition grants the claimant the right to interest from the moment the harm occurred. Until the implementation of the Damages Directive, the claimant was entitled to interest from the moment of the commencement of the damages case in the court until the final execution of the judgement under the general Article 6.37(2) of the Civil Code. Pursuant to Article 6.210 of the Civil Code, the interest rate remains set at 5 or 6%<sup>28</sup> per annum to be calculated from the initiation of the civil case before a court. Following established Lithuanian case law, the court awards interest *ex officio*, irrespective of whether it is requested by the claimant or not. The new Law on Competition does not directly indicate the interest rate nor does it refer to the Civil Code with respect to its rate. However, it is assumed that the interest rate of 5 or 6% (depending on the nature of the parties to the court proceedings) shall apply.

Third, under the new Law on Competition, significant importance has been given to the guidelines of the European Commission regarding the quantification of damages. 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

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<sup>26</sup> Following Article 6.251 of the Civil Code, the court is entitled, however, to reduce the amount of damages if the application of full compensation would lead to unacceptable and severe consequences for the defendant, based on the financial status of the parties to the proceedings and their relationship, as well as the nature of liability. However, the aforementioned discretion of the court may be used only in exceptional cases.

<sup>27</sup> With regard to indirect damages, Lithuanian case law shows that only net loss of profit shall be compensated, i.e. expenses and taxes related to such income shall be deducted.

<sup>28</sup> The 6% rate shall apply in case the parties are private legal persons or businessmen, in other cases the 5% rate will apply.

amount of damages. The court shall have such discretion in case it is established that a claimant suffered damages but it is practically impossible or excessively difficult precisely to quantify the damages sustained. The court informs the parties to the court proceedings about the intention to use such discretion.

Furthermore, the new 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. 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 follow these guidelines as well, because otherwise their opinion would be criticized by the other procedural parties and the court itself. 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 the damages. Therefore, competences in the field of competition economics, sufficient knowledge of the relevant sector and related damages' quantification is crucial for court appointed as well as other experts. Practice shows however that currently there is a lack of such experts in Lithuania.

Fourth, unlike previous legislation, the court shall be entitled to ask the national competition authority to provide its opinion on the quantification of damages in the given case and the Competition Council shall be entitled to provide its opinion with respect to that issue.<sup>29</sup>

Considering the aforementioned novelties concerning damages quantification, the claimant and the court shall have more useful tools in the quantification of such damages, which will enhance private enforcement in Lithuania.

## 6. Passing-on of overcharges

Lithuanian law, effective before the implementation of the Damages Directive, remained silent about the possibility for the infringer to defend himself using the passing-on defence. Moreover, no presumptions of passing-on existed under Lithuanian law. In general, any person who suffered damages due to a breach of competition law might request damages

<sup>29</sup> For more details see Section I *Private Enforcement in Lithuania before the Implementation: Status Quo*.

compensation, if all elements for the application of civil liability are proven. However, following the principle of full compensation, the injured person should be able to recover only actual damages – overcompensation is not allowed. There has been no case law regarding passing-on of overcharges in Lithuania before the implementation of the Damages Directive.

Article 47(1) of the new Law on Competition established directly that the court will evaluate whether, and to what a degree, the overcharge was passed on to the claimant's purchasers. The court will refer to the guidelines of the European Commission on how to estimate the share of an overcharge which was passed on to indirect purchasers.

The new Law on Competition transposed, in general, all the provisions of Articles 11–14 of the Damages Directive related to the passing-on of overcharges, including a rebuttable presumption of the passing-on of overcharges to indirect purchasers, subject to conditions, and the defendant's right to invoke as defence against a damages claim the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law (the burden of proof shall be on the defendant).

## **V. Procedural law issues: considerable changes**

### **1. General remarks**

The implementation of the Damages Directive into Lithuanian legislation brought certain novelties to its procedural rules related to private enforcement. They include: exclusive court jurisdiction, specific rules related to standing, broader access to evidence, binding effect of the decisions of the Competition Council, etc. The new Law on Competition does not, however, introduce any other peculiarities with respect to procedural law related to private enforcement. Hence, general rules established by the Code of Civil Procedure, such as rules on award of litigation expenses, shall apply to antitrust damages cases.

The main novelties and their features transposed into the new Law on Competition as well as challenges to be met in their application are described and analysed below.

## 2. Standing

The new Law on Competition explicitly provides standing to bring damages claims both by direct and indirect purchasers and suppliers as well as other injured persons. In its earlier version, the Law on Competition contained a general rule that any person who has suffered damages caused by a breach of Article 101 or 102 TFEU (and equivalent provisions under the Law on Competition) had a right to claim damages. Hence, the right to lodge a damages claim was not restricted to a certain group of litigants (either legal persons or individuals), provided they could demonstrate that their legitimate interests had been violated by unlawful actions. Importantly, the Law on Competition has not changed in that damages claims can still be brought irrespective of whether there is an infringement decision of the competition authority or not – both standalone and follow-on claims are allowed.

Furthermore, claims can be lodged by a separate claimant or jointly with other claimants. Since 1 January 2015, there is also a possibility to lodge a collective damages claim of at least 20 claimants, provided that the requirements and conditions under the Code of Civil Procedure are met. Lithuania has chosen an opt-in model, similarly to other EU Member States with continental law traditions. However, until the implementation of the Damages Directive there were no private antitrust cases initiated under collective claims in Lithuania. However, the administration of the Vilnius city municipality has recently initiated pre-trial proceedings for a follow-on collective action against the municipal heat supplier *Vilniaus energija* and the biomass supplier *First Opportunity*. The case concerns compensation of damages suffered due to a vertical competition restricting agreement of the two defendants.<sup>30</sup>

The new Law on Competition establishes certain procedural rules related to multiple injured persons and their ability to claim damages caused by a violation of Article 101 or 102 TFEU and equivalent national legislation.

First of all, having accepted the damages claim the court will be obliged to announce the initiation of the case and indicate the parties to the case (i.e. claimant(s) and defendant(s)) on its website. Although the specific time for such publication is not indicated in the Law on Competition, it can be understood that such an announcement should be done immediately

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<sup>30</sup> Infringement decision of the Competition Council No. 2S-17/2015, dated 2.12.2015 (approved by the administrative court of first instance and pending before the Supreme Administrative Court).

after the initiation of the case. The purpose of such a provision is to disseminate information about the private antitrust case and to encourage other injured parties to join it. The Law on Competition directly provides that persons considering that they suffered damages due to illegal actions of the defendant(s) may join the case following Article 46 of the Code of Civil Procedure, that is, as third parties who submit independent claims on the subject matter of the dispute. Such persons may join the case before the beginning of closing arguments in the court of first instance.

Secondly, the Law on Competition provides specific rules with respect to the joining of several separately initiated cases. Namely, if the court finds out before the adoption of its final judgement that other claimants have initiated private antitrust cases against the same defendant(s), the court will join all such cases into a single case in order to quantify damages properly – the entire amount of damages as well as damages of each of the claimant. Therefore, differently from the general rule under Article 136(4) of the Code of Civil Procedure, the court has a duty, rather than a right, to join such cases if the aforementioned fact has occurred. The purpose of such a provision is to ensure case law consistency of several claims against the same defendant(s) as well as to ensure that the principles of full damage compensation, no over-compensation and punitive damages are applied (for example, if claims are submitted by both direct purchasers and indirect purchasers).

### 3. Collective redress

On 1 January 2015, new and more detailed rules related to collective redress came into effect under the Code of Civil Procedure. Lithuania has chosen an opt-in model similarly to most other EU Member States.

However, until the implementation of the Damages Directive, there were no private antitrust cases initiated as collective actions in Lithuania. Recently, the Vilnius city municipality announced its decision to file a follow-on collective action against the municipal heat supplier *Vilniaus energija* and the biomass supplier *First Opportunity*. The case concerns compensation of damages suffered due to their restrictive vertical agreement.<sup>31</sup> However, there is no public information available yet about the filing of such a claim.

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<sup>31</sup> Ibid.



#### 4. Binding effect of national infringement decisions

Until the implementation of the Damages Directive, the legal value of infringement decisions issued by competition authorities was not specifically indicated under Lithuanian law. Only if a decision of the national competition authority (Competition Council) was appealed and subsequently confirmed by the administrative court, circumstances established in the final court decision would be regarded as fully proved and having *res judicata* effect on the parties involved in such proceedings.

The interpretation of the legal value of such infringement decisions was given by case law. Namely, in the civil case *Šiaulių tara v. Stumbras*,<sup>32</sup> the Court of Appeal established that infringement decisions that are not appealed and thus remain valid, are regarded as official written evidence with a higher evidential (*prima facie*) value. Following Article 197(2) of the Code of Civil Procedure, circumstances indicated in *prima facie* evidence are considered fully proven until and unless they are contradicted by other relevant evidence, except for witness evidence. The only possibility to employ witness evidence is if such a refusal would contradict the principles of fairness, justice and reasonability. Such an interpretation of the legal value of infringement decisions was further confirmed by the Supreme Court in the civil case *Klevo lapas v. Orlen Lietuva*<sup>33</sup> in 2010. In the scarce practice of private antitrust enforcement in Lithuania (*Šiaulių tara v. Stumbras*, *Klevo lapas v. Orlen Lietuva*), general courts have upheld the findings of the Competition Council presented in its infringement decisions.

The Supreme Court emphasized that infringement decisions do not prove the existence of civil liability of the infringer. To establish it, all elements of civil liability must be proven, including damages and the causal link.

The new Law on Competition abolishes any distinction between appealed and not appealed infringement decisions of the Lithuanian Competition Council – both infringement decisions shall be regarded as binding after the term for appeal has expired. Article 51(3) of the new Law specifies which circumstances established in an infringement decision shall be regarded as proven in the damages cases: the nature of the infringement, its territory, duration and infringers. The same rule applies to final court decisions upholding an infringement decision of the Competition Council. Therefore, these circumstances shall have binding effect.

<sup>32</sup> Court of Appeal decision in civil case No. 2A-41/2006 *Šiaulių tara v. Stumbras*, dated 26.05.2006.

<sup>33</sup> Supreme Court decision in civil case No 3K-3-207/2010 *Klevo lapas v. Orlen Lietuva*, dated 17.05.2010.

Unlike the infringement decisions of the Competition Council, final infringement decisions issued by national competition authorities of other EU Member States, as well as other Member States' court decisions, shall have only *prima facie* effect with regard to the infringement of Article 101 or 102 TFEU in Lithuania. That means that the aforementioned general rules of the Code of Civil Procedure regarding the legal value and possibilities to deny the findings in such foreign infringement decisions and court decisions would apply.

Infringement decisions of the Competition Council, where possible, also indicate that harm has been caused to consumers due to the competition law infringement, although more explicit statements and evidence are not usually provided. Such findings of the Competition Council shall not be regarded as proven, as they shall not have binding effect under Article 51(3) of the new Law on Competition. However, the new Law on Competition empowers the Competition Council upon the request of a court to submit its opinion with respect to the determination of the amount of damages sustained in a particular private antitrust case. Such an opinion of the Competition Council shall not bind the court, but it might be of significant assistance to the court in determining the amount of damages, provided that the Competition Council shall actively participate in the court proceedings and in the determination of the amount of damages.

The new Law on Competition establishes, however, a novelty related to the determination by the court of damages suffered by direct and indirect purchasers. Following Article 51(9) of the Law on Competition, the court will consider other court decisions, including court decisions of other EU Member States, regarding damages suffered due to the same infringement but by other claimants acting at a different level of the supply chain. The goal of this provision is to ensure that no overcompensation shall be granted to the claimants.

As the majority of private enforcement cases are follow-on cases, this novelty will make private enforcement more attractive as it might significantly reduce the burden of proof and the costs sustained by claimants. Nevertheless, this novelty will not apply if the relevant infringement decision of the Competition Council has not been appealed and is binding. Lithuanian case law shows that most infringement decisions are appealed in practice.<sup>34</sup> In such cases the claimant will either have to wait for the final court decision, or to initiate the claim based on the infringement

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<sup>34</sup> For more information see the link in Lithuanian: <http://kt.gov.lt/en/publications-1/annual-reports-1> (6.03.2017).

decision and to request the suspension of the case (in order to safeguard the limitation period). Nevertheless, appeals' practice might change due to novelties introduced into the new Law on Competition, allowing the infringer to submit a settlement submission voluntarily acknowledging the infringement, and consequently to receive a reduction of the penalty imposed by the Competition Council. This novelty might significantly reduce the amount of appeals lodged to infringement decisions.

Considering the fact that the majority of private enforcement cases are follow-on cases, active public enforcement of the Competition Council is crucial for the enhancement of private enforcement. Nevertheless, the Competition Council does not, in practice, initiate investigations in all cases.

Under the Prioritisation Programme<sup>35</sup> introduced in 2012, the Council selects which investigations should be initiated and executed. Having analysed the practice of the Competition Council, it prioritises investigating bid rigging and other hard-core restrictions. Consequently, less attention is paid to abuse of a dominant position and vertical agreements as well as to other competition law infringements where the effect on competition has to be evaluated and substantiated in order to establish the infringement. For instance, since 2010, there were no infringement decisions related to the abuse of dominance (there are, however, ongoing investigations). Such prioritisation causes an injured person who suffered damages due to an abuse of dominance or a restrictive vertical agreement either not to seek recovery of the damages at all or, in very rare cases, bring standalone claims before the court. Therefore, the role of the Competition Council is significant in enhancing private enforcement in Lithuania.

## 5. Expanded competence of the Competition Council in court proceedings

According to a general rule under Article 49(3) of the Code of Civil Procedure, general courts are empowered to involve a state authority in their court proceedings to deliver an opinion in a case in order to fulfil the functions entrusted to that state authority, provided the case is related to the protection of public interest. A state authority may also join the case on its own initiative.

Cases related to a violation of competition law are usually regarded as related to public interest in Lithuanian case law. It has thus become

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<sup>35</sup> Resolution of the Competition Council No 1S-89, dated 2.07.2012 (with subsequent amendments).

quite common for the general court to involve the Competition Council in private standalone antitrust cases requesting the provision of such opinions.

Until the implementation of the Damages Directive, the opinion of the Competition Council related solely to the existence of the violation of competition law. The competition authority tended to present only a general guidance on the application of EU and national competition law, indicating the relevant case law, without evaluating the case more specifically. It did so even though the Code of the Civil Procedure allowed the Competition Council to have full access to the materials of the damages case, to deliver explanations and interpretations, submit evidence, participate in the investigation and examination of evidence, as well as to present applications. In general, the approach taken by the Competition Council was in line with legislation and reflected the practice of the European Commission in the provision of its opinions under Article 15(1) Regulation 1/2003. However, following the practice of the European Commission, the opinions of the Competition Council could have been even more tailored to the case concerned.

However, the Competition Council has not regarded itself as competent to provide its opinion on damages and their quantification in antitrust damages cases. The situation might substantially change in the future due to the adoption of the new Law on Competition. The Competition Council is now entitled to submit its opinion on the quantification of damages upon request of the court hearing in the antitrust damages case. This right (not an obligation) of the Competition Council established in Article 51(8) of the new Law on Competition derives from Article 17(3) of the Damages Directive. Therefore, it will be the discretion of the Competition Council to decide how active it shall be during antitrust damages cases with respect to the determination of the quantum of damages. Such a procedural rule differs from the aforementioned rule under Article 49 of the Code of Civil Procedure, whereby the Competition Council is obliged to provide its opinion if the court involves it in the court proceedings. The general rule enshrined in the Code of the Civil Procedure will continue to apply only to the extent that the Law on Competition does not provide differently, in other words, the obligation for the Competition Council to provide an opinion in a damages case will apply only with respect to competition law violations.

Such a distinction might be explained by the difference in competences and functions of the Competition Council with respect to public enforcement and private enforcement. The main functions of the Competition Council are, *inter alia*, to safeguard the compliance of public institutions and private

entities with competition law (Article 18 of the Law on Competition), that is, to ensure the effectiveness of public enforcement. However, the effectiveness of public enforcement is closely interrelated with the effectiveness of private enforcement and *vice versa*. Therefore, the role of the Competition Council is likely to increase in private enforcement cases as well, provided that the authority becomes increasingly more active in the provision of specific guidance to the court and becomes a more active participant in court proceedings. More tailor-made and more active cooperation of the Competition Council is important especially at this stage, when private enforcement in Lithuania is still developing quite slowly. Proper cooperation between the Competition Council and the courts would help increase private incentives to seek compensation before the court and enhancing the ‘culture’ of private enforcement. Furthermore, it would also help facilitate deterrence from competition law violations, which is a direct goal of the Competition Council.

## 6. Disclosure of evidence

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, each party collects and submits to the court all available evidence which it intends to refer to in the proceedings. In the event a party to the court proceedings cannot receive certain evidence related to the case on his/her own, he/she may request the court to order disclosure of evidence related to the case and held by the other procedural party or by a third party. As a general rule, the court will not order disclosure of evidence at its own discretion.

Article 221 of the Code of Civil Procedure also allows a person to apply to a court for the safeguarding of evidence, if there are reasonable concerns about the inability or difficulty to present the required evidence later. Such a request may be submitted and the court may order such safeguards before the claim is filled or afterwards. Such an instrument can be very important in standalone cases where access to evidence is more difficult. In practice, safeguarding evidence is rather common in damages compensation cases related to unfair competition where an infringement is very latent and difficult to prove.

In general, until the implementation of the Damages Directive, the court has had quite a broad discretion to decide whether to grant access to evidence. In addition to the aforementioned procedural rules, the new

Law on Competition transposes procedural novelties of the Damages Directive which will broaden access to evidence and thus somewhat reduce the asymmetry of information suffered by claimants. It should be noted that the new Law on Competition does not provide a definition of ‘evidence’, hence the definition of evidence under Article 177(1) of the Code of Civil Procedure shall apply.<sup>36</sup>

Firstly, 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 disclosure requests. In addition, Article 52(7) of the new Law on Competition obliges the court, before deciding whether to grant access, to allow the participants to the court proceedings to express their opinion within 7 days of such a request. This novelty will make it possible to balance the legitimate interests of all parties to the proceedings and to avoid ‘fishing expedition’ at the earliest stage.

Secondly, new rules regarding the treatment of, and access to confidential information were introduced under Article 52(5) of the new Law on Competition. The court is entitled to order disclosure of confidential information yet certain measures, or their combination, should be used when doing so. They include: identifying those parties to the proceedings who will be entitled to work with confidential case material (‘confidentiality circle’) and related duties meant to ensure the protection of confidential information; the prohibition to copy and disclose such information, etc.

Thirdly, Article 53(1) of the new Law on Competition establishes the rules on the prioritisation of evidence in the same manner as under in Recital 29 and Article 6(10) of the Damages Directive. Therefore, disclosure by a competition authority of evidence included in its case file is seen as 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 limitation of access to the file of the national competition authority as well as of the European Commission.

It should be mentioned that following Recital 21 and Article 6(3) of the Damages Directive, access to the file does not cover the disclosure of internal documents of, or correspondence between competition authorities.

<sup>36</sup> Evidence in civil proceedings means any actual data serving as a basis for a court to establish in the statutory procedure the existence, or non-existence of circumstances substantiating claims and replies submitted by parties as well as other circumstances important for reaching a fair decision of the case.

At the same time, Article 21(7) of the Law on Competition does not directly establish disclosure protection of correspondence between competition authorities. According to this provision, such protection applies to the internal documentation of the Competition Council and documents directly related to its internal work organisation. Nevertheless, the aforementioned Article should be interpreted in the light of the Damages Directive.

Until the implementation of the Damages Directive, access to the file of the Competition Council (except for the state and business secrets and internal documentation of the Competition Council) was directly granted only for the participants to the antitrust investigation. Specific rules have also applied with respect to the access to leniency material. Access was allowed only after the investigation closed. However, legislation was silent on access to the file for injured persons other than participants to the antitrust investigation. Therefore, general rules under the Code of Civil Procedure applied. As a rule, other than restricted material, the disclosure of other material of the Competition Council could be ordered by the court upon a reasonable request of a party to the court proceedings. Non-confidential versions of infringement decisions issued by the competition authority were officially published and so they were publicly available.

This novelty is of significant importance as access to the competition authority's file concerning its antitrust investigation is crucial for private enforcement. The file may include information not only related to the infringement itself, but also important information related to the amount of damages and the causal link between the infringement and damages.

Fourthly, in contrast to previous rules, the new Law on Competition limits disclosure protection only to leniency statements of the cartelists<sup>37</sup> as well as settlement submissions. Leniency statements submitted by cartelists will not be accessible to any persons, including to other cartelists. Analogous rules will apply with respect to settlement submissions, which were introduced in Lithuania only with the adoption of the new Law on Competition. As a result, pre-existing documents submitted as annexes to a leniency statement are no longer exempted from disclosure.

These rules narrow legal protection granted previously in Lithuania to an immunity recipient which used to cover all leniency material submitted by the leniency applicant that qualified for immunity (such as pre-existing documents attached to the leniency statement). Until the implementation

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<sup>37</sup> 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 shall not apply as it does in case of leniency statements submitted by cartelists.

of the Damages Directive, the Competition Council was not entitled to disclose to damages' claimants any of the leniency material submitted by immunity recipients – after the implementation, protection is granted only to the immunity recipient's leniency statement itself.

The aforementioned novelty, together with other specific rules applied to immunity recipients introduced by the new Law on Competition, balances however 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 and penalisation of the most serious infringements of competition law. At the same time, damages claims in cartel cases generally follow from 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 to leniency statements only, rather than all leniency materials, the law broadens the possibilities for the victims of cartels to claim damages compensation.

Finally, the new Law on Competition directly establishes the *contra spoliatorem* principle, that is, the presumption that the relevant issue is proven, or dismissing claims and defences, for the failure or refusal to comply with a disclosure order as well as for the destruction of evidence. By contrast, the previous text of the Law on Competition and the Code of Civil Procedure used to be silent on how the court should treat a situation when the defendant, or another party, does not comply with the court's disclosure of evidence order, even though in practice the courts applied the *contra spoliatorem* principle in exceptional cases. In addition, the new Law has introduced a significant fine, up to € 10,000, for the destruction of evidence as well as for failure to comply with the confidentiality order.

## VI. Consensual dispute resolution in private enforcement

The new Law on Competition does not define 'consensual dispute resolution' or a 'consensual settlement' as it is defined in the Damages Directive.<sup>38</sup> Therefore, the consensual dispute resolution mechanism and consensual settlements shall be interpreted in the light of the Damages Directive. This includes Recital 48 of the Directive which provides exemplary

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<sup>38</sup> 'Consensual dispute resolution' means any mechanism enabling parties to reach an out-of-court resolution of a dispute concerning a claim for damages (Article 2(21) of the Damages Directive) whereas 'consensual settlement' means an agreement reached through consensual dispute resolution (Article 2(22) of the Damages Directive).



forms of consensual dispute resolution mechanisms, such as out-of-court settlements (including those where a judge can declare a settlement binding), arbitration, mediation or conciliation.

In addition to the aforementioned specific rules regarding the suspension of the limitation period and attributing liability of jointly and severally liable persons in reciprocal claims applicable to those involved in the consensual dispute resolution process, the new Law on Competition transposed also other tools introduced in the Damages Directive that are meant to encourage an agreement on the compensation of damages caused by a competition law infringement through consensual dispute resolution mechanisms, as indicated in Recital 48 of the Damages Directive.

Firstly, Article 48 of the new Law on Competition introduced specific rules equivalent to Article 19 of the Damages Directive. They concern the reduction of the claim of the settling injured party by the settling co-infringer's share of the damages. The new Law does not regulate procedural issues when and how the claim should be reduced to the amount settled with the settling co-infringer. Therefore, general rules of the Code of Civil Procedure on the approval of a settlement agreement, amendment of the claim and termination of the case with respect to the settling co-infringer will apply.

The new Law on Competition also prohibits non-settling co-infringers from recovering a contribution for the remaining claim from a settling co-infringer. However, if non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party, the settling injured party will be entitled to exercise the remaining claim against the settling co-infringer, unless such a right of the claimant is expressly excluded under the terms of the consensual settlement (Article 48(3) of the new Law on Competition). However, the new Law on Competition is silent about the procedures when and how the remaining claim may be exercised against the settling co-infringer. By contrast, the Code of the Civil Procedure establishes that in case the settlement agreement is approved and court proceedings are terminated due to the approved settlement agreement, an application to the court in relation to the dispute between the same parties about the same subject matter and on the same grounds shall be inadmissible (Article 294(2) of the Code of Civil Procedure). In addition, the court decision must apply only with respect to the co-infringers and other participants to the court proceedings indicated in the court decision (Article 266 of the Code of the Civil Procedure).

Secondly, Article 50 of the new Law on Competition, in compliance with Article 18 of the Damages Directive, also empowers the court to suspend

the case for up to two years where the parties are involved in consensual dispute resolution concerning the damages claim. Following the wording of the aforementioned provision, the court is entitled, rather than obliged, to suspend the antitrust damages case on the aforementioned ground. The court will decide on a case-by-case basis whether it is necessary to suspend the case due to the consensual dispute resolution process.

However, it is arguable whether the court may suspend the case in the event only some of the parties are involved in the consensual dispute resolution process while other defendants or claimants refuse to be involved in consensual dispute resolution. It is noteworthy that under the Code of the Civil Procedure, the court may not suspend the case only with respect to those parties which are involved in the consensual dispute resolution process. Therefore, in the opinion of the authors of this report, if at least one of the co-defendants refuses to participate in consensual dispute resolution the court will not be entitled to suspend the case.

## VII. Summary

The new Law on Competition has introduced quite a few significant rules, both substantive and procedural, into Lithuania's private antitrust enforcement law. It is expected that these novelties will significantly change the situation of private enforcement and that it will become easier to claim damages for competition law infringements in Lithuania both in standalone and follow-on cases. However, these changes will mostly depend on how successfully the courts will be in applying these novelties in practice, especially damages quantification and access to evidence rules. Strong knowledge of EU and national competition law and case law is also crucial for the courts in order to enhance the culture of private enforcement. However, the most significant factors for the increase of antitrust damages cases in Lithuania will be related to the effectiveness of the work of the Competition Council and the willingness of injured parties to defend their rights. The more infringement decisions the Competition Council adopts (especially related to severe and long-lasting competition law infringements), the more active incentives there will be for injured persons to use private enforcement as a tool to protect their rights and, as a result, to enhance public enforcement of competition law.

## Literature

- Malinauskaite, J. (2013). Private enforcement of competition law in Lithuania: A story of underdevelopment. *Global Competition Litigation Review* 3.
- Laužikas, E., Mikelėnas, V. and Nekrošius, V. (2003). *Civilinio proceso teisė I (Law of Civil Procedure I)*. Vilnius: Justitia.

## I. Manner of implementing the Directive

First, this report narrates the history of the works on the harmonisation of private antitrust enforcement in Poland, which commenced in 2015. The starting point for the works on the implementing Act was the formulation of the Assumptions behind the draft Act (hereinafter, Assumptions), a draft discussion paper on the proposed legal rules which, according to Polish law, must precede the actual draft Act. The first draft of the Assumptions was published in early December 2015 on the website of the Civil Law Codification Commission at the Ministry of Justice (hereinafter, CLCC).<sup>1</sup> However, the members of the CLCC were dismissed mid-December 2015 and the Minister of Justice announced plans to create a new Codification Commission of the Republic of Poland. After the dissolution of the CLCC, the Ministry of Justice continued the works on the implementation of the Damages Directive. The draft Assumptions, somewhat changed by the Ministry, were published and submitted for public consultation in March 2016. The Standing Committee of the Council of Ministers approved their

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<sup>1</sup> In Polish available at: <https://bip.ms.gov.pl/pl/dzialalnosc/komisje-kodyfikacyjne/komisja-kodyfikacyjna-prawa-cywilnego/> (all Internet references in this article were last visited on 9.03.2017).

final version in June 2016,<sup>2</sup> and instructed the Minister of Justice to draft the Act. The Assumptions were the baseline for the works on the draft Act. The draft Act, named the draft Act on Claims for Damages for Infringements of Competition Law (hereinafter, ACD), was published and submitted for public consultation in November 2016.<sup>3</sup> It was subsequently approved by the Council of Ministers and sent to the lower chamber of the Parliament (*Sejm*) on 8 March 2017. The ACD is at the moment (9 March 2017) going through the consecutive steps of the Polish legislative process in the Parliament. In this phase, it will be read three times in the *Sejm*; the adopted Act will then be examined by the higher chamber of the Polish Parliament (*Senat*), followed by another vote in the *Sejm* on the resolution of the *Senat*. If the Act is ultimately adopted by the *Sejm*, it will subsequently be sent to the President of the Republic of Poland for signing. If the Polish President signs it, the Act will be published in the Journal of Laws. It seems, therefore, that there is still a long way to go from where Polish legislative works currently are, to the actual implementation of the Directive.

The ACD consists of 39 articles. The first 31 articles set out the rules governing claims and actions for damages under national law for competition law infringements – both rules required by the Damages Directive and some additional ones. Next, the ACD is going to amend the general provision of the Civil Code<sup>4</sup> relating to the limitation period for tort-based compensation claims. The ACD is also going to amend the 1993 *Act on combating unfair competition*,<sup>5</sup> so as to avoid possible overlaps and/or a conjunction of rules. In addition, the ACD is going to contribute to the 2007 Act on Competition and Consumer Protection<sup>6</sup> so as to protect the files of the Polish competition authority<sup>7</sup> in accordance with the requirements of the Damages Directive. The final part of the ACD contains relevant transitional provisions and a rule on the entry into force of its provisions, namely the 14-day period after its publication when its applicability is suspended (*vacatio legis*).

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<sup>2</sup> In Polish at: <https://legislacja.rcl.gov.pl/projekt/12283303>.

<sup>3</sup> In Polish at: <https://legislacja.rcl.gov.pl/projekt/12292051>.

<sup>4</sup> The 1964 Civil Code (*Kodeks cywilny*), consolidated version Journal of Laws 2016 item 380 as amended.

<sup>5</sup> Consolidated version Journal of Laws 2003 No. 153, item 1503 as amended.

<sup>6</sup> Consolidated version Journal of Laws 2017 item 229.

<sup>7</sup> The President of the Office of Competition and Consumer Protection, in Polish *Prezes Urzędu Ochrony Konkurencji i Konsumentów*, hereinafter also as the UOKiK President.

## II. Scope of the implementation

First, regarding the types of claims covered (see p. 15–16), the ACD does not go beyond actions (claims) for damages. The Polish legislators do not seem willing to introduce a wider scope of the application of the principles embodied in the Directive than their application to actions for damages. The possibility of introducing a comprehensive range of solutions, which would also refer to remedies other than only actions for damages, was not even extensively discussed during the legislative works in the Ministry of Justice. However, the complexities of the available remedies raise many questions about the application of different sets of procedural and substantive rules in the same case involving various claims (see also Piszcz, 2017a).

Second, regarding the types of infringements covered (see p. 16), the drafters of the ACD have chosen not to go beyond the two types of infringements covered by the Directive (anticompetitive agreements, decisions by associations of undertakings or concerted practices and abuses of a dominant position), even though the enlargement of the scope of the transposing provisions in this regard has occurred in some Member States (Portugal, Spain).

Third, regarding the division of infringements into those which may affect EU trade and those without effect on EU trade (see p. 16–17), the ACD does not limit the scope of the transposed solutions exclusively to infringements with an effect on EU trade; this should be expected to be the most popular solution in all Member States. It does not seem reasonable for Member States to have double standards with respect to two different types of infringements (this would make private enforcement of competition law even more difficult for judges and the injured parties).<sup>8</sup> In the Polish practice, the new provisions are not going to be applied often to infringements with an effect on EU trade, since this category of violations is very rarely identified in Poland. The new provisions will thus be applied far more often to infringements without such an effect. An interesting fact is that in the years 2013–2015, the Polish competition authority typically dealt with only 3–4 cases per year that concerned infringements which might have affected trade between Member States within the meaning of

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<sup>8</sup> Among others, CDC (a well-known group of companies specializing in the enforcement of cartel damage claims) supports the reasonable recommendation to adopt a unique set of provisions for all antitrust infringements, irrespective of whether the infringement concerns EU or national law (CDC Cartel Damage Claims, 2015, p. 2).

Article 101 or 102 TFEU (out of, accordingly, 141, 98 and 71 of the total number of cases dealt with in this period of time).<sup>9</sup>

Furthermore, regarding the personal scope of the rules and the legal basis for the liability of the parent company for its subsidiaries (see p. 17–18), the drafters of the ACD have so far opted to leave the discussed principle out of both private and public enforcement of Polish competition law, even though they cannot be unaware of the efforts undertaken by scholars to convey the shift in the area of public enforcement (Semieniuk, 2015). It is also true that Polish courts have so far seemed to resist the idea that liability could be attributed to the parent company on the basis of the current legal framework for public enforcement of Polish competition law.<sup>10</sup> The drafters of the ACD have also not given any attention to the question whether (or not) to use this legislative amendment processes to address the need to introduce safeguards for those who wish to claim damages for competition infringements committed by successors or associations of undertakings, even if the rules on their civil liability cannot be determined precisely under the Directive.

Finally, there is another special issue, which falls outside the scope of the Damages Directive, but might have been dealt with on the occasion of its transposition. Recital (5) of the Preamble to the Directive seems to aim to inspire Member States to adopt solutions incentivising infringers to provide compensation voluntarily. Such solutions, even though not required by the Damages Directive, were added to the British system on the occasion of the transposition of the Directive (Competition and Markets Authority, 2015). Infringers are allowed to submit their proposed scheme with regard to voluntary compensation to the competent authority for approval; the underlying documents call it ‘a voluntary redress scheme’. No such variation to the system has been proposed by the drafters of the ACD. However, it should be noted that a voluntary compensation scheme is able to incentivise infringers to offer compensation, provided that a robust enforcement system is in place, something that Poland is unfortunately lacking.

It can be seen from the above that ‘spontaneous’ harmonisation with a significantly broader scope than that provided for in the Damages Directive has not occurred in Poland so far. It has to be added that the use of minimum harmonisation clauses will be referred to in the following

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<sup>9</sup> *Office of Competition and Consumer Protection*, Reports on activities, [http://www.uokik.gov.pl/reports\\_on\\_activities.php](http://www.uokik.gov.pl/reports_on_activities.php).

<sup>10</sup> See judgement of the Court of Competition and Consumer Protection (SOKIK) of 13 December 2013, XVII AmA 173/10.

parts of this report. Furthermore, the issue of standing as put forward in the ACD, is going to be considered in the later part of this report dealing with procedural issues even though it falls outside the scope of the Damages Directive.

### III. Competent courts

Regarding competent courts, the Polish *status quo* is that a general rule applies to antitrust claims. Accordingly, district courts (in Polish *sądy rejonowe*) are competent to handle claims of up to PLN 75,000.00 (approx. EUR 17,000.00), and regional courts (in Polish *sądy okręgowe*) handle other claims. The same division of competences is characteristic for the majority of other types of civil claims in Poland.

However, according to Article 10 ACD (contained in Chapter 3 of the ACD titled ‘Rules governing pursuing claims for damages for infringements of competition law in civil proceedings’), a regional court shall have exclusive authority over actions for antitrust damages in 1<sup>st</sup> instance (authority of a kind that they already possess in relation to all unfair competition claims and all collective redress actions). Because of their superior experience and expertise, regional courts are likely to handle such complex cases better than a single professional judge at a district court. However, this solution can also be seen differently, if one uses the access to justice perspective, because regional courts are far more ‘distant’ from potential claimants, as they usually cover quite extensive territories.

The creation of specialised courts or chambers with competition law and economics knowledge has been considered a good idea in literature, due to the complexity and the specific subject matter of actions for antitrust damages (CDC Cartel Damage Claims, 2015, p. 20). However, the drafters of the ACD decided not to devote the resources of the specialised Regional Court in Warsaw – the Court of Competition and Consumer Protection (hereinafter, SOKiK) to private enforcement of competition law. SOKiK remains only a review court within the meaning of Article 2(10) of the Directive, that is, a national court empowered to review the decisions of the Polish competition authority by ordinary means of appeal.

If the use of a specialised court was chosen, access to private enforcement would be very narrow in geographical terms, since SOKiK is the only such court in the whole country. SOKiK has already been facing a workload that proved too much for it to handle in a timely manner. It was not only a review court with regard to the decisions of several administrative authorities, but



had also jurisdiction as the court of 1<sup>st</sup> instance in actions relating to clauses of standard forms of agreements concluded with consumers (Korycińska-Rządca, 2016, p. 252). Having been deprived of jurisdiction over the latter issue (even though it remains a review court in such cases), SOKiK is now going to have more resources available. However, it remains to be seen how the speed of its proceedings will change as a result of this jurisdictional shift.

On the other hand, if the use of a specialised court was chosen, such a solution would have had positive impact in terms of SOKiK judges' deep knowledge of competition law.

The main focus of Chapter 3 of the ACD is on establishing competent courts, or rather, on pointing out which already existing courts will be competent to handle claims for antitrust damages under the new legal framework. However, Chapter 3 contains also specific rules regarding territorial jurisdiction of those courts. The rules of the Civil Procedure Code<sup>11</sup> (hereinafter, CPC) on general territorial jurisdiction and alternative territorial jurisdiction apply. However, Article 11 ACD provides for an exception in this context, which offers the possibility to bring an action for antitrust damages before a court which is not competent according to the rules of the CPC but which is seized of an action for damages for the same infringement of competition law (*forum connexitatis*).

In addition to the above, Article 12 ACD refers to the situation where several (two or more) courts of 1<sup>st</sup> instance are seized of an action for damages for the same competition law infringement. Each of them may request the other(s) to transfer its/their case(s) in order to join them to be dealt with and adjudicated together, provided that this is sensible, in particular to avoid the issue of conflicting judicial decisions (Article 12(1)). It is interesting to note that the court, when asked for the transfer of a case, shall transfer it only if this is not contrary to the principle of procedural economy (Article 12(2)).

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<sup>11</sup> The 1964 Civil Procedure Code (*Kodeks postępowania cywilnego*), consolidated version Journal of Laws of 2016 item 1822 as amended.

## IV. Substantive law issues

### 1. Limitation periods

As regards limitation periods, Article 10(1) of the Damages Directive mentions not only limitation periods as such, but contains also rules regarding the beginning of the relevant limitation period, its duration, and circumstances under which it is suspended or interrupted. The above mentioned institutions already exist in the Polish Civil Code in relation to tort-based liability. However, the implementation process requires some adjustments to be made addressed specifically to competition-based damages claims (see for more Stawicki and Turno, 2016, p. 140 et seq.). Furthermore, solutions included in the ACD are somewhat more extensive than a mere transposition of the Damages Directive, since its drafters decided to use the implementation process to also introduce some adjustments to the Civil Code. Those amendments relate to the moment when the injured party learns about the damage and the person liable to redress it, as well as the injured party's due care in this respect.

The drafters of the ACD took, first of all, care to properly implement the limitation period in case of competition-based damages claims, as stated in Article 10(3) of the Damages Directive. Consequently, following Article 10(3) of the Damages Directive, Article 9(1) ACD extends the general limitation period for tort-based damages claims specified in Article 442<sup>1</sup> paragraph 1 of the Civil Code from three to five years in relation to competition-based damages claims (limitation period *a tempore scientiae*).<sup>12</sup> Furthermore, according to the same Article, the limitation period does not begin to run during the infringement of competition law. Notwithstanding the above, according to Article 442<sup>1</sup> paragraph 1 of the Civil Code after the amendments included in Article 9(1) ACD, the limitation period in competition-based damages claims will not exceed 10 years from the time when the infringement of competition law ceases to exist (limitation period *a tempore facti*). Since the Damages Directive does not include any rules regarding the limitation period *a tempore facti*, the drafters of the ACD decided to maintain this institution, since it already existed in Article 442<sup>1</sup> paragraph 1 of the Civil Code, with some necessary adjustments required by the Damages Directive. The applied solution seems to fully correspond to Article 10 of the Damages Directive (see also Stawicki and Turno 2016,

<sup>12</sup> According to Article 442<sup>1</sup> paragraph 1 of the Civil Code, the limitation period for other tort-based damages cases is three years.

p. 151), but it does not eliminate problems in identifying the moment when a competition law infringement actually ends (Wolski, 2015, p. 17).

As mentioned above, some adjustments of Article 442<sup>1</sup> paragraph 1 of the Civil Code affect the whole scope of tort-based damages claims, not only those based on competition law infringements. According to the new wording of Article 442<sup>1</sup> paragraph 1 of the Civil Code (Article 32 ACD), a tort-based claim will be time-barred after three years (five years in competition – based damages claims) from the day when the injured party learned or with due care could have learned about the damage and about the person liable to redress it. The aforementioned amendment explicitly covers the subjective factor of the injured party's 'due care' when assessing the moment of that party's awareness of both the damage and the infringer (see also Stawicki and Turno, 2016, p. 142–143).

In order to implement Article 10(4) of the Damages Directive, the drafters of the ACD proposed in Article 9(1) and (2) ACD the suspension of the limitation period from the time of: 1) initiating antimonopoly proceedings by the competition authority (UOKiK President), or 2) proceedings initiated by the European Commission or a competition authority of another Member State, against the competition law infringer, provided the damages claim is based on the same infringement. As the Damages Directive stipulates in Article 10(4) *in fine*, according to the ACD, the suspension of the limitation period ends one year after the final infringement decision was issued or any other termination of the proceedings occurred. The Damages Directive gives Member States a choice between a suspension and an interruption of the limitation period after the opening of antitrust proceedings by a competition authority. Therefore, the use of a suspension, instead of an interruption, in the ACD remains within the framework of the Damages Directive.

It seems that this way the Polish draft met all expectations laid down in the Damages Directive with respect to the rules governing limitation periods in competition-based damages claims. This regards, in particular, the duration of that period (five years) as well as rules concerning the beginning of the limitation period and its suspension due to pending proceedings before a relevant competition authority concerning the same competition law infringement.

## 2. Type of liability

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 identified as the main legal ground of private enforcement of competition law in Poland (Jurkowska, 2008, p. 66; Wolski, 2016a, p. 78; Wolski, 2016b, p. 40).<sup>13</sup> The drafters of the ACD decided to create a separate basis for liability addressed directly to the aforementioned claims, in order to disperse any doubts. This regards in particular claims of indirect purchasers. Moreover the lawmakers intension was to create liability based on the presumption of fault.

First, Article 415 of the Civil Code laying down the main principle of tort-based liability stipulates that ‘a person who has inflicted damage to another person by her/his own fault shall be obliged to redress it’.<sup>14</sup> This wording brings ambiguity related to the possibility of bringing a claim by an indirect purchaser, since Polish doctrine seems to be of the opinion that bringing a damages claim by an indirectly injured party is not allowed on the basis of Article 415 of the Civil Code.<sup>15</sup> This could mean, in turn, that contrary to Article 14 of the Damages Directive, bringing a competition-based damages claim by an indirect purchaser would not be possible. As a result, Article 3(1) ACD stipulates clearly that the infringer is obliged to redress damage caused by the infringement of competition law to anybody, unless the infringer is not at fault. This directly expresses the liability of an infringer to any person who suffered damage 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 (for more about the principle of liability in competition-based damages claims in some European states see Wolski, 2016a, p. 69–95).

Second, Article 3(1) ACD includes a presumption of fault which does not exist under Article 415 of the Civil Code. As a result, based on the ACD, 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 that created in Article 3(1) ACD applicable to private enforcement of competition law.

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<sup>13</sup> The other possible legal basis pointed out in this context concerned unjust enrichment (Article 405 at seq. of the Civil Code) in the case of nullity of contracts and, far more rarely, contractual liability (Article 471 of the Civil Code).

<sup>14</sup> English version: Bil, Broniek, Cincio and Kielbasa, 2011, p. 185.

<sup>15</sup> Bringing a claim by an indirectly injured person is exceptionally allowed, e.g. based on Article 446 of the Civil Code (see Safjan, 2008, p. 1441–1442).

Third, Article 7 ACD contains a presumption of damage caused by the infringement of competition law which goes further than that stipulated in Article 17(2) of the Damages Directive. According to the ACD, it is presumed that any infringement of competition law causes damage, while according to the relevant provision of the Damages Directive this presumption concerns only cartels. As stated in the draft Explanatory Notes accompanying the ACD,<sup>16</sup> the Damages Directive does not oppose such solution. Additionally, according to the draft Explanatory Notes accompanying the ACD, there is a need to help injured parties to bring competition-based damages claims as far as the premises of liability of the infringers are concerned. However, this need is not limited to cartels but also exists in relation to other infringements of competition law.<sup>17</sup> It is worth mentioning that both of the aforementioned presumptions are rebuttable according to Article 234 CPC.

### 3. Joint and several liability

Article 441 paragraph 1 of the Civil Code provides the rule of joint and several liability of persons liable for the damage applicable to the entire regime of tort-based liability. Accordingly, if several persons are liable for the damage their liability is joint and several. The joint behaviour of undertakings infringing competition law is mentioned in Article 11(1) of the Damages Directive providing joint and several liability in the field of competition-based damages claims. It is almost undisputable in Polish legal doctrine that the rule established in Article 441 paragraph 1 of the Civil Code is fully applicable to damages claims based on competition law infringements (Podrecki and Wiese, 2016, p. 119). As a result, there is no need to implement Article 11(1) of the Damages Directive into the ACD (Podrecki and Wiese, 2016, p. 137).<sup>18</sup> There are also other applicable rules governing joint and several liability in tort-based cases laid down in Article 441 paragraph 2 and paragraph 3 of the Civil Code (for example, recourse claims). Those rules are fully applicable in the case of harm caused by an anti-competitive behaviour too.

Notwithstanding the above, the Damages Directive sets forth specific rules limiting joint and several liability of: small or medium sized enterprises (SMEs), immunity recipients and infringers involved in the settlement

<sup>16</sup> In Polish at: <https://legislacja.rcl.gov.pl/projekt/12292051/katalog/12389818#12389818>.

<sup>17</sup> See also draft Explanatory Notes accompanying the ACD, p. 11.

<sup>18</sup> See also draft Explanatory Notes accompanying the ACD, p. 9.

process. As a result, provisions of Article 11(2–6) of the Damages Directive mainly aim to limit joint and several liability of the aforementioned entities. Appropriate adjustments had thus to be implemented into the ACD. As a result, Article 5(1) and (2) ACD provides a similar scheme of limitation as that set forth in Article 11(2), (3) and (4) of the Damages Directive. Furthermore, Article 5(3) ACD establishes a specific limitation with respect to claims directed to immunity recipients, following Article 11(6) of the Damages Directive. However, an interesting question comes up in relation to the limitation of joint and several liability of SMEs, namely how the rules specified in Article 5 ACD will work in judicial practice. In particular, how can the court determine in civil proceedings that ‘joint and several liability would irretrievably jeopardise the SME’s economic viability and cause its assets to lose all their value’? This is why the manner of limiting the joint and several liability of SMEs, as set forth in Article 11(2) of the Damages Directive and implemented by Article 5(1) ACD, remains doubtful with respect to its practical feasibility (Wolski, 2015, p. 13; see also Podrecki and Wiese, 2016, p. 129).

Apart from limiting the liability of SMEs, Article 19 of the Damages Directive restricts also the liability of settling co-infringers. As a result, according to Article 6(1) ACD, if the injured party settles with one of the jointly and severally liable co-infringers, then the injured party can demand from other jointly and severally liable co-infringers to redress his/her damage but reduced by the amount of the recourse claim which the settling co-infringer would have been obliged to pay according to Article 441 paragraph 2 of the Civil Code. This provision reflects Article 19(1) of the Damages Directive and amends the recourse claim rule arising from Article 441 paragraph 2 of the Civil Code. Furthermore, according to Article 6(2) ACD, to the extent to which the injured party cannot obtain the redress of his/her damage from other (non-settling) co-infringers according to Article 6(1) ACD, the injured party can demand the compensation of his/her damage by a settling co-infringer, unless the settlement provides otherwise. The aforementioned provision implements Article 19(3) of the Damages Directive. The drafters of the ACD did not decide to express Article 19(4) of the Damages Directive directly in the ACD, but this rule can be deducted from the general rules governing liability for damages in Polish civil law. Accordingly, damages paid to an injured party cannot exceed harm suffered by the injured party (Banaszczyk, 2008, p. 1000–1001). The court, when deciding about the amount of damages to be paid to the injured party, shall thus take into consideration all amounts already paid to the injured party by the co-infringers (based on the same competition

law infringement), including the amount of earlier settlements. Therefore, a direct expression of Article 19(4) of the Damages Directive in the ACD does not seem to be necessary.

#### 4. Quantification of harm

In the context of the quantification of harm, Article 3(2) ACD refers to the Civil Code. This is not surprising due to the fact that the principle of full compensation is stipulated in Article 3 of the Damages Directive. The aforementioned principle is consistent with the principle of full compensation present in Polish civil law (Banaszczyk, 2008, p. 998). This also means that the compensation paid to the injured party cannot exceed the damage which that party suffered (Banaszczyk, 2008, p. 1000–1001).<sup>19</sup> To this extent, there are no differences between Article 3 of the Damages Directive and Polish civil law. However, some adjustments were needed and those have been inserted into the ACD, in particular with respect to the concepts of an overcharge and interests.

Article 3(1) ACD expresses the main principle according to which the infringer is obliged to redress the damage caused to anyone, unless (s)he is not at fault. Article 3(2) ACD refers to the Civil Code with respect to the remaining scope of civil liability for damage caused by an infringement of competition law. This means, in turn, that based on the principle of full compensation the infringer shall be liable for actual damage and lost profits. One of the types of damages most commonly associated with competition law infringements, namely an overcharge, was defined in Article 2(11) ACD. This definition fully reflects the notion of overcharge outlined in Article 2(1) of the Damages Directive.

Additionally, in case of damage caused by tort according to Article 481 of the Civil Code, the infringer would be obliged to pay interest to the injured party. This complies with Article 3(2) *in fine* of the Damages Directive. Article 363 paragraph 1 of the Civil Code sets forth 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’.<sup>20</sup> Having this in mind, as well as remembering motive 12 of the Damages Directive relating to the time

<sup>19</sup> As the Damages Directive stipulates in Article 3(3), full compensation shall not lead to overcompensation.

<sup>20</sup> English version: Bil, Broniek, Cincio and Kielbasa, 2011, p. 161.

when the injured party can demand interest, the Polish lawmakers provided in Article 8 ACD that if the basis for calculating damages are prices from the date other than the date of calculating the damages, the party injured by the infringement of competition law can demand interest according to the reference rate of the National Bank of Poland (NBP) for the period starting on the day when the prices were the basis for calculating the damage and until the day when the claim for damages is due. On this basis, the injured party can demand compensatory interest for the aforementioned period. According to the opinion of the drafters of the ACD, this solution makes it possible to fully implement the Damages Directive's provisions on full compensation and on interest without, at the same time, leading to overcompensation.<sup>21</sup>

Article 30(1) ACD states that the court when quantifying damage caused by an infringement of competition law may follow the guidelines included in the *Communication on quantifying harm* issued by the European Commission (2013/C 167/07<sup>22</sup>) as well as those mentioned in Article 16 of the Damages Directive. Furthermore, following Article 17(3) of the Damages Directive, Article 30(2) ACD stipulates that at the request of the court, the UOKiK President, or the competition authority of another EU Member State, may assist the court in quantifying the harm, if the evidences collected and information possessed by such authority allow it to do so. However, it seems that the soft nature of this provision, in particular the fact that the competition authority is not under an obligation to assist the court, as well as the number of reservations included in this rule, undermine its practical significance.

## 5. Passing-on of overcharges

Article 4 ACD implements the rules of the Damages Directives with respect to the passing-on of overcharges. According to Article 4(1) ACD, if the infringement of competition law resulted in an overcharge of direct purchasers, and an indirect purchaser bought products or services to which the infringement of competition law relates, or products or services derived from products or services to which the infringement relates, it is presumed that the overcharge has been passed on to the indirect purchaser. However,

<sup>21</sup> See draft Explanatory Notes accompanying the ACD, p. 12.

<sup>22</sup> 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).



reference to the aforementioned presumption can be made only by an indirect purchaser who claims the redress of damages arising from the passing-on of the overcharge upon that indirect purchaser (Article 4(2) ACD). The presumption can be rebutted according to Article 234 CPC. Having in mind the aforementioned provisions, as well as those laid down in Article 3(1) ACD (redress of damage to anyone), it seems that all of the rules of the Damages Directive concerning the passing-on of overcharges have been transposed by the ACD. Those not directly mentioned by the ACD shall be worked out in the future on the basis of current rules included in the Civil Code and judicial practice.

## V. Procedural issues

### 1. Standing

The question of standing of business organisations and consumer organisations in the course of private antitrust damages claims, which is part of the question of standing of ‘someone acting on behalf of one or more alleged injured parties’ (see Article 2(4) of the Damages Directive defining an ‘action for damages’), is addressed in Article 13 ACD, even though the Directive does not require Member States to provide business organisations and consumer organisations with standing to sue.<sup>23</sup>

Currently, this question is structurally related to the Civil Procedure Code (CPC). Article 61 § 3 CPC stipulates that a non-governmental organisation (NGO) may bring an action on behalf of an undertaking being its member (but only a natural person) in case of a dispute with another undertaking arising out of conducted business activity. On the other hand, Article 61 § 1 p. 3 CPC states that an NGO may bring actions for consumer protection on behalf of a natural person. It is more than hinted in the draft Explanatory Notes accompanying the ACD, that considering an action for antitrust damages as an action for consumer protection may be doubtful (though not excluded).<sup>24</sup>

Article 13 ACD clearly gives standing to both business and consumer NGOs to initiate representative actions for antitrust damages, as well as to participate in proceedings already pending before the court. To this end, the objective (or rather one of the objectives) pursued by a business NGO should be to protect the market against infringements of competition

<sup>23</sup> See also draft Explanatory Notes accompanying the ACD, p. 15.

<sup>24</sup> *Ibid.*

law (Article 13(1)). In case of a consumer NGO, its objective must be the protection of consumers. Quite obviously, the injured party's consent for a NGO to act before the court shall be needed. These minimum (not excessive) requirements applying to NGOs seeking to represent injured parties should be welcomed. However, those laid down by the ACD do not seem designed so as to prevent improper litigation.

## 2. Disclosure of evidence

It goes without saying that the disclosure of evidence in private competition law enforcement is one of its most often discussed issues. The main reasons for this are the significance of evidences for effective enforcement as well as their sensitivity, in particular when they are included in files held by a competition authority. The latter is notably important when the relevant evidence relates to a leniency or settlement procedure. If the evidence is held by the infringer, (s)he is for obvious reasons not interested in its disclosure. This means that the part of the Damages Directive which is devoted to evidence disclosure, mainly Article 5, Article 6, Article 7 and Article 8, is relatively extensive and complex. This is an attempt to reconcile the conflict that exists between public and private interest, in order to facilitate private enforcement of competition law. There does not seem to be a situation where the balance of these two interests is quite perfect, and so one of these interests ultimately prevails – the plaintiff's interest in obtaining damages or a competition authority's interest in boosting leniency and settlements (see also Piszcz, 2015, p. 80; Gac, 2016, p. 67). The complexity of the evidence disclosure issue is reflected in the ACD, preceded by long discussions at the reconciliation conferences before the formulation of the final draft. As a result, 16 articles (Articles 15 to 29 and Article 34(1)) of the ACD include rules on the disclosure of evidence.

Article 15 ACD stipulates that upon a court order, the parties are obliged to provide information about other competition-based damages proceedings regarding the same competition law infringement which they are involved in as well as judgements issued therein. This helps the courts to issue comprehensive judgements in different proceedings regarding the same infringement of competition law. In order 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, but only if the plaintiff substantiated his/her claim and if (s)he has committed his/

her self to use this evidence only in the pending proceedings. A request for the disclosure of evidence under the same conditions can also be directed to the court by the defendant (Article 16(1) ACD *in fine*). If the evidence is included in the files of a competition authority then the court can order its disclosure from that source only if obtaining it from the opponent is not possible or excessively difficult (Article 16(2) ACD). Following the Damages Directive, Article 17 ACD includes provisions protecting the efficiency of public enforcement of competition law. Accordingly, it is not permitted to disclose leniency statements and settlement submissions, unless a specific part of the relevant document does not constitute the leniency statement or settlement submission. That part of the document can be disclosed. Furthermore, information created specifically for the purposes of the proceedings of the competition authority, as well as withdrawn settlement submissions can be disclosed only after the public enforcement proceedings are completed (Article 17(2) ACD).

Articles 18 to 21 ACD have a procedural nature. Thus they set forth requirements addressed to the procedural writ (motion for the disclosure of evidence), grant a party the right to be heard before the court decides on the evidence disclosure, and set conditions under which the court dismisses a request for access to evidence, proportionality principle included.<sup>25</sup> Having in mind the aforementioned conditions, it is important from the plaintiff's perspective that according to Article 20(3) ACD being exposed to liability for damages caused by an infringement of competition law does not constitute fair interest under the protection (see Article 5(5) of the Damages Directive). That fair interest is taken into consideration by the court when deciding on the motion for the disclosure of evidence. In Article 22 ACD, its drafters proposed the protection of business secrets and other secrets that enjoy legal protection. In such cases, the court can restrict parties' access to the files or set other specific rules in that access. The parties, the third party as well as the competition authority can lodge a complaint to the court's order on the disclosure of evidence (Article 23 ACD). The same parties can also demand for the order to be changed or repealed when the circumstances changed which have originally justified the order (Article 24 ACD). The final order on evidence disclosure creates an enforcement title against the person obliged to do so (Article 25 ACD). Furthermore, the ACD includes provisions sanctioning both of the opposing situations, namely when the person obliged to disclosure evidence refuses to follow the order, as well as when a party files the motion to disclose

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<sup>25</sup> See draft Explanatory Notes accompanying the ACD, p. 18–20.

evidence in bad faith (*mala fide*), breaches the rules on access to evidence set forth by the court according to Article 22 ACD, or uses disclosed evidence for a different purpose than the pending proceedings (Article 26 and 27 ACD). Finally, as stated in Article 28 ACD, documents mentioned in Article 17(1) ACD (leniency statements and settlement submissions) cannot constitute evidence in damages proceedings. A similar restriction applies, until the end of the proceedings pending before the competition authority, to information mentioned in Article 17(2) ACD, in other words, information that a natural or legal person obtained exclusively through the access to files of public enforcement proceedings led by the competition authority. Other evidences, obtained by a natural or legal person in a manner mentioned in Article 28(1) ACD, may be admitted to the damages proceedings only following a motion to that effect submitted by the aforementioned person or his/her legal successor (Article 28(2) ACD).

The rules on disclosure of evidence have been presented above in order to provide a broad picture of the relevant part of the forthcoming Polish Act. They are complex and include many details that could not be described here due to the framework of this report. However, those outlined above make the conclusion possible that the drafters of the ACD did their best in order to properly transpose the relevant part of the Damages Directive into the Polish legal system.

### 3. Effect of national decisions

The drafters of the ACD chose to implement Article 9(1) of the Damages Directive (the non-cross-border effect of decisions) in Article 29 ACD. The latter states that a final decision of the UOKiK President, to the extent it declares a practice as restricting competition, and a final judicial decision adopted as a result of an appeal against such a decision, are binding upon a court in proceedings regarding claims for damages for infringements of competition law, but only with regard to the declaration of a competition law infringement.

As to Article 9(2) of the Directive (a cross-border effect of national decisions), constituting a minimum harmonisation clause, the drafters of the ACD did not use solutions found in other Member States (binding effect in Germany and Spain, or rebuttable presumption in Portugal) as inspiration for the Polish provisions. They decided to choose the minimal solution, which treats foreign decisions less favourably than national decisions. Therefore, they proposed not to change Polish procedural rules at all since

they believe that the minimal solution is already part of Polish procedural law regarding all civil cases. According to Article 231 CPC, courts may consider facts essential for the resolution of the case as established based on other established facts (evidence by inference from other established facts, called a ‘factual presumption’ by the CPC, in Polish *domniemanie faktyczne*). Following the unsatisfactory translation of the term ‘*prima facie* evidence’ as a ‘factual presumption’ (*domniemanie faktyczne*) into the original Polish-language version of the Directive, it is believed by the drafters of the ACD that the concept of a factual presumption within the meaning of Article 231 CPC is equal to *prima facie* evidence within the meaning of Article 9(2) of the Damages Directive, even though the issue of *prima facie* evidence does not appear to be a straightforward matter in Polish procedural law literature (Pais and Piszcz, 2014, p. 232). The Polish equivalent of the term ‘*prima facie* evidence’ has not been created by the legislature, nor has the homogeneous criteria of the application of such evidence by Polish courts been defined in procedural laws. Still, there exists a certain practice of *prima facie* evidence being used, in particular to prove the causal relationship in cases of some types of damages (H. Dolecki explains that it is used in particular in cases where one of the parties has a weaker evidentiary potential, such as a patient pursuing claims against a hospital or an employee in some disputes with his/her employer; see Dolecki, 2013, para. 12). I. Adrych-Brzezińska observes that it is not clear in current Polish literature if, in Poland, *prima facie* evidence is a factual presumption or a legal substantive presumption. It is also not clear if the burden of proof is reversed in favour of the plaintiff and thus falls on the defendant (Adrych-Brzezińska, 2015, p. 181 et seq.). With such inconsistencies in the literature, it is surprising that the drafters have not chosen to use a safer option in the form of a rebuttable presumption.

Choosing a factual presumption raises doubts. The Supreme Court remarked in the context of the factual presumption that a party cannot challenge the fact that a court does not apply it, because the court is not obliged to apply factual presumptions, adding that the application of the factual presumption could be challenged if the court, thereby, infringed the principles of logic and life experience.<sup>26</sup> It must be noted that this does not seem like the kind of solution preferred by the authors of the Directive, especially if we put emphasis on the aim underpinning the Directive, that is to ensure effective private enforcement actions under civil law.

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<sup>26</sup> See the judgment of 22.07.2008, II PK 360/07, published in Lex No. 500212.

#### 4. Collective redress

As it has been suggested before, the Directive is being implemented in Poland in a minimalistic manner. Hence, the legislative works have not been extended beyond the scope of the Directive (see Recital (13) sentence 2 of the Preamble) to include provisions on collective redress mechanisms. The opt-in system existing under the 2009 Act on the Pursuit of Claims in Group Proceedings (hereinafter, PCA)<sup>27</sup> is not going to be improved for the purpose of private antitrust enforcement on the occasion of the transposition of the Directive.

Article 1(2) PCA includes a list of claims that may be pursued in group proceedings including: consumer protection, product liability and tort liability claims. However, group lawsuits seeking to protect personal rights are barred. Antitrust claims are classified as tort liability claims (Jurkowska, 2008, p. 68–69; Piszcz, 2012, p. 67). When it comes to enforcement practice however, it is worth noting that in the almost seven years of the binding force of the PCA, no group actions have ever been pursued with respect to antitrust. The fundamental right of access to justice, including access to collective redress, is granted to persons who have suffered harm caused by an infringement of competition law; however, the key lies in whether they enforce it. On the occasion of the implementation of the Directive, the Polish legislature could have improved existing legal framework on group proceedings, thoroughly tested in cases of claims other than antitrust damages. It is regrettable that the Polish legislature has not taken this opportunity.

#### VI. Consensual dispute resolution in antitrust enforcement

Article 2(21) of the Directive contains a definition of consensual dispute resolution which states that it is any mechanism enabling parties to reach the out-of-court resolution of a dispute concerning a claim for damages. This compact definition does not exemplify these mechanisms. However, Recital (48) sentence 2 of the Preamble offers a variety of examples of consensual dispute resolution mechanisms such as out-of-court settlements (including those where a judge can declare a settlement binding), arbitration, mediation or conciliation.

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<sup>27</sup> Journal of Laws 2010, No. 7 item 229.

According to the drafters of the ACD,<sup>28</sup> the introduction of a definition of consensual dispute resolution would not add value to Polish procedural law. As the Table of convergence explains, the Civil Procedure Code has already introduced the concept of an ‘out-of-court method of dispute resolution’ (in Polish *pozasądowy sposób rozwiązania sporu*), which can be found in Article 187 § 1 CPC.<sup>29</sup> The drafters of the ACD stress this concept’s similarity to the notion of consensual dispute resolution. Although the former is not defined in the CPC, it is believed by the drafters of the ACD that the content of this concept has already become well established in Poland. Therefore, they consider the lack of a separate definition of consensual dispute resolution in line with the Damages Directive.

Chapter VI of the Directive joins suspensive and other effects of consensual dispute resolution (Article 18) with the effect of consensual settlements on subsequent actions for damages (Article 19). Observations on the implementation of Article 19 have already been presented in Part IV.3 of this report. As to Article 18, its paragraph 1 grants a suspensive effect to consensual dispute resolution in terms of the limitation period for bringing an action for damages. This provision is regarded as dealing, in essence, with situations when the parties attempt to resolve the case primarily through mediation or conciliation (Moisejevas, 2015, p. 187–188).

In Poland, provisions related to this topic are contained, first of all, in Article 123 § 1 (1) and (3) of the Civil Code. They stipulate that the limitation period shall be interrupted<sup>30</sup> (which means that when the proceedings are concluded, the limitation period shall begin to run anew) by any activity before the court or other authority entitled to hear cases or enforce claims of a given kind or before the court of arbitration, undertaken directly either to pursue, declare, satisfy or to secure claims. The limitation period shall also be interrupted by the initiation of mediation as well as,

<sup>28</sup> See the Table of convergence (*Tabela zbieżności*); <https://legislacja.rcl.gov.pl/docs//2/12292051/12389818/12389819/dokument273624.pdf> (p. 4–5).

<sup>29</sup> From 1.01.2016.

<sup>30</sup> Article 123 of the Civil Code provides for the interruption of limitation periods, which is more beneficial for injured parties, rather than their suspension mentioned in Article 18(1) of the Directive (in the Civil Code, a suspension is provided for in other categories of situations). It is fair to say that a systemic interpretation of Article 18(1) makes it possible to leave the concept of interruption in Article 123 of the Civil Code. It should be taken into account that Article 18(1) is related to provisions on limitation periods contained in Article 10 of the Directive. The latter tend to treat the suspension and interruption of limitation periods as options depending on national laws. In Poland, traditionally the effect of activities undertaken directly to pursue, declare, satisfy or to secure claims has been the interruption of the limitation period and not its suspension (see Stawicki and Turno, 2016, p. 157).

according to Article 36 of the *Act on out-of-court consumer disputes resolution* of 23 September 2016,<sup>31</sup> by the initiation of proceedings on out-of-court consumer dispute resolution.

The drafters of the ACD describe the transposition of Article 18(1) as not necessary.<sup>32</sup> They interpret Article 18(1) of the Directive narrowly. As a result, the process leading to the conclusion of out-of-court settlements (other than those concluded before the mediator or arbitrator) does not stop the limitation period. It is explained in the draft Explanatory Notes accompanying the ACD that ‘consensual dispute resolution processes’, in the meaning of Article 18(1) of the Directive, include only those ways of out-of-court dispute resolution that are conducted within a certain framework, as procedures. The drafters of the ACD are of the opinion that it would otherwise not be possible to establish the time of the initiation and completion of the consensual dispute resolution ‘process’, which would result in legal uncertainty. However, it is necessary to remember that the English word ‘process’ was translated into the Polish version of Article 18(1) of the Directive as *procedura* (‘procedure’), whereas it is not necessarily used in this meaning in the Directive (for example, Recital (45) sentence 2 of the Preamble to the Directive states that ‘[q]uantifying harm in competition law cases is a very fact-intensive process’). Moreover, the Polish interpretation seems to run counter to the aims of Recital (48) sentence 3 of the Preamble whereby ‘[t]he provisions in this Directive on consensual dispute resolution are therefore meant to facilitate the use of such mechanisms and increase their effectiveness’. It also does not take into account the arguments on this issue of both foreign and Polish researchers. Literature says with certainty that consensual dispute resolution should be understood broadly, to also cover negotiations between the parties and/or their lawyers. It is thus not limited to formal mechanisms of dispute resolution (Wijckmans, Visser, Jaques and Noël, 2015, p. 76; Modzelewska de Raad, 2016, p. 173–174), even though in order to rely on the suspensive effects referred to in Article 18(1) of the Directive, evidence should be provided that negotiations are actually taking (or have taken) place.

Another interesting issue here is the mitigating effect of consensual dispute resolution on a fine being imposed by a competition authority for an infringement of competition law (to find out more about this issue, see Piszcz, 2017b). Article 18(3) of the Directive states that the authority may consider compensation – paid as a result of a consensual settlement and

<sup>31</sup> Journal of Laws 2016, item 1823.

<sup>32</sup> See draft Explanatory Notes accompanying the ACD, p. 25.



prior to its decision imposing a fine – to be a mitigating factor when setting the fine. In addition, Article 2(22) of the Directive defines a consensual settlement as an agreement reached through consensual dispute resolution. Currently, Article 111 of the Polish Act on Competition and Consumer Protection, which speaks of aggravating and mitigating factors, allows the Polish competition authority to consider compensation, as provided for in Article 18(3) of the Directive. The drafters of the ACD have thus rightly not taken any steps to further amend it.

It is also worth noting the suspensive effect of consensual dispute resolution in terms of court proceedings. Pursuant to Article 18(2) of the Directive, without prejudice to provisions of national law in matters of arbitration, Member States shall ensure that national courts seized of an action for damages may suspend their proceedings for up to two years where the parties thereto are involved in consensual dispute resolution concerning the claim covered by that action for damages. Importantly, in case of a suspension of proceedings before a Polish civil court upon the request of both parties, according to Article 182 § 1 CPC, the court shall discontinue them unless the parties file a request to resume the proceedings within one year from the date of the decision on its suspension. The drafters of the ACD correctly decided to increase the maximum length of the suspension period for circumstances described in Article 18(2) of the Directive from one to two years (Article 14 ACD). This amendment is rightly limited to competition law cases.

## VII. Summary

It is obvious that the drafters of the Polish Act on Claims for Damages for Infringements of Competition Law (ACD) had to choose between the minimal solutions set out in the Damages Directive and going beyond its literal scope. It can be seen from the governmental draft that Poland could have stepped away from the minimal provisions of the Directive on more occasions than it actually did. In some aspects described above, there is also a risk that the Directive will not be implemented in an appropriate way.

To sum up the matters of substantive law against the background of the transposition process of the Damages Directive into Polish law, a few elements are worth noting. First, the liability type remains unchanged as fault-based, albeit with some adjustments, those required by the Damages Directive included. These adjustments include, in particular, liability towards anyone who suffered damage (indirectly injured party included),

as well as the presumption of fault and presumption of harm caused by an infringement of competition law. Second, limitation periods have been adjusted to the requirements of the Damages Directive, especially in relation to their length (five years), the moment when the limitation period begins to run, and the circumstances under which it is suspended. Furthermore, the ACD amends Article 442<sup>1</sup> paragraph 1 of the Civil Code so as to include the factor of ‘due care’ when assessing if the injured party could learn of the damage and the person liable to redress it. The latter amendment will affect not only competition-based damages claims but the entire scope of tort-based liability. Third, rules governing joint and several liability in private enforcement of competition law, based on the Civil Code, will not be substantively changed. However, the ACD does transpose the Damages Directive’s provisions on the limitations of such liability when it comes to SMEs. Keeping in mind their complexity and ambiguousness, the practical application of these rules creates many doubts. Fourth, significant amendments were not necessary in relation to the quantification of harm, since both the Damages Directive and the Polish Civil Code include the same rules in this respect. The only exception in this regard concerns the issue of ‘interest’, which has been slightly changed by the ACD because, unlike the Civil Code, according to motive 12 of the Damages Directive the injured party has the right to interest from the time when the competition harm occurred. As a consequence, a relevant amendment has been included into the ACD. Furthermore, irrespective of the supportive role of the *Guidelines on quantifying harm* issued by the European Commission, the ACD contains provisions on the competition authority assisting the court in this context. However, as mentioned already, the soft nature of these rules can cause doubts in relation to their practical significance. Fifth, the ACD includes provisions on the passing-on of overcharges. In this context, the ACD defines the notion of an overcharge and creates a rebuttable presumption that the overcharge has been passed on to indirect purchasers. As a result, it is worth emphasising that the ACD properly applies the substantive law rules included in the Damages Directive. Even if private competition law enforcement does not start swiftly in Poland after the transposition process is concluded, it will be difficult to say whether this is caused by the manner of implementing the Damages Directive. The real reason would be either because the Damages Directive misaddresses the issues of the underdevelopment of private enforcement or it does address them but the provisions of the Damages Directive are not shaped properly.

To sum up the matters of procedural law contained in this report, it is first necessary to comment on the approach to the issue of standing to sue.

The relevant draft provisions, and in particular those regarding standing of non-governmental organisations, should be welcomed. However, it is necessary to emphasise that those provisions do not seem designed so as to prevent improper litigation. Second, making conclusions on the issue of the disclosure of evidence, it is worth stressing that the rules of the Damages Directive governing that matter, access to files of the competition authority included, are not only complex but are also imperfectly drafted. This is also the most debated issue of private enforcement, as it sits on the verge of private and public interest of competition law enforcement. The future will show how the rules transposed into the Polish legal system will work in legal practice. It is expected that the most interesting part of the issue is the future interplay between the courts, the parties to the proceedings and the competition authority in getting and granting access to evidence of great importance to the final result of the proceedings. Third, also in case of provisions on the effect of national decisions on private enforcement actions (in particular cross-border effect of national decisions), it is unclear how the transposed rules will work in practice. A factual presumption described in part V.3 does not seem to ensure potential plaintiffs effective private enforcement actions under civil law, in particular if compared to Member States who chose, for example, a rebuttable presumption. Fourth, regrettably, the drafters of the ACD have not decided to amend current Polish provisions on collective redress on the occasion of the transposition of the Directive, even though practice has proven that those provisions are, in some aspects, not tailored to suit the needs of both courts and procedural parties.<sup>33</sup>

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<sup>33</sup> However, the *Sejm* is working on amendments to provisions on collective redress in general on the occasion of the introduction of the legal solutions to facilitate the recovery of debt (draft no 1185).

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## I. Manner of implementing the Directive

Since the enactment of the first Romanian competition law (Law 21/1996), this contained a specific provision stressing the right of victims of competition law infringements to obtain compensation for the damages which they have incurred. *‘Apart from the sanctions applied in accordance with this law, the right of a physical and legal persons to obtain full compensation for the damages created through an anticompetitive act prohibited by this law remains reserved’.*

This rule, which merely re-states the principle of torts liability, was supplemented in 2010 and 2011 with several specific provisions, aimed at creating a specific framework for the private enforcement of competition rules. The new provisions regarded: passing-on of overcharges; statute of limitation; standing of consumer associations in actions for damages; access to the file of the competition authority; and single (instead of joint and several) liability of leniency applicants. These provisions were inspired by the debates and the works of the European Commission,<sup>1</sup> since the European Court of Justice gave force to the right to compensation of private victims of antitrust infringements. At the time of its enactment, the legal framework provided by Romanian law was among the most advanced in the European Union. Private litigation cases started to appear after 2011,

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<sup>1</sup> The ‘Green Paper’ of 2005 and the ‘White Paper’ which followed in 2008.

although most ended up being finalized with out-of-court settlements. Up to now, there is only one case, decided by the Bucharest Court of Appeal, in which a private plaintiff obtained the recovery of damages from a state-owned former monopoly. The latter was previously found to have abused its position in the market for postal deliveries by the Romanian Competition Council.<sup>2</sup> The decision of the Court of Appeal is currently under review by the High Court of Justice.<sup>3</sup>

The draft recently presented by the Romanian government differs from the Draft Law which was circulated with the stakeholders and submitted to public consultations in the second half of 2016. The intention seems to be at the moment to implement Directive<sup>4</sup> through an emergency government ordinance (hereinafter, EGO), since the implementation deadline had already passed and the European Commission initiated formal infringement procedures against Romania. It has to be said, however, that the implementation of the Directive does not qualify, as a matter of principle, for the use of a legal instrument such as an EGO. For this reason, this report will refer to the Draft Law rather than the draft EGO. If adopted through an EGO, the legal provisions implementing the Directive may be subject to a significant review in the Parliament, which will be eventually called to approve the EGO, with any amendments it may deem necessary.

## II. Competent courts

*De lege lata*, actions for the recovery of damages caused by competition law infringements may be brought before the lower courts ('judecătorie'). This is not the most favourable situation, given the relative lack of experience of judges of the lower courts, and the complex technical aspects often emerging in actions for damages based on competition law infringements. The Draft Law which is currently proposed by the government of Romania, proposes to assign first-instance competences to decide on such cases solely to the Bucharest Tribunal, the latter being a higher court with judges

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<sup>2</sup> The decision, in Romanian, may be found at: [http://www.consiliulconcurrentei.ro/uploads/docs/items/id2940/decizia\\_nr52\\_din\\_16122010\\_publicare.pdf](http://www.consiliulconcurrentei.ro/uploads/docs/items/id2940/decizia_nr52_din_16122010_publicare.pdf)

<sup>3</sup> Details available at: [http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/?ms\\_code=rom](http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/?ms_code=rom)

<sup>4</sup> Reference to the 'Directive' means throughout this text, to 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.

generally possessing a better understanding of competition law issues. However, the appointment of only the Bucharest Tribunal – rather than also the tribunals located in other Romanian cities (there is a tribunal in the capital city of each county, so a total of 42 tribunals across Romania), might affect the ability of small victims to go against the perpetrators of competition law infringements. The proposal derogates from the main basic rule of civil matters in Romania, whereby claims are brought against the defendant. However, the proposed provision neither replicates the rule which assigns competence for cases brought by consumers to the court from the area in which they reside, nor the rule which provides that actions for the recovery of damages may also be brought before the courts of the area where the wrongdoing (tort) took place or where the damages occurred.

### **III. Substantive law issues**

#### **1. Limitation periods**

In its current form, Romanian Competition Law provides that actions for damages may be brought by victims within two years after the relevant sanctioning decision of the Romanian competition authority has become final, further to a court decision in this respect.

The Draft Law put forward by the government adopts in its entirety the solution proposed by the Directive. Hence, the right to seek damages is to extinguish after five years. Also, the limitation period shall not run prior to the cessation of the competition law infringement, or prior to the date when the plaintiff became aware, or should have reasonably become aware, of the infringement of competition rules which had inflicted damages upon him/her and the identity of the perpetrator. The period shall be suspended for the duration of the investigation carried out by the Romanian Competition Council and one year afterwards. For actions for damages brought against small and medium sized companies (hereinafter, SMEs) and against the beneficiaries of leniency, the new rules provide that if other defendants end up bankrupt, the statute of limitation shall run out three years after the final bankruptcy decision. Also, a suspension will occur during alternative dispute resolution procedures, albeit not exceeding two years, for the plaintiffs and the defendants involved in such procedures.



## 2. Joint and several liability

As envisaged by the Draft Law, leniency applicants against whom actions for the recovery of damages are brought cannot be held responsible for such damages jointly and severally with their co-infringers.

The Draft Law implementing the Directive goes one step further, following the lines indicated in the Directive. Hence, future legislation will restate that co-perpetrators will be jointly and severally liable for the damages they inflicted through their anticompetitive behaviour, with two exceptions:

- i. A small and medium sized company (as defined in Recommendation No 2003/361/CE of the European Commission of 6 May 2003) will be liable only towards its direct and indirect purchasers provided that: its market share on the relevant market was less than 5% during the infringement and if employing joint and several liability may endanger the economic viability of the SME and may result in a total loss of the value of its assets. A SME will be liable towards other victims of the infringement only if full compensation cannot be obtain from other co-infringers. This exception shall not apply if the SME was an iniator or ring leader of the infringement, or if it has previously committed another competition law infringement.
- ii. Succesful leniency applicants will be liable jointly, but not severally, towards their direct and indirect purchasers. They will be liabe towards other victims only if full compensation cannot be obtained from those co-infringers which did not benefit from the leniency regime.

## 3. Quantification of damages

In line with the Directive, the Draft Law implementing it includes provisions concerning the quantification of damages.

The two main aspects of this section are: the relative presumption that anticompetitive agreements and concerted practices cause damages, and the possibility of the Romanian Competition Council to assist the court in such matters as *amicus curiae*.

The treatment of the aforementioned legal presumption must be criticised. It brings little value to a matter subject to long-established concepts of torts liability whilst, at the same time, limiting the application of the said presumption only to anticompetitive agreements and practices with the exclusion of the abuse of dominance. This reflects a bedrock

assumption of the administrative enforcement of competition rules – that cartels and vertical anticompetitive agreements produce harm, without the need to prove it in specific cases investigated by the competition authorities – with little relevance to the recovery of damages, where such a concept is already covered by torts liability. On the other hand, there is no abuse of dominance without the abused – and, consequently, affected – entities, so it would have made sense to extend the presumption to unilateral conduct as well.

#### 4. Passing-on of overcharges

The Draft Law implementing the Directive in Romania is rich and detailed with respect to the passing-on of overcharges. Still, the legislation currently in force in Romania already refers to such situations, although in a more concise manner.

First, the Draft Law sets out the basic principle that both direct and indirect purchasers may seek damages from undertakings which infringe competition rules. Importantly, it is provided that the suppliers of the infringers may also seek damages, thus covering damages caused both downstream and upstream.

The passing-on defence is permitted, but the claimant must prove that a transfer of the overcharge had in fact occurred, with the possibility to ask the plaintiff and third parties to disclose relevant information in this respect. It is not clear who these third parties are, from which disclosure may be sought, as they should be part of the trial. This means that unless indirect purchasers join the same case, they cannot be compelled to provide data and evidence supporting the defence raised by the infringer. In addition, the Draft Law provides that disclosure requests directed at the plaintiff and third parties should be ‘reasonable’, which is an undefined term foreign to the Romanian legal system.

From the other side, indirect purchasers may ask to be compensated if their claim meets three strict cumulative conditions:

- a) The defendant infringed competition rules;
- b) The infringement resulted in an overcharge to the direct purchaser from the infringer;
- c) The indirect purchaser acquired the goods or services which were the object of the competition law infringement or acquired goods or services incorporating them.

## IV. Procedural issues

### 1. Standing

Direct purchasers and indirect purchasers can bring actions for damages against undertakings which infringed competition rules. Although the Draft Law implementing the Directive is not specific – and, in fact, because the Draft Law is not specific – the concept of indirect purchasers covers not only those who purchased the contested good or services from the direct purchaser (first-degree purchasers), but also any subsequent purchasers, as long as they are able to demonstrate that they suffered damages and the three aforementioned conditions are met. This aspect is important because in today's economy supply chains tend to be longer than just two or three links (the infringer, its direct purchaser and an indirect purchaser). Consumers, for instance, are often separated from the infringers by several levels in such chains.

Speaking of consumers, the Draft Law implementing the Directive provides that associations for the protection of consumers may bring legal actions for the safeguarding of the interests and rights of consumers. In truth, the Draft Law does not bring anything new to the current picture. This right has existed in Romania for many years already, but did not work in practice. No such actions have ever been brought before Romanian courts, despite the fact that they are exempted from stamp duties and other taxes or duties. Hence, the simple re-statement of the fact that consumer associations have standing to bring legal actions on behalf of consumers is a significant shortcoming of the proposal. It should be noted simultaneously that Romania did not make any changes in its legislation to implement any of the proposals put forward by the European Commission in its *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*.

### 2. Disclosure of evidence

The treatment of the disclosure of evidence, as provided by the Draft Law implementing the Directive, is in fact a step back from the current regime on rights available to plaintiffs applicable at the moment under Romanian civil procedural rules.

The draft reflects closely the spirit of the Directive itself, which has an obvious bias in favour of shielding leniency and settlement submissions

from any disclosure, to the detriment of the right to full and effective compensation of victims of competition law infringements. This stance runs counter to what the European Court of Justice stated in its seminal *Pfleiderer*<sup>5</sup> judgment: ‘*The provisions of European Union law on cartels, and in particular Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 TFEU and 102 TFEU, must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement. It is, however, for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law weighing the interests protected by European Union law*’. The key part of this ruling is ‘*from being granted access*’ and the meaning of ‘access’ is beyond any doubt seen as the possibility to have direct contact with the documents which the Commission wanted to protect. A similar judicial view is expressed in the *Donau Chemie* judgment.<sup>6</sup>

The Draft Law implementing those provisions of the Directive which deal with the disclosure of evidence are, basically, an exact translation of the corresponding parts of the Directive. The relevant provisions even have the same numbering as those in the Directive – Article 5 to Article 8. One specific addition in this context are the penalties proposed by the Romanian government for the failure to properly protect leniency and settlements submissions, ranging from 0.1% to 1% of the turnover of the infringer if it is a legal person (this is, in fact, a very large sanction), and up to approximately 1200 EUR for individuals (this fine is almost insignificant).

### 3. Effect of national decisions

The proposed law designed to implement the Directive takes over the solutions proposed by the European Commission, namely:

- I. Final decisions of the European Commission and of the Romanian Competition Council, or final decisions of Romanian courts, will irrefutably establish that a competition law infringement took place.

<sup>5</sup> *Pfleiderer vs. Bundeskartellamt* – C 360/09, decision of the Grand Chamber of 14 June 2011.

<sup>6</sup> *Bundeswettbewerbshörde v Donau Chemie AG and Others*, C-536/11, decision of 6 June 2013.

II. A final decision of a national competition authority from another EU Member State, or a final court decision originating in another Member State, will create a relative presumption that an infringement of competition rules took place, in addition, wherever deemed necessary, with any other evidence.

Although the Draft Law seems to have intended to implement the provisions of Article 9 of the Directive almost literally, the way in which they were translated might result in an extension of the range of decisions which can be invoked in order to prove a competition law infringement. More specifically, whilst the Directive refers to a decision by a 'review court', that is, courts ruling on the validity of administrative decisions issued by competition authorities, the Romanian Draft Law does not include this specification. As such, it covers a wider range of court decisions, based on which an infringement may be presumed to have taken place. For instance, an earlier court decision rendered in a private litigation case, involving the same plaintiff and the same infringement, might be used by a subsequent plaintiff as a binding precedent regarding the existence of the wrongdoing. On the face of it, such an effect of the law would be in conflict with the principle of the relativity of court decisions, which are binding only for the parties. However, implementing such a solution might actually make sense, considering '*specialia generalibus derogant*' and given the principle of full and effective compensation of the victims of competition law infringements. Thus, the initial successful plaintiffs will pave the way for successive plaintiffs.

#### 4. Collective redress

As mentioned in the above section regarding court standing, Romania did not implement the European 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*.

Moreover, common rules of civil procedure in Romania do not allow, or facilitate significantly, collective or representative actions of the victims of competition law infringements. The only favourable provision, granting consumer associations standing in cases brought on behalf of consumers, has not resulted in even a single case so far brought by such associations. Of course, growing consumer awareness regarding their rights and the damages they incur as a result of competition law infringements might give this instrument a fresh start.

It has to be argued, however, that the sole fact that consumer associations are granted standing will not be sufficient to make damages actions more popular, unless additional provisions are introduced empowering them to bring representative actions and facilitating the aggregation of the victims (opt-out actions should be considered as well).

## **V. Consensual dispute resolution in antitrust enforcement**

The Draft Law implementing the Directive contains specific provisions with respect to arbitration and other alternative dispute resolutions mechanisms.

Thus, courts faced with actions for damages may suspend their procedures for a period of up to two years, allowing the parties to settle the claim amicably. A defendant, who agreed on an amicable settlement with a plaintiff, cannot be asked to compensate unrecovered damages which are due from his/her co-perpetrators if it proves impossible to recover them from those co-infringers. In other words, the liability for damages of a settling co-infringer is no longer joint but individual – solely for its contribution to the damage incurred. Moreover, the limitation period does not run during the time when the plaintiff and the defendant are engaged in an alternative dispute resolution process.

It is fair to say that the Draft Law proposed by the Romanian government should have gone one step further and made alternative dispute resolution mechanisms more attractive. It could have provided, for instance, reductions in stamp duties which have to be borne by plaintiffs who, in good faith, enter and discuss an out-of-court settlement.

## **VI. Other provisions**

The Draft Law implementing the Directive provides that the Romanian Competition Council will consider the payment of compensation by a competition law infringer to the victims, or the existence of a mechanism for covering such damages, as a mitigating circumstance when setting the amount of the administrative fine for that infringement. In practice, this provision will only be applicable where the infringers admit to their involvement in the wrongdoing. Otherwise, any payments made by the perpetrator to a victim might have any other basis, and should thus not be taken into account when considering mitigating factors.

## VII. Summary

The current legislative proposals put forward by the Romanian government for the implementation of the Directive into the Romanian legal system follows rather closely the lines set out by the European Commission in the Directive. The proposals do little to ensure that the victims of competition law infringements will benefit from full and effective compensation. There are several inconsistencies in the drafts circulated so far, which might end up being corrected at a later stage, such as the time of its approval by the Parliament. Moreover, a lack of coordination with other provisions of Romanian law is apparent. Besides the fact that the preferred route seems to be that of following the Directive, the lack of coordination and consistency of the drafts circulated so far is accentuated by the fact that the Directive does not really bring anything new into the legal systems of EU Member States.

Every country in the European Union has long-established legal mechanisms for the recovery of damages, through torts liability in the common-law system and delict-based liability in the continental system. Hence, the main purpose of the Directive, and the way in which it is implemented, should be to enhance and boost the application of these rules in the more technical setting of competition law infringements. However, it is up to the national legislators to ensure that the new mechanisms integrate properly with their overall legal systems and truly facilitate the recovery of damages by victims of competition law infringements.

## I. Manner of implementing the Directive

### 1. Early-history of private enforcement in Slovakia

The implementation of the Damages Directive is not the first attempt to regulate procedural or substantive rules that can, at least partially, fall within the concept of private enforcement of competition law. The original text of Article 42 of 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) stipulated that ‘consumers, whose rights were violated by a prohibited restriction of competition, can submit a claim to the court for the infringer to cease such behaviour and repair the illegal state. A legal person empowered to protect consumer rights can lodge the same claim’. The title of this provision was quite misleading: ‘Civil Disputes from Prohibited Restrictions of Competition’. Reading the title of the said provision literally could have led to the argument that Article 42 APEC represents *numerus clausus* of possible civil claims. Furthermore, this provision referred to ‘civil law disputes’ and, due to the dichotomy of Slovak civil law, to civil law *stricto sensu* centred on the Civil Code (*Občiansky zákonník*), as well as to commercial law governed primarily by the Commercial Code (*Obchodný zákonník*). Hence, it was not clear to which claims it referred to.

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Currently, there is no doubt that damages caused by competition infringements are covered by the rules of the Commercial Code<sup>1</sup> – particularly its Article 373 et seq. – irrespective of whether the injured party is an undertaking or not. Compared to rules on liability for damages under the Civil Code<sup>2</sup> (general system), liability under the Commercial Code is based on principles of strict liability. Therefore, the real purpose of the provision of Article 42 APEC became unclear due to its quite limited content (a form of injunction and *restitutio in integrum* order) without any reference to damages claims. A possible involvement of consumer associations, as actively legitimated claimants, represents, therefore, the only measure different from those enshrined in the Commercial Code and reflects the first form of possible collective redress. Nevertheless, this provision has never been used as the basis for a successful court dispute, and there is no final meritorious judgment dealing with a case under the previous wording of Article 42 APEC.

## 2. Awaiting the Damages Directive

By Amendment 2014 of the APEC,<sup>3</sup> the provision of Article 42 was completely replaced by a new provision regarding liability for damages caused by a competition law infringement. This regulation was introduced while the Damages Directive was being drafted, thus inspiration by the draft of the Directive is evident. Amendment 2014 laid down a specific regime, and a modification of joint and several liability of leniency applicants was introduced:

- a party to the competition restricting agreement which fulfilled the conditions for the participation in the leniency programme is not obliged to pay damages if the damages could be paid by other parties of the same competition restricting agreement;
- a party to the competition restricting agreement which fulfilled the conditions for the participation in the leniency programme is excluded from the obligation to settle with those other participants of the competition restricting agreement which paid damages;

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<sup>1</sup> Act No. 513/1991 Coll. Commercial Code as amended.

<sup>2</sup> Act No. 40/1964 Coll. Civil Code as amended.

<sup>3</sup> Act No. 151/2014 Coll. amending 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 of other central bodies of state administration of the Slovak Republic as amended as amended and amending certain other acts.

- if the damage cannot be paid by other participants of the same competition restricting agreement, a party to the competition restricting agreement which fulfilled the conditions for the participation in the leniency programme is liable only for damages caused to its own direct or indirect customers or suppliers.<sup>4</sup>

The new wording of Article 42 APEC removed, therefore, the previously available form of collective redress and did not replace it with any corresponding regulation. On the other hand, it tried to conciliate the right for damages and the advantageous position of successful leniency applicants in order to support the leniency programme.

This version of APEC's 'civil claims' was quite short-living because it was completely repealed by the act transposing the Damages Directive with the effect from 27 December 2016.

### 3. Transposition of the Damages Directive

The Slovak legislator decided to transpose the Damages Directive following the simplest approach possible (which is unfortunately common in Slovakia) and so the Directive was transferred into a brand new act dealing with private enforcement. The act has quite a long title: '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' (hereinafter, Act 350/2016). The method used was briefly accounted for in the explanatory memorandum of the draft bill: 'Necessity of the separate legal regulation is given by the specificity of the rules of the directive...'.<sup>5</sup>

Although such an approach to the transposition is quite easy for legislative bodies (sometimes it is enough to copy a provision of the relevant directive), it is not easy to understand it *vis-a-vis* the whole context of the legal rules contained in other laws.

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<sup>4</sup> Cf. Art. 42 APEC.

<sup>5</sup> [http://www.rokovania.sk/File.aspx/ViewDocumentHtml/Mater-Dokum-203571?prefixFile=m\\_](http://www.rokovania.sk/File.aspx/ViewDocumentHtml/Mater-Dokum-203571?prefixFile=m_) (13.03.2017).

## II. Scope of the implementation

Act 350/2016 is manifestly a mere transposition of the Damages Directive and does not represent any form of codification of private enforcement of competition rules. The act regulates ‘some of the legal relations relevant for the law on damages arising from a violation of competition law’ and ‘some of the rules of enforcement of such law’<sup>6</sup> and therefore the scope of this act is very limited. Other possible claims and rules for damages claims are covered by the Commercial Code (Article 21 of Act 350/2016) and further enforcement rules can be found in the Civil Disputes Code (*Civilný sporový poriadok*)<sup>7</sup> (Article 21 of Act 350/2016). Act 350/2016 represents *lex specialis* to the Commercial Code and the Civil Disputes Code, and therefore provisions of the Commercial Code and the Civil Disputes Code contrary to Act 350/2016 are not applicable within competition law enforcement. However, provisions of Articles 21 and 22 of Act 350/2016 can be read so that Act 350/2016 together with the Commercial Code and the Civil Disputes Code represent *numerus clausus* measures for damages claims arising from competition law infringements (this system, indeed, does not cover remedies other than damages claims). Moreover, the notion of ‘competition law’ is defined quite strictly in Act 350/2016 because it covers merely Article 101 and 102 TFEU and provisions of the APEC on competition restricting agreements and the abuse of a dominant position (and therefore does not cover e.g. violations of competition law by public bodies under Article 39 APEC).

The Slovak legislator decided to transpose the Damages Directive outside the Commercial Code and the Civil Disputes Code but also outside the APEC. This approach meant that it was necessary to re-define concepts already enshrined in the APEC, such as ‘leniency programme’, ‘settlement’ or ‘cartel’.

## III. Competent courts

The Civil Disputes Code, which replaced and re-codified earlier rules on civil disputes (previously laid down by Act No. 99/1963), upheld the already existing ‘specialization’ of the District Court Bratislava II (*Okresný súd Bratislava II*) as first instance, and the Regional Court in Bratislava (*Krajský súd v Bratislave*) as the appellate court for disputes derived ‘from economic

<sup>6</sup> Act 350/2016, Art. 1.

<sup>7</sup> Act No. 160/2015 Coll.

competition'.<sup>8</sup> This provision does not represent a genuine specialization of the District Court Bratislava II or the Regional Court in Bratislava. Both courts are part of the judicial structure in Slovakia, which is build up from non-specialized district courts, regional courts and the Supreme Court of the Slovak Republic. The Specialized Criminal Court is the only specialized court in Slovakia. All courts shall deal with civil, commercial, family, administrative and criminal matters. Furthermore, the District Court Bratislava II cannot be considered a 'specialized commercial court' or 'competition court' because claims arising from unfair business practices are dealt with by District Court Bratislava I, District Court Banská Bystrica and District Court Košice I (first instance) and other specific business-and-commerce-related disputes are dealt with by other first instance courts.<sup>9</sup> Thus this 'specialization' of courts is more of an allocation of cases to 'smaller' courts from the centre, rather than a real attempt for specialization. Furthermore, there isn't even a specialization in competition matters, because decisions of the Antimonopoly Office of the Slovak Republic (hereinafter, AMO) are reviewed by the Regional Court in Bratislava (but by different panels than the appellate panel for commercial disputes, including possible damages claims); a decision of the regional court can be challenged by a cassation claim lodged with the Supreme Court.

In first instance courts, cases are handled by a single judge, appeals are handled by a panel of three judges. It seems, therefore, that it will be quite hard for a judge sitting alone to assess the whole complexity of a damages claim in competition matters.

## IV. Substantive law issues

### 1. Limitation periods

The provision of Article 5 of Act 350/2016 literally followed Article 10 of the Damages Directive. It stipulates that limitation periods 'shall not begin to run before the infringement of competition law has ceased and the

<sup>8</sup> Art. 27 Civil Disputes Code.

<sup>9</sup> Bills and checks disputes by District Courts Bratislava V, Trnava, Trenčín, Nitra, Žilina, Banská Bystrica, Prešov and Košice I; labour disputes by District Courts Bratislava III, Piešťany, Nové Mesto nad Váhom, Topoľčany, Ružomberok, Zvolen, Poprad, Košice II; bankruptcy and restructurization by District Courts Bratislava I, Trnava, Trenčín, Nitra, Žilina, Banská Bystrica, Prešov, Košice I; intellectual property by District Court Banská Bystrica; stock exchange disputes by District Court Bratislava V; public procurement District Court Malacky; preliminary review of consumers' contracts by Regional Courts in Bratislava, in Banská Bystrica and in Košice.

claimant knows, or can reasonably be expected to know of the behaviour and the fact that it constitutes an infringement of competition law, of the fact that the infringement of competition law caused harm to it and the identity of the infringer'. This is an unusual wording for national legislation. On the one hand, the Directive can give negative definitions and rules for the purposes of harmonization, on the other hand, national legislation shall provide comprehensible rules for citizens of a given country. Hence, the Act 350/2016 should have provided an answer to the question when the limitation period starts to run, rather than describe the time when it does not start to run.

General rules on limitation periods for damages claims set out by the Commercial Code contain a general four year limitation period that shall start to run when the injured party knows, or can reasonably be expected to know of the harm suffered and the identity of the person liable for damages. This limitation period will expire not later than 10 years from the end of the injurious behaviour that caused the harm.<sup>10</sup>

Act 350/2016 introduced a five year limitation period for competition damages claims without any cap on the limitation period. It is thus unclear how to read the provisions of the Commercial Code in light of Act 350/2016. Shall they be read together: the limitation period shall start to run under the Commercial Code but not earlier than required by Act 350/2016, and can run for 5 years within the 10 year cap under the Commercial Code? Another interpretation can be found in the provisions of Article 5 of Act 350/2016 as a comprehensive regulation of limitation periods in claims for antitrust damages, which thus make the provisions of the Commercial Code not applicable. The Explanatory Memorandum attached to the draft Act gives no explicit answer to this question.<sup>11</sup> However, in the Explanatory Memorandum the content of Article 5<sup>12</sup> Act 350/2016 is described as a 'basic postulate' of rules on limitation periods, and so it seems that the legislature does not expect any other rules for limitation periods.

The Slovak legislator opted in Act 350/2016 for the interruption of limitation periods during the investigation and the administrative procedure of the relevant competition case. Rules required by the Damages Directive were, however, mixed up in the Slovak Act. The latter requires the interruption of the limitation period 'if a competition authority takes action for the purpose of the investigation or its proceedings with respect of an

<sup>10</sup> Art. 397 and 398 of the Commercial Code.

<sup>11</sup> Dôvodová správa, osobitná časť, k § 6; <http://www.rokovania.sk/Rokovanie.aspx/BodRokovaniaDetail?idMaterial=25912> (13.03.2017).

<sup>12</sup> Originally Art. 6 in the Draft bill.

infringement of competition law to which the action for damages relates'.<sup>13</sup> The difference is that 'the new limitation period' starts to run one year after the infringement decision has become final, or after the proceedings are otherwise terminated. Even such regulation does not seem to be contrary to the Directive (since the maximum duration of the limitation period is not given), launching a new limitation period one year after a final antitrust decision seems to lead to an unbalanced prolongation of legal uncertainty of the infringer, because there is no reason to prolong the new limitation period (whereas there are, indeed, reasons for such approach in cases of a suspended limitation period).

The provision of Article 6(7) of Act 350/2016 gives an additional limitation period: one year after the moment when the claimant gets to know, or could know that he/she can claim damages only from a successful leniency applicant.

## 2. Joint and several liability

Provisions on joint and several liability are again an almost literal copy of the content of the Damages Directive. Article 11(1) of the Directive was mirrored in Article 6(1) and Article 6(2) of Act 350/2016. The right for compensation between injurers and the limitation of liability of successful leniency applicants (Article 11(5)) were copied into Article 6(3) and 6(4) of the Act.

Limited joint and several liability of an immunity recipient (Article 11(4) of the Directive) was transposed into Article 6(7) of Act 350/2016 containing the same wording.<sup>14</sup> The Damages Directive requires Member States to 'ensure that any limitation period applicable to cases under this paragraph is reasonable and sufficient to allow injured parties to bring such actions'.<sup>15</sup> The transposition of this provision into Act 350/2016 is quite problematic. The first problem lies in the wording of the provision itself, because it seems that something is missing in the legislative text because the third sentence of Article 6(7) refers to '[l]imitation period under the first

<sup>13</sup> Literal wording of the Directive in Art. 5(3) Act 350/2016.

<sup>14</sup> An immunity recipient is jointly and severally liable only to its direct purchasers or indirect purchasers or direct providers or indirect providers. To other injured parties, it is jointly and severally liable only where full compensation cannot be obtained from the other infringers involved in the same breach of competition law. The limitation period under the first sentence will lapse one year after an injured person knows or could know that it can claim damages only from an immunity recipient.

<sup>15</sup> Damages Directive, Art. 11(4).

sentence (...)’ but there are no provisions on limitation periods in the first sentence of this paragraph (the first sentence deals with a substantive limitation of joint and several liability). Moreover, the provision on this specific limitation period refers to situations when it is possible to claim damages only from an immunity recipient (i.e. situation under the second sentence). Notwithstanding this terrible legislative technique, in a specific set of coincidental circumstances, Article 6(7) can shorten the limitation period compared to the general limitation period under Act 350/2016. This is so because Article 5(2) defines limitation period differently, without preference to a later termination of the limitation period: either five years after an injured party knows or should have known all elements of the damage, or one year after he/she gets to know of the possibility to claim damages only from an immunity recipient. Thus, this formulation of the limitation period gives greater protection to immunity recipients than to the objective of providing claimants with enough time to raise their claim, as required by the Directive.

The Damages Directive left Member States quite an open challenge to reconcile the requirement of full compensation under its Article 3 and the derogation from joint and several liability of infringers that are small or medium-sized enterprises (SMEs) under Article 11(2) of the Directive. Act 350/2016, again, copied the provisions of Article 11(2) and (3), however with two differences.

First, it refers to the definition of SME under Annex I Article 2 of Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty,<sup>16</sup> rather than Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises<sup>17</sup> as the Directive does. Slovak law corrected therefore a flaw of EU legislation, which imposed a requirement to follow a non-binding act (Recommendation) via its incorporation into legally binding acts (Directive). To overcome this fault, Act 350/2016 refers to the definition of a SME contained in a legally binding act (Regulation). On the other hand, Slovak law has no option as far as correcting the flaw of the Damages Directive which requires a more favourable treatment of SMEs but not of micro-enterprises. Both the aforementioned Recommendation and the Regulation of the Commission defines the relevant category as

<sup>16</sup> OJ L 187, 26.06.2014, p. 1.

<sup>17</sup> OJ L 124, 20.05.2003, p. 36.

‘micro, small and medium-sized enterprises’ (rather than just SMEs), and gives a particular definition of micro-enterprises and small enterprises.

Second, Act 350/2016 adds another derogation from the favourable treatment granted by the Directive to SMEs – ‘it is not possible to recover damages from other infringers that were involved in the same infringement’.<sup>18</sup> This provision was designed to transpose the Directive’s requirement to find a balance between the favourable treatment granted to SMEs and the principle of full recovery of damages. The Slovak provision was clearly inspired by the derogation provided for immunity recipients, but in this case without any possibility to prolong the limitation period.

### 3. Quantification of harm

Act 350/2016 solved the first requirement of Article 17(1) of the Directive<sup>19</sup> quite simply by – as evident from ‘the Table of Equality’<sup>20</sup> – referring to the general application of the Commercial Code and the Civil Disputes Code only as a general safeguard.<sup>21</sup> Power of the court to estimate the amount of the harm when its quantification is ‘disproportionally difficult or absolutely impossible’ represents the transposition of the Article 17(1) of the Directive. However, the Slovak wording is somewhat different than the Directive: where the word ‘practically’ impossible is used in the Directive, it is ‘absolutely’ impossible in Slovak law and where the Directive speaks of ‘excessively difficult precisely’, the Slovak Act uses the term ‘disproportionally difficult’. Although there are differences between the EU and the Slovak law, and there can be discussion on the meaning of these differences, the meaning of Act 350/2016 shall be the same as the Directive in light of the duty for the application of national laws to comply with EU law. Equivalently to the Directive, the Act introduces only a rebuttable presumption that cartel infringements cause harm, but does not provide an additional tool that could help claimants to file an effective action (e.g. presumption on the amount of harm).

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<sup>18</sup> Act 350/2016, Art. 6(6).

<sup>19</sup> ‘Member States shall 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.’

<sup>20</sup> This table is a mandatory part of draft bill documentation and shows the equivalence between provisions of the transposed directive and provisions of the draft.

<sup>21</sup> [http://www.rokovania.sk/File.aspx/ViewDocumentHtml/Mater-Dokum-203572?prefixFile=m\\_](http://www.rokovania.sk/File.aspx/ViewDocumentHtml/Mater-Dokum-203572?prefixFile=m_) (13.03.2017).



Cooperation with the Slovak competition authority was not enshrined in Act 350/2016. Instead, AMO was given a new competence in the amended APEC, while the wording of the provision corresponds to Article 17(2) of the Directive.<sup>22</sup> In addition to this directive-style model of cooperation, the transposition model of ‘national’ *amicus curiae* was introduced independently to the Civil Disputes Code (Article 94 of the Civil Disputes Code); thereby the model of the Commission acting as *amicus curiae* under Regulation No. 1/2003 was transferred onto the national level with the AMO acting as *amicus curiae* in purely national cases.

#### 4. Passing-on of overcharges

Again, passing-on of overcharges represents a group of provisions that were copied from the Directive into Act 350/2016 without any substantial change. In this context, it is quite interesting to note the transposition of the EU requirement that ‘[i]n order to avoid overcompensation, Member States shall lay down procedural rules appropriate to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level’ in the Slovak provision stating that ‘(...) compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level (...)’.<sup>23</sup> This provision is definitely not procedural provision and therefore Slovak legislator transposed this requirement of the Directive merely by substantial rule.

### V. Procedural issues

#### 1. Standing

Act 350/2016 gives no further details regarding standing and thus general rules of civil court procedure apply (under the Civil Disputes Code). The focal point for finding possible claimants is the person who actually suffered harm by way of an anticompetitive behaviour. However, both the Directive and the Act distinguish between the term ‘injured party’ as a substantive term and a ‘claimant’ as a procedural term. They also do not solve the problem arising where another person succeeds in the right to compensation

<sup>22</sup> Art. 22(1)(n) APEC.

<sup>23</sup> Act 350/2016, Art. 7(1).

of the injured party by contract or *mortis causa*. Are rights of the ‘injured party’ linked merely to the person that actually suffered harm or also to its successors? The Directive and the Act do not seem to be precise in this context. On the other hand, the notion of a ‘claimant’ can cover all persons that raise an action for damages irrespective of whether they are actual injured parties or their successors.

Neither associations of consumers nor public authorities have standing in damages claim disputes in favour of consumers or other injured parties, unless they are acting as proxies of certain individual consumers.<sup>24</sup>

## 2. Disclosure of evidence

The Slovak legal order does not provide any possibility to seek a court order before the commencement of civil proceedings in order to enable the filing of a civil action. The court can be asked to order to secure such evidence, even before filing an action by the claimant, only if there is concern that a piece of evidence will not be available in the future, or will be produced only with serious difficulties.<sup>25</sup>

During the court proceedings the court or the judge can order anybody to produce a document that may be used as a piece of evidence.<sup>26</sup> However, due to the contradictory character of civil court proceedings, the court or the judge will issue such order only if such evidence is mentioned or described by one of the parties of the civil proceedings. The obligation to produce a document in one’s possession is a general obligation and covers all subjects of law, including parties to the court proceedings, state authorities as well as third parties. Therefore, the transposition of Articles 5 to 8 of the Damages Directive represents a limitation of the general power of Slovak courts to order to produce a document or other evidence. In this part, provisions of Articles 12 to 18 of Act 350/2016 represent *lex specialis* to the Civil Disputes Code. All corresponding provisions of the Directive were transferred to Slovak law in a detailed manner. Provisions which at least partially relate to the protection of evidence applied by the AMO, the integrity of its investigations as well as the effectiveness of measures

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<sup>24</sup> Associations of consumers have standing in cases on the protection of ‘collective interests of consumers’. However, only refraining from the illegal behaviour and *restitutio in integrum* can be requested in such proceedings and thus they are not covered by the Directive (Cf Art. 54 of the Commercial Code).

<sup>25</sup> Cf. Art. 338 of the Civil Disputes Code.

<sup>26</sup> Cf. Art. 129(2) CCPC, Art. 185 CDC.

aimed to enforce competition law via public (administrative) law remain separated from the APEC, even though the latter Act contains detailed provisions on the protection of leniency applications, disclosure of evidence etc.<sup>27</sup> Hence, there is a strict distinction between the protection of leniency applications and files of the AMO for public law purposes (APEC), and their protection for civil claims purposes (Act 350/2016).

While the rules of the Directive regarding disclosure of evidence left little for the Member States' own approach, its provision on penalties for non-compliance with these disclosure rules (Article 8 of the Directive) left the Member States with several options. First of all, there is a requirement to impose 'effective, proportionate and dissuasive' penalties. For this purpose, the Damages Directive orders (or suggests?<sup>28</sup>) other alternative penalties: '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'.

The possible pecuniary sanction for refusing to provide a documents is quite low in Slovakia (up to 500 € and 2000 € in case of repeat offence<sup>29</sup>) compared to the possible level of damages in competition cases. Hence, it is not likely that a defendant will be willing to produce such document, even at the risk of being fined by the court. It is clear that such fines are neither effective, proportionate nor dissuasive as required by Damages Directive when it comes to cases concerning quite high damages. Liability to pay costs can be higher than the fine itself and such 'consideration' under Article 18(2) of the Act can be more deterrent than the fine. Furthermore, the Act copied all non-pecuniary alternative sanctions, that is, presuming the relevant issue is proven as well as dismissing claims and defences in whole or in part. These non-pecuniary sanctions can be employed only if a pecuniary sanction appears to be ineffective.

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<sup>27</sup> APEC, Art. 40 and 41.

<sup>28</sup> Wording of this provision is unclear because of the different language versions: some of them formulate the provision as an order to the Member State ('shall include' in the respective language), e.g. English, Czech, Italian, Spanish versions, or a suggestion to the Member States ('should include' or 'can include' in the respective language), e.g. Slovak, German versions.

<sup>29</sup> Art. 102 of the Civil Disputes Code.

### 3. Effect of national decisions

Under Article 193 of the Civil Disputes Code, the court is bound by the decision of an authorised body that states that an administrative infringement was committed and specifies the identity of the infringer. Since the AMO adopts such decisions in competition matters, these provisions have already been in line with Article 9(1) of the Damages Directive. Nevertheless, Act 350/2016 unnecessarily specified this general rule in its Article 4(1) with respect to the decisions issued by the AMO and its possible subsequent judicial review.

It was quite interesting to see how the Slovak legal order adapts the requirement of the Damages Directive that decisions of a foreign competition authority can be presented at least as ‘prima facie evidence’.

Act 350/2016 uses quite a confusing wording for the transposition of this requirement: ‘The final decision on a competition infringement issued in another Member State of the European Union is considered evidence of the competition infringement unless it is proven otherwise in the court proceedings on damages claims’.<sup>30</sup> Under general civil procedural rules, ‘[t]he court considers a fact, for which the law lays down a presumption that allows contrary evidence, proven unless it was found otherwise during court proceedings’.<sup>31</sup> So in the context of decisions of foreign competition authorities, what is the ‘fact’ that can be rebutted? The hypothesis of Article 4(2) of Act 350/2016 states: ‘The final decision on a competition infringement issued in another Member State of the European Union is considered evidence of the competition infringement’. What shall the party to the proceedings prove: (1) that the decision is not a piece of evidence (i.e. it is inadmissible as evidence), or (2) that the content of the decision is not true, or (3) that the decision is not a decision on an infringement (because it is not related to a particular infringement at issue)? Hence it can be suggested to form such a rebuttable presumption as a presumption of the existence of a competition infringement if it was declared by a foreign decision, unless proven otherwise.

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<sup>30</sup> Act 350/2016, Art. 4(2).

<sup>31</sup> Art. 192 of the Civil Disputes Code.

#### 4. Collective redress

Individual claims against undertakings that infringed competition rules can be effective in cases when the injured party has sufficient resources and legal support to prove such claims. The necessity to submit a well-prepared action, supported by sufficient evidence, will become even more evident after the application of the new Civil Disputes Code. Under its new procedural rules the court is not obliged to find the ‘objective truth’, i.e. real state of the matters at issue, but only to decide which ‘truth’ of the parties can be considered proven. Hence the party can lose its claims merely due to the fact that it is not able to timely produce enough evidence. Individual claims for damages arising from an infringement of competition rules can thus be effectively enforced mainly in disputes between undertakings and seem to be less effective in matters of final customers. An effective system of collective redress can overcome the economic power and legal support of the offender. The Damages Directive in its preamble (recital 13) explicitly declares that its aim is not to introduce a collective redress system.

Therefore, no collective redress provisions were introduced into Act 350/2016 (Smyčková, Kotrecová, 2016). Furthermore, the Civil Disputes Code does not contain provisions that could be employed in order to claim damages in competition matters. Since the Damages Directive does not require the introduction of a system of collective redress in competition matters, it is unlikely that Slovakia will enact such system anytime soon.

Nevertheless, some authors (Šramelová, 2010, p. 107–114) see some features of opt-in actions in Slovakia’s general procedural rules. It is possible to file a joint action by several plaintiffs, or the court can join several cases into a joined case in order to achieve procedural economy. These actions are, however, still separate and individual claims must be individually assessed by the court, although this could be done by a single judgment with multiple operative parts. Such approach can, however, ruin the case itself, because multiple individual parties with individual interests, different submissions, quality of evidence and incapacities showing before the court can really slow down the proceedings.

Furthermore, as Bejček warns (Bejček, 2010, p. 9 et seq.), the majority of claimants will be not willing to push through their relatively small claims, and so infringers will not be frightened by substantial claims for damages if the total damage consists of a myriad of small individual harms caused to customers.

## VI. Consensual dispute resolution in antitrust enforcement

The wording of Article 20(1) of the Act, transposing Article 19(1) of the Damages Directive, differs from the Directive and reads as follows: ‘The court does not authorize claims for damages of the injured party for damage caused by some of the infringers to the extent to which it was already satisfied by consensual dispute resolution (...)’. Compared to this, the Directive stipulates as follows: ‘(...) the claim of the settling injured party is reduced by the settling co-infringer’s share of the harm (...)’. This difference is crucial in this context because the Directive excludes the whole ‘share’ of the settling infringer while Slovak law excludes merely the extent to which the injured party was satisfied. Since the Slovak legislature copied the rest of Article 19 of the Directive, the consequences can be substantial: non-settling infringers are still jointly and severally liable for damages to the settling injured party, including the unsatisfied share of the settling infringer while, at the same time, they cannot ask for the share of the settling infringer.

The remaining effects of consensual dispute resolution (the interruption of court proceedings, interruption of limitation periods and mitigating factor) were transposed into the Act without making any substantial changes to the text copied from the Damages Directive.

## VII. Summary

The Slovak legislature decided to transpose the Directive at the last moment (the Act was adopted on 29 November 2016 with effect from 27 December 2016) in the simplest way possible – almost the whole text of the Directive was copied into the new Act, which remains separate from the APEC and the Civil Disputes Code. Although there are some divergences between the text of the Directive and Slovak provisions, it seems that they were caused more by errors in the legislative process than by the intention of the Slovak legislature (there is no explanation of such intent in the explanatory memorandum accompanying the draft bill). The transposition of the Damages Directive does not change substantial civil or commercial law and questions on the protection of files of the AMO, disclosure of evidence or the passing-on of overcharges have not been common in court proceedings. Hence, it does not seem that this new Act will deliver a breakthrough in civil claims for damages in competition cases. Even though collective redress can help consumers start disputes, neither

companies, nor the State or public bodies are willing to raise damages claims (e.g. the AMO closed several bid-rigging cases and yet public authorities raised no claims for damages).

Finally, the specific legal framework created for private enforcement can make some policies, institutions or measures gain more visibility. However, in the case of ‘codified’ areas of the law, it can actually have an adverse effect. What is not inside the codes for a particular legal area (e.g. commercial law, civil court procedure) appears to be less important because it is less ‘visible’ than if the provisions transposing the Damages Directive were to be directly ‘inserted’ into the codes (e.g. the Commercial Code, the Civil Disputes Code).

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## I. Introduction

This national report aims to present the regime of private antitrust enforcement in the Republic of Slovenia *before* and *after* the implementation of the new Directive 2014/104 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 that was to be implemented by the Member States by 27 December 2016.<sup>1</sup> Individual provisions of the directive and their corresponding provisions in Slovenian (draft) legislation will be analysed testing thereby whether a correct, coherent and substantively adequate transfer of the directive into Slovenian law has been made. The report will assess both currently valid as well as planned provisions of the relevant legislation through the lens of the new directive. An in-depth analysis of the focal issues of the final proposal of amendments to the Slovenian Prevention of Restriction of Competition Act will be provided, revealing the most problematic issues of the new regime and dilemmas that have arisen in transposing the directive into the Slovenian system of civil law.<sup>2</sup>

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<sup>1</sup> OJ EU L 349, 5.12.2014.

<sup>2</sup> The report is based on the following articles and monographs (or parts within): Fatur, Podobnik and Vlahek, 2016; Vlahek, 2016b, p. 547–590, 620–621; Vlahek, 2016a, p. 375–428; Vlahek and Lutman, 2017, p. 41–70, 135–136.



## II. Method of implementing the Directive

In Slovenia, the directive will be implemented by way of adopting a law amending the existent Prevention of Restriction of Competition Act (Sl. *Zakon o preprečevanju omejevanja konkurence*, hereinafter, ZPOmK-1) of 2008.<sup>3</sup> This will be the ninth amendment to the ZPOmK-1<sup>4</sup> 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*, hereinafter, ZPOmK-1G)). The focal part of the amending act comprises of a new Part VI titled 'Certain rules of private enforcement of breaches of competition law' encompassing Articles 62 and 62a – 62o that will be inserted into the ZPOmK-1 replacing the existent Part VI titled 'Court Proceedings' and its Article 62.

The implementation process of the directive in Slovenia is in its final stage. A final draft proposal of the implementation provisions of 16 November 2016<sup>5</sup> was being refined by the Ministry of Economic Development and Technology (Directorate for Internal Market, Sector for the Protection of Consumers and Competition) until the end of February 2017, after it received comments to various draft proposals of 2016 by the European Commission and the interested stakeholders in Slovenia, i.e. the industry, law professors, judges, the Slovenian Bar Association, the Slovenian Competition Protection Agency, the Ministry of Justice et al. The official public consultation on the ZPOmK-1G took place between 15 June 2016 and 15 July 2016 after the first draft proposal of 6 June 2016 was published on the web pages of the Ministry of Economic Development and Technology<sup>6</sup> and on the e-governance web pages.<sup>7</sup> After receiving initial comments to the first draft proposal, the ministry started refining the text of the ZPOmK-1G and forwarded a new version of the text to all those who had submitted comments to the first draft proposal of 6 June 2016. On 5 September 2016, a public consultation on the ZPOmK-1G addressing the issues of private enforcement and the implementation of the directive was held at the Ministry. On the basis of the comments received there,

<sup>3</sup> 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. The ZPOmK-1 entered into force on 26.04.2008.

<sup>4</sup> For a historical background of Slovenian competition law and the substance of the amendments to the ZPOmK-1, see Fatur, Podobnik and Vlahek, 2016, p. 27–32.

<sup>5</sup> EVA 2016-2130-0075. Not available online.

<sup>6</sup> Available in Slovene only: <[http://www.mgrt.gov.si/si/zakonodaja\\_in\\_dokumenti/notranji\\_trg/predlogi\\_predpisov/sektor\\_za\\_varstvo\\_potrošnikov\\_in\\_konkurence/](http://www.mgrt.gov.si/si/zakonodaja_in_dokumenti/notranji_trg/predlogi_predpisov/sektor_za_varstvo_potrošnikov_in_konkurence/)> (5.03.2017).

<sup>7</sup> <<https://e-uprava.gov.si/drzava-in-druzba/e-demokracija.html>> (6.03.2017).

the ministry improved the text once more and published it again on its web pages on 6 September 2016.<sup>8</sup>

The initial drafts dealt not only with the implementation of the directive but were meant to also amend other provisions of the ZPOmK-1 outside the scope of private enforcement. Since the latter parts of the drafts were strongly criticized by the stakeholders in their written submissions and at the public consultation held by the ministry on 5 September 2016,<sup>9</sup> and as the implementation deadline for the directive was approaching, the ministry eventually decided to focus only on private enforcement of competition law and thus left out of the draft proposal of 16 November 2016 all other amending provisions. These will obviously have to await further consultations and ZPOmK-1 amendments.

Implementation of the directive was addressed also at the Slovenian Competition Day held on 22 September 2016.<sup>10</sup> Individual consultations on the implementation of the directive with law professors and judges had also taken place during the drafting process. Ministry officials have also been in contact with European Commission officials in charge of the implementation. The drafting process avoided the use of a mere copy-paste technique and addressed individual topics of the directive seriously paying due regard, as much as possible, to concepts that existed in Slovenian civil law already as well as to all relevant legislation being drafted at the same time as the ZPOmK-1G.<sup>11</sup> In contrast to some other pieces of legislation drafted in Slovenia, no special drafting groups or committees were established for the purposes of implementing the directive, and no legal professionals were officially employed to draft the new law. The provisions of the ZPOmK-1G were drafted by the ministry itself (in cooperation with the European Commission), albeit with extensive *pro bono* assistance of legal professionals, in particular members of the Competition Committee of the Slovenian Bar Association and the authors of this report striving for a proficient implementation of the directive. Inter-institutional assessment and alignment of the text has also been made before the finalization of the proposal.

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<sup>8</sup> Available in Slovene only: <[http://www.mgrt.gov.si/si/zakonodaja\\_in\\_dokumenti/notranji\\_trg/predlogi\\_predpisov/sektor\\_za\\_varstvo\\_potrosnikov\\_in\\_konkurence/](http://www.mgrt.gov.si/si/zakonodaja_in_dokumenti/notranji_trg/predlogi_predpisov/sektor_za_varstvo_potrosnikov_in_konkurence/)> (5.03.2017).

<sup>9</sup> The critique was oriented mostly towards the proposed novel regulation of unified competition and minor offences proceedings.

<sup>10</sup> <[http://www.varstvo-konkurence.si/en/information\\_centre/news/article/1438/5384/6debfad74a35f2e882e16e25fb58095/](http://www.varstvo-konkurence.si/en/information_centre/news/article/1438/5384/6debfad74a35f2e882e16e25fb58095/)> (5.03.2017).

<sup>11</sup> A new Act on Collective Actions is being drafted and the Act on Civil Procedure is being amended.

On 2 March 2017, the Government of the Republic of Slovenia adopted the *Proposal on Act Amending and Supplementing the Prevention of Restriction of Competition Act* (Sl. *Predlog Zakona o spremembah in dopolnitvah Zakona o preprečevanju omejevanja konkurence*, hereinafter, ZPOMK-1G),<sup>12</sup> and submitted it to the National Assembly on 3 March 2017 for adoption<sup>13</sup> in the so-called summary proceedings (Sl. *skrajšani postopek*).<sup>14</sup> According to Article 142 of National Assembly Rules of Procedure,<sup>15</sup> the person proposing the law may ask the Assembly to adopt the law in summary proceedings if, *inter alia*, less complex alignments with other acts or with EU law are required.<sup>16</sup> After the Board of the President of the National Assembly decides for summary proceedings to take place, the proposal is submitted immediately to the relevant parliamentary committee and parliamentary discussions that follow are shortened. As the ZPOMK-1G is to be adopted in summary proceedings, it is presumed to be voted on already in April 2017 (otherwise it would be adopted in June or in the following months). The draft ZPOMK-1G is now being assessed by the Parliamentary Committee on the Economy (the phase of the second discussion of the act started on 10 March 2017, amendments to the act may be filed until 31 March 2017, and the session of the committee is set for 6 April 2017)<sup>17</sup> and it will soon be submitted to the National Assembly for discussion and adoption which is planned already for April this year.<sup>18</sup>

<sup>12</sup> EVA 2016-2130-0075.

<sup>13</sup> EPA: 1804 – VII, see: <[https://www.dz-rs.si/wps/portal/Home/deloDZ/zakonod/aja/izbranZakonAkt?uid=4503C4F5A702D9F8C12580D800422CEA&db=pre\\_zak&mandat=VII&tip=doc](https://www.dz-rs.si/wps/portal/Home/deloDZ/zakonod/aja/izbranZakonAkt?uid=4503C4F5A702D9F8C12580D800422CEA&db=pre_zak&mandat=VII&tip=doc)> (14.03.2017).

<sup>14</sup> Article 142 of the National Assembly of Slovenia Rules of Procedure, Official Gazette RS, No. 35/02, with further amendments.

<sup>15</sup> Official Gazette RS, No. 35/02, with further amendments.

<sup>16</sup> The Ministry has merely stated that as it is an EU directive to be implemented, the use of summary proceedings is proposed. The reason behind it lies surely in the fact that Slovenia is a couple of months behind the implementation deadline. Taking into account all the complexities of the new regime of private antitrust enforcement, the novelties might not seem to be less complex alignments of Slovenian law with EU law.

<sup>17</sup> See: <[https://www.dz-rs.si/wps/portal/Home/deloDZ/seje/programDela/terminskiProgram/!ut/p/z/1/hY5BC4IwHMU\\_jdf9\\_3MutNu6hGkIFWi7hMaaA3UyV0KfPjsGRe\\_2eL\\_HeyChAjnUD6Nrb-xQd4s\\_y9UIS4tjsqECt4coxJRmySnf5xQLCuU\\_QC4x\\_pBA2IE0TU\\_ma0-QcOOQpxEPI2TIWPSef0PDYg3SqZtyypG7W1613o\\_TOsAA53km2lrdKTKZAL81Wjt5qD5AGPvqmatSvABYM2hs/dz/d5/L2dBISvZ0FBIS9nQSEh/>](https://www.dz-rs.si/wps/portal/Home/deloDZ/seje/programDela/terminskiProgram/!ut/p/z/1/hY5BC4IwHMU_jdf9_3MutNu6hGkIFWi7hMaaA3UyV0KfPjsGRe_2eL_HeyChAjnUD6Nrb-xQd4s_y9UIS4tjsqECt4coxJRmySnf5xQLCuU_QC4x_pBA2IE0TU_ma0-QcOOQpxEPI2TIWPSef0PDYg3SqZtyypG7W1613o_TOsAA53km2lrdKTKZAL81Wjt5qD5AGPvqmatSvABYM2hs/dz/d5/L2dBISvZ0FBIS9nQSEh/>)> (14.03.2017).

<sup>18</sup> In case of regular parliamentary proceedings, the act would be adopted a couple of months later.

### III. Scope of the implementation

In comparison to the previous Prevention of Restriction of Competition Act (Sl. *Zakon o preprečevanju omejevanja konkurence, ZPOmK*)<sup>19</sup> of 1999 and its predecessor of 1993 (The Protection of Competition Act, Sl. *Zakon o varstvu konkurence, ZVK*),<sup>20</sup> the ZPOmK-1 of 2008 has broadened its traditional administrative scope by including a new Article 62 regulating some of the core aspects of damages claims within private antitrust enforcement. When drafting the ZPOmK-1, the Slovenian legislature evidently took inspiration from the CJEU's case-law as well as from the European Commission's activities aiming at fostering private antitrust enforcement in the Member States. Although at that time no binding secondary legislation of the EU existed regulating antitrust damages actions, the drafters of the act had already modelled – at least to some extent – the Slovenian regime upon the planned future European regulation of antitrust damages claims enshrined, *inter alia*, in the European Commission's White Paper of April 2008 on damages actions for breach of EU antitrust rules. Article 62(1) of the existent ZPOmK-1 first states that anyone who intentionally or negligently breaches Slovenian or European antitrust rules is liable for damages resulting from such breach. Article 62(2) provides for a binding effect of a final decision of the Agency or the Commission finding a breach of Slovenian or European antitrust rules. Article 62(3) states that during the administrative proceedings before the Agency or the Commission, the limitation is suspended until the finality of the proceedings. Finally, Article 62(4) obliges Slovenian courts to inform the Agency of every action requesting damages for breaches of Slovenian or European antitrust rules and is to be read in conjunction with Article 63 of the act that sets out the general regime of cooperation between the courts on the one hand, and the Slovenian Competition Protection Agency and the Commission on the other. Apart from the specific regime governing damages claims set out in the ZPOmK-1, the general substantive and procedural rules of the Code of Obligations (Sl. *Obligacijski zakonik*, hereinafter, *OZ*)<sup>21</sup> and the Civil Procedure Act (Sl. *Zakon o pravdnem postopku*, hereinafter, *ZPP*)<sup>22</sup> are relevant in private antitrust enforcement proceedings.

<sup>19</sup> Official Gazette RS, No. 64/07, with further amendments. It entered into force on 14.07.1999.

<sup>20</sup> Official Gazette RS, No. 18/93. It entered into force on 24.04.1993.

<sup>21</sup> Official Gazette RS, No. 83/01, with further amendments.

<sup>22</sup> Official Gazette RS, No. 26/99, with further amendments. For further details as to the act, see Galič, 2014.

The current draft ZPOmK-1G addresses the implementation of the directive as follows:

- it lists rules on private enforcement of competition law as falling within the scope of the ZPOmK-1 (Article 1 ZPOmK-1);
- it states that the ZPOmK-1 transposes the directive into the Slovenian legal order (Article 2 ZPOmK-1);
- it defines anew the notions of the ZPOmK-1 including those falling within private enforcement (Article 3 ZPOmK-1);
- it renames Part VI of the act from ‘Court proceedings’ to ‘Certain rules on restitution of damages for breaches of competition law’ and replaces the existent Article 62 with Articles 62 (Restitution of damages for breaches of competition law), 62a (Disclosure of evidence and information), 62b (Deciding on the damages claim), 62c (Merging of civil proceedings), 62č (Disclosure of evidence and information in civil proceedings), 62d (Limits on the use of evidence obtained through access to the file of a competition authority), 62e (Consequences of failure to comply with the order on disclosure of evidence or information), 62f (Monetary penalty), 62g (Effect of a competition authority decision), 62h (Special rules for small and medium sized enterprises on joint and several liability), 62i (Special rules for an immunity recipient on joint and several liability), 62j (Limitation), 62k (Special rules on quantification of harm), 62l (Passing-on of overcharges), 62m (Damages actions of indirect purchasers), 62n (Staying of proceedings in case of consensual dispute resolution) and 62o (Effect of a consensual settlement on other damages actions).

The ZPOmK-1G also adds a new Part aVIa titled ‘Cooperation between the courts and competition authorities’ encompassing an amended Article 63 ZPOmK-1 (which is currently part of Part VI of the ZPOmK-1).

Until the new directive is implemented into Slovenian law,<sup>23</sup> the currently valid provisions of national law addressing the issues of private antitrust enforcement (i.e. Article 62 ZPOmK-1) will complement the existing European regime as to damages actions in cases of breaches of Articles 101 or 102 TFEU.<sup>24</sup> With regard to breaches of Slovenian antitrust rules, only

<sup>23</sup> For further analysis of the directive and its implementation in Slovenia, see Vlahek, 2016, p. 547–590, 620–621.

<sup>24</sup> According to final provisions of the renewed ZPOmK-1, Articles 62a, 62c, 62č, 62d, 62e, 62f and 62l(4) ZPOmK-1 will apply in antitrust damages proceedings starting after 26.12.2014 in which no first instance decision ending the first instance proceedings has been issued yet, or was set aside. These articles do not apply if the action for damages was filed before 26.12.2014, and the decision ending first instance proceedings was set

Slovenian law (i.e. Article 62 ZPOmK-1) applies (although the concepts of EU law are of importance to purely national cases as Slovenian competition law is extensively transcribed from European competition law). With respect to all those issues of antitrust damages actions not covered by EU law and/or by Article 62 ZPOmK-1, general provisions of the OZ and the ZPP apply.

Once the directive is implemented, Member States will have to respect the principles of effectiveness and equivalence with regard to all of the rules of private enforcement of EU competition law falling outside the directive.<sup>25</sup> The principle of effectiveness in particular will be of importance in all of those cases where national provisions will not enable an effective solution in the spirit of the goals of the directive.

The title of the directive (as well as the definition provided in point 1 of Article 2 of the directive) is somewhat misleading as it suggests that the directive applies also to actions for breaches of (purely) national antitrust rules. Paragraph 10 of the preamble to the directive (as well as point 3 of Article 2 of the directive) clarifies that the notion ‘national competition law’ refers only to cases where the infringement also has an effect on trade between the Member States, as in this case, European competition law is to be applied in parallel to national competition law as required by Article 3 of Regulation 1/2003.<sup>26</sup> The directive therefore does not set out rules on the enforcement of purely national antitrust rules. It is nevertheless appropriate that the Slovenian legislature is aligning the rules on actions for damages for breaches of national antitrust rules with those on actions for damages for breaches of EU competition law (Vlahek, 2016, p. 553–555). Such alignment has in fact been made already by the ZPOmK-1 of 2008. The ZPOmK-1G will insert a new paragraph into Article 3 ZPOmK-1 laying down the definitions specific to antitrust damages claims. There, a ‘breach of competition law’ is defined as a breach of Article 6 or 9 ZPOmK-1, Article 101 or 102 TFEU, and articles of national legislation of the Member States (no EEA States’ national law – or their respective competition agencies and their decisions – is mentioned) prohibiting concerted practices or the abuses of a dominant position in the sense of Articles 101 and 102 TFEU (*ibid.*, p. 554). No breaches of competition

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aside after 26.12.2014. If the first instance decision was issued before that date, these articles also do not apply.

<sup>25</sup> Article 4 of the directive.

<sup>26</sup> The ZPOmK-1 regulates the so-called unified proceedings of Slovenian competition authority, i.e. proceedings held applying simultaneously Articles 6 ZPOmK-1 and 101 TFEU or Articles 9 ZPOmK-1 and 102 TFEU. For further details, see Vlahek, 2009, p. 84–87; Bratina, 2009, p. 287–289.

law outside Articles 101/102 TFEU and their national counterparts are included in the definition.

As for the issue of the definition of the term *infringer* in the Directive and its potential consequences on national legislation or jurisprudence regarding the concept of a single economic entity, we predict no major hindrances. The concept of a single economic entity as developed by the European courts in a number of cases (*Akzo*<sup>27</sup>, *Dow Chemical*<sup>28</sup>, *Stora*<sup>29</sup>; but on the other hand also *Bollore*<sup>30</sup>) and – as it now seems – cast in stone as almost a *praesumptio iuris et de iure* in a quite legalistic and rigid manner in *Akzo*, is well established in the case law of Slovenian courts and (to an extent) taken for granted by the academia. Nevertheless, we point out that we disagree with the syllogistic approach that permeated the EU competition law environment after the judgments on *Stora* and *Akzo*. Relying solely on share percentages and using circular logic as indirect evidence to bolster the proof of decisive influence, e.g. the existence of the right to appoint members of the management structure by a sole shareholder, which is inherent to an absolutely concentrated shareholders structure (Bottemann and Atlee, 2009), is in our view inappropriate.

What should further be emphasized with regard to the scope of the implementation is the question of application of the rules of the directive to claims of unjustified enrichment. In cases of overcharges, for example, a claim based on unjustified enrichment would (at least in Slovenia) most likely be filed by the claimants (or they would use it as a safety net). The reason behind it is that it would be easier for them to prove the elements of unjustified enrichment than those of damages liability. Limitation period is usually also longer for these claims (a general five years objective period) than for damages claims (a general three years subjective plus five years objective period). The question is whether the rules of the existent Article 62 ZPOmK-1 dealing explicitly with damages claims could be applied (and to what extent) also to unjustified enrichment cases. Same goes for the directive. Although the title and terminology of the directive signal that it is to be applied to damages claims only, the directive does regulate overcharges where, *inter alia*, the rules on unjustified enrichment could apply (overcharges can be perceived as a result of a partially null and void contract and the party paying them could claim them back). Under

<sup>27</sup> Judgment in *Akzo Nobel NV and Others v Commission*, C-97/08, ECLI:EU:C:2009:536.

<sup>28</sup> Judgment in *Dow Chemical v Commission*, T-77/08, ECLI:EU:T:2012:47.

<sup>29</sup> Judgment in *Stora v Commission*, T-354/94, ECLI:EU:T:2002:48.

<sup>30</sup> Judgment in *Bollore and others v Commission*, Joined Cases T-109/02 etc, ECLI:EU:T:2007:115.

Slovenian law, damages claims and unjustified enrichment claims are two different claims with a different set of elements to be shown by the claimant (and with different rules on limitation). At least according to the prevailing legal authors (Cigoj, 2003, p. 266; Polajnar-Pavčnik: *Komentar OZ, 2. knjiga*, GV Založba, Ljubljana, 2002, p. 58; indirectly also Jadek Pensa, 2002, p. 1077; for comparative law, see, for example, Schwenger, 2009, p. 436; Koziol and Welser, 2007, p. 288; Koller, 2006, p. 556) – but not, however, according to the Slovenian Supreme Court which has given an unjustified enrichment claim a subsidiary role<sup>31</sup> – it is up to the claimant to decide which of the two (or even both) instruments to use. In order to avoid any uncertainties as to the scope of the new implementing rules, this issue was being addressed by Slovenian drafters in the course of the implementation process. The first drafts did not pay any regard to it but the scope of the implementing rules was later intentionally broadened to all possible civil claims in cases of antitrust breaches (the chapter itself was titled ‘Civil claims in cases of breaches of antitrust’). The final draft, however, narrowed (supposedly on insistence of European Commission officials in charge of implementation (*sic!*)) the scope back to damages claims (‘Certain rules on restitution of damages for breaches of competition law’) leaving unjustified enrichment claims out of the new regime and thus depriving the claimants of the benefits of the directive (of the rules on limitation, for example).<sup>32</sup>

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<sup>31</sup> II Ips 147/2013 of 28.05.2015 where the Supreme Court has stated that unjustified enrichment claims can in principle not be in competition with damages claims if the act causing the enrichment is illegal and all other elements of a civil delict are met. Such conclusion can implicitly be derived also from Article 189 OZ stating that after the limitation period for a damages claim has lapsed, the claimant may request from the person liable for damages to return to the claimant, in accordance with the rules applicable in cases of unjustified enrichment, what that person has gained by the act causing the damage. In cases of competition law breaches this article will not be of any use after the directive is implemented, as the limitation period for damages claims is being extended and otherwise favourably regulated in comparison to unjustified enrichment claims.

<sup>32</sup> That this is in fact an issue to be addressed is evident from *Japan v. Kosumo Sekiyu K.K. and others* pending before Tokyo District Court (judgment of 27 June 2011). See also *SAS v. Luftfartsverket* (judgment of Court of Appeals in Göta, T 33-00 of 27 April 2001). See Vande Walle, 2011.



## IV. Competent courts

In contrast to judicial review within public antitrust enforcement,<sup>33</sup> the ZPOmK-1 does not set out any specific rules on jurisdiction in private antitrust enforcement cases. General rules of the ZPP therefore apply. The draft ZPOmK-1G proposal does not address this issue so the framework of the competent courts in damages actions and other actions of private antitrust enforcement is to remain the same. Hence, the courts of general jurisdiction will further assess these cases (district courts as the first, high courts as the second and the Supreme Court of Slovenia as the third instance).

According to the ZPP, jurisdiction in first instance civil and commercial cases in Slovenia is divided between local and district courts based on various criteria. It is to be noted that there are no specialized civil or commercial courts in Slovenia, only specialized divisions for civil and commercial cases are organized within larger district courts, high courts as well as the Supreme Court of Slovenia. First instance cases before local and (mostly also before) district courts are held before a single judge. This is currently also the case in cases of private antitrust enforcement as the 2008 ZPP amendment annulled Article 34 ZPP which set out that cases ‘relating to protection of competition’ are always assessed by a panel of judges. However, in February 2017 when the latest amendments to the ZPP were enacted,<sup>34</sup> a new Article 486a was inserted into the ZPP enabling, as of 14 September 2017, the judge assessing a commercial dispute (as explained below, disputes regarding competition fall within this notion) to ask in exceptional cases the president of the high court to delegate the case to a panel of three judges if complex legal or factual questions are to

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<sup>33</sup> In April 2008 when the ZPOmK-1 entered into force, the Supreme Court of RS was given jurisdiction to review as the first (and at the same time the last) instance court the decisions of the Slovenian Office for the Protection of Competition. The previous ZPOmK of 1999 gave jurisdiction to review the office’s decisions to the Administrative Court of RS. In August 2013, the Act amending the Courts Act gave jurisdiction back to the Administrative Court of RS and as of then, the Supreme Court acts again only as an appellate administrative court in competition law cases. For further details on judicial review of the Slovenian competition authority’s decisions, see Fatur, Podobnik and Vlahek, 2016, p. 208–220.

<sup>34</sup> Act amending the Civil Procedure Act (hereinafter, *ZPP-E*), Official Gazette of RS, No. 10/17, in force as of 14 March 2017, but the majority of its provisions apply as of 14 September 2017.

be addressed.<sup>35</sup> High courts having (*inter alia*) supervisory jurisdiction over local and district courts, hear cases in panels of three judges, while the Supreme Court as the third instance court (assessing cases in extraordinary remedy proceedings, limited to questions of substantive law and of serious breaches of procedure) hears cases in panels of three or five judges.<sup>36</sup>

Generally, local courts have jurisdiction in cases where the disputed value does not exceed EUR 20.000, whereas district courts hear cases where the disputed value exceeds EUR 20.000. However, in certain matters, jurisdiction is divided regardless of the disputed value. For example, district courts have exclusive jurisdiction in commercial cases (to which a specific set of rules of the ZPP applies),<sup>37</sup> as well as in matters 'relating to protection of competition'. 'Disputes relating to protection of competition' are always deemed commercial regardless of a party's status. The ZPP does not regulate 'disputes relating to protection of competition' in a specific chapter (only specific rules on commercial disputes apply). It does, however, state with regard to certain rules of the ZPP that they are not to be applied to disputes 'relating to protection of competition' (such disputes cannot be characterized as small claims disputes).

As competition law disputes usually arise between two (or more) commercial entities (e.g., a telecommunications operator claims damages from another operator holding a dominant position on the relevant market arguing that the defendant had breached European or/and Slovenian antitrust), they are perceived as commercial in nature, a district court will have jurisdiction and specific set of rules of the ZPP on proceedings in

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<sup>35</sup> The president of the high court will decide on that by issuing an order against which no appeal is available. The other two judges will be chosen according to the court rules on appointing judges in individual cases.

<sup>36</sup> In some cases within the jurisdiction of the high courts, a sole judge issues decisions, while in some cases within the jurisdiction of the Supreme Court, a panel of seven judges issues decisions. For further details, see the relevant provisions of the ZPP and the Courts Act (Sl. *Zakon o sodiščih*, hereinafter, ZS), Official Gazette RS, No. 19/94, with further amendments). See also Galič, 2008, p. 183.

<sup>37</sup> Save in commercial cases concerning easements and real encumbrances, lease or tenancy relations, and disturbance of possession where local courts always hear the cases. Commercial cases are those cases where both parties are registered commercial companies or institutes, co-operatives, local communities or the state, regardless of whether a dispute between them results from pursuing their commercial activity. Litigations between one such person and a natural person who is a registered proprietor of a business (the so-called sole trader), as well as litigations between two sole traders are, however, deemed commercial only if the dispute has arisen within their commercial activity. Certain types of disputes are, however, always deemed commercial regardless of a party's status.

commercial matters will apply. The disputed value in such cases will also most plausibly exceed EUR 20.000 triggering the jurisdiction of district courts. Even regardless of the disputed value and of the type of dispute (be it civil or commercial), cases of private antitrust enforcement would surely be characterized as matters concerning ‘protection of competition’ thus automatically switching jurisdiction to district courts, as well as activating specific provisions of the ZPP regulating commercial disputes. This is why district courts, applying procedural rules in commercial matters, would have jurisdiction also in actions with smaller claims (i.e. those where the disputed value does not exceed EUR 20.000) in non-commercial disputes (e.g. in damages actions between a consumer and his or her operator who had abused its dominant position). Due to the potential complexity of competition law related issues (even in cases of follow-on private actions), and the need to uniformly apply competition law and other legal rules relevant within the sphere of competition law enforcement, giving jurisdiction to district courts in all cases of private antitrust enforcement is undoubtedly reasonable.

In contrast with some other legal areas, such as intellectual property where only the District Court in Ljubljana has jurisdiction at first instance, there is, however, unfortunately no specialized court in Slovenia assessing (only) competition law issues. We strongly advocate for such regulation, combined with the assurance that only judges proficient in competition law are appointed to assess competition law cases. We have also been stressing that the reasonableness of the rule in force prior to the 2008 amendment to the ZPP, setting out that cases of ‘protection of competition’ are handled by a panel of judges, rather than by a single judge, should be assessed and that this rule, if found appropriate, should be reintroduced. The new Article 486a, that will apply starting from 14 September 2017, is a step towards a higher quality of judgments, but it will do little without the required specialization and proficiency of judges in competition law.

Approximately a dozen private antitrust enforcement cases have been assessed by Slovenian courts so far (for a detailed analysis of the cases, see Vlahek, 2016a, p. 407–426). A lot of these cases are still pending as the proceedings are lengthy and mostly inefficient. They are concerned mainly with the abuses of a dominant position in the telecommunications sector. Most of them are stand-alone damages actions, while in some cases, the plaintiffs are the defendant’s contractual partners claiming nullity of their agreements and consequently requesting the repayment of overcharges (as well as the damage sustained). Court proceedings have almost exclusively been initiated by competitors of undertakings that have allegedly abused

their dominant position on the relevant markets, although consumers and other customers of the infringing undertakings are also slowly starting to realize their legal rights and procedural steps to enforce them.

It is to be underscored that a new Act on Collective Actions (Sl. *Zakon o kolektivnih tožbah*, hereinafter, ZKoliT) is currently being drafted by the Ministry of Justice.<sup>38</sup> Civil claims arising from breaches of Slovenian and EU competition law (Articles 6 and 9 ZPomK-1 and Articles 101 and 102 TFEU) fall within its scope.<sup>39</sup> It is proposed that only one of the Slovenian district court (preferably that in Ljubljana) will have exclusive jurisdiction to assess collective actions and collective settlements.<sup>40</sup> A copy of the new Article 486a ZPP enabling collective actions to be assessed by a panel of judges instead of a single judge, will most plausibly be copied into the ZKoliT irrespective of the type of the dispute (i.e. be it commercial or not).

The Ministry of Economic Development and Technology has stated in its explanatory note to draft ZPomK-1G that they will follow the development of case-law within private antitrust enforcement in Slovenia. Amended Article 63 ZPomK-1 laying down the framework for cooperation between Slovenian courts and the European Commission and the Slovenian Agency for the Protection of Competition will be relevant in this regard.<sup>41</sup>

## V. Substantive law issues

### 1. Limitation periods

Already upon its enactment in 2008, the ZPomK-1 reflected the European Commission's ideas enshrined in its Green Paper and its White Paper as regards the effect of the initiation of administrative infringement proceedings on the limitation period for damages claims. The currently valid Article 62(3) ZPomK-1 thus provides that the limitation period for damages claims is suspended while public enforcement of competition

<sup>38</sup> The first draft proposal of the act (EVA 2016-2030-0007) is available at: <[http://www.mp.gov.si/si/zakonodaja\\_in\\_dokumenti/predpisi\\_v\\_pripravi/](http://www.mp.gov.si/si/zakonodaja_in_dokumenti/predpisi_v_pripravi/)> (14.03.2017).

<sup>39</sup> Draft Article 2/1/3 of ZKoliT.

<sup>40</sup> It is not known yet which of the district courts will have exclusive jurisdiction, although it would probably only be reasonable to vest it with the District Court in Ljubljana that usually has jurisdiction in individual civil actions within private antitrust enforcement as Ljubljana is usually where the seat of the defendants is.

<sup>41</sup> This framework is already set out in the existent Article 63 ZPomK-1, but has been somewhat deficient and will thus be amended accordingly by the ZPomK-1G. For further details, see Vlahek, 2016a, p. 398–399; Vlahek, 2016b, p. 586–589.

rules by the Slovenian Competition Protection Agency or the European Commission (and review courts) is still ongoing.<sup>42</sup> Until the provisions of the ZPOmK-1 are amended in accordance with the directive, the CJEU's case law,<sup>43</sup> Article 62(3) ZPOmK-1 and general national rules on the statute of limitations as set out in the OZ apply.<sup>44</sup>

The issue of the statute of limitations has been one the most challenging questions in the implementation process in Slovenia and has been the focus of the ministry's drafting activities. The regime on limitation periods as set out in the directive (Article 10 of the directive and paragraph 36 of its preamble) was identified as ambiguous by the Ministry and the stakeholders. Drafting national provisions presented a serious challenge also because the

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<sup>42</sup> Article 62(3) ZPOmK-1 which entered into force on 26 April 2008, raises uncertainties as to its temporal application since prior to its entry into force, suspension of limitation during public enforcement proceedings was not regulated. In cases where the limitation period started to run (but has not yet lapsed) prior to the entry into force of Article 62(3), it may be unclear whether Article 62(3) enabling the suspension of limitation can be activated or not. For further details, see Vlahek, 2016a, p. 397–398. Another question the Slovenian courts have to address is whether the claimants may refer to suspension of limitation due to administrative infringement proceedings even in relationships where the limitation period would otherwise run out already prior to the enactment of ZPOmK-1 in 2008. For further details, see Vlahek, 2017.

<sup>43</sup> In particular Judgment in *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04), *Antonio Cannito v Fondiaria Sai SpA* (C-296/04) and *Nicolò Tricarico* (C-297/04) and *Pasqualina Murgolo (C-298/04) v Assitalia SpA*, ECLI:EU:C:2006:461.

<sup>44</sup> The OZ is the basic law regulating statute of limitations and (cogent) limitation periods for bringing a claim. Once the statute of limitation runs out, the right to claim the performance ceases (but the debtor may still perform his or her obligation voluntarily, the creditor's right itself does therefore not cease). The limitation applies only if the other procedural party refers to it, the courts must therefore not take account of limitation *ex officio*. General limitation period is five years and three years for claims arising from commercial contracts. The limitation period for damages claims is three years as of the moment the victim became aware of the damage and the perpetrator causing damage, while the claim must be brought within five years as of the moment of the occurrence of the damage. If the damage is caused by a contractual breach, the limitation period is that as set out for contractual claims. Unless the law provides otherwise, the limitation period starts to run the first day after the creditor had the right to claim the performance, or after the debtor had breached his or her duty not to act. The OZ sets out detailed rules on suspension and interruption of limitation periods. One of the basic rules is that limitation is not interrupted by merely demanding performance from the debtor. In order to interrupt limitation, the creditor must file an action with the courts or other competent institution. There are, however, some special areas where special limitation periods for damages actions are set out in Slovenian legislation. Slovenian courts have additionally clarified some of the rules on limitation. For further details, see Vlahek, 2016a, p. 397; Vlahek and Lutman, 2017, p. 59–60.

regime laid down in the directive clashes to some extent with the general Slovenian system of limitation (see Vlahek and Lutman, 2017, p. 59–69; Vlahek, 2017).

According to the latest draft Article 62j(1) ZPOmK-1, the limitation period is 5 years starting from when the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know of the behaviour of the infringer constituting an infringement of competition law (here, the provision differs (certainly unintentionally) in a small detail from the one in the directive where point (a) of Article 10(2) presupposes also the claimant's knowledge of the fact that the behaviour constitutes an infringement<sup>45</sup>); (b) of the harm caused by the infringement of competition law (here, too, the meaning is not absolutely identical but the provision will surely be read as the one in the directive); and (c) the identity of the infringer. Although the OZ does not mention it explicitly, the discoverability criterion has been an integral part of Slovenian general rules on limitation so in that regard draft Article 62j(1) is not a novelty. Fixing the start of the running time of the limitation period at the moment when the infringement has ceased (and not merely at the subjective moment when the claimant gained knowledge of the three relevant elements) is in line with the directive. Although such rule is not set out in the CO, Slovenian legal theory and case-law have provided for such a rule in cases of so-called on-going breaches and a successively emerging damage (Vlahek and Lutman, 2017, p. 64–65). It is, however, not clear whether the wording of the directive 'the moment the infringement has ceased' refers to the infringement as a whole or merely in relation to a particular injured party (*ibid.*, p. 64).

When implementing the directive, Slovenia has opted for a two-tier system of limitation periods as allowed by paragraph 36 of the preamble to the directive. A 10-year objective (sometimes called 'absolute'<sup>46</sup> or 'long-

<sup>45</sup> Determining the occurrence of this moment has not been addressed in the directive, although this will be very important in determining when the period started to run. See Vlahek and Lutman, 2017, p. 60.

<sup>46</sup> In the Slovenian legal environment, the term 'absolute limitation period' usually denotes a limitation period within criminal law and minor offences law meaning an objective period in which a final court decision would have to be issued (not merely an action filed with a court as is the case with limitation within civil law). Some authors have nevertheless mentioned it also within civil law. Some state that the 'absolute period' (i) starts running at an objective point of time (called 'objective periods') and (ii) cannot be suspended. Others, however, have used the term 'absolute period' as a synonym of 'objective period' (which can be suspended in Slovenian law), i.e. irrespective of whether the period can be suspended or not. The Ministry did not regard this »absolute period«

stop' or 'maximal') limitation period has been added in draft Article 62j(2) ZPOmK-1. It starts running from the moment when the damage is sustained and it cannot start to run before the infringement has ceased. It is to be underscored that according to draft Article 62j(4) ZPOmK-1, a suspension of limitation applies to both the 5-year and 10-year period. The Ministry encountered problems in understanding the nature of the 'absolute' limitation period mentioned in the preamble of the directive, as they were not certain whether this limitation could also be suspended or not, and what would be the appropriate duration of such an 'absolute' limitation period in view of the EU legislature. At first, a 30-year period starting to run when the infringement has ceased was proposed (referring to German rules with regard to the length of the period), but was faced with strong opposition from virtually all stakeholders. The drafters eventually opted for a 10-year period mirroring the Austrian combination of a 5-year and 10-year period. The legislature decided to apply the suspension of the limitation period to both – the 5 year and the 10 year period, thus trying to prevent cases where the longer period would lapse before the infringement was assessed by the competition authority (for further details, see Vlahek and Lutman, 2017, p. 41–70, 135–136; Vlahek, 2017; an analysis of Slovenian private enforcement cases with the relevant time-frame of the cases is available in: Vlahek, 2016a, p. 407–426). Due to that, the long-stop period of 10 years (already a 100% increase in comparison to the general 5-year long-stop period set out in the OZ) can be prolonged for further years thus decreasing the efficiency of the protection granted to debtors.<sup>47</sup>

The Slovenian legislature opted for a suspension, rather than interruption of the limitation period.<sup>48</sup> According to draft Article 62j(3) ZPOmK-1, a limitation period is suspended from the day a competition authority takes an action for the purpose of an investigation or its proceedings with respect of an infringement of competition law, until the end of one year after the infringement decision has become final or after the proceedings were otherwise terminated. Some of the stakeholders opposed such

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as a period in which a final court decision would have to be issued. See Vlahek and Lutman, 2017, p. 63; Vlahek, 2017.

<sup>47</sup> While the general rules on the suspension of limitation set out in the OZ do apply to both the short and the long period (this is not stated explicitly in the OZ but is accepted in legal theory), the reasons for suspension are solely exceptional circumstances that preclude the creditors from filing an action with the court. In cases of antitrust damages actions this is clearly not the case as national courts have jurisdiction to assess whether EU and/or national antitrust rules have been breached (stand-alone actions). See Vlahek and Lutman, 2017, p. 63, 69–70; Vlahek, 2017.

<sup>48</sup> It is to be underlined that the Slovenian translation of Article 10 is incorrect.

vague definition of the starting point of this period stressing that it might sometimes be impossible for the parties to know when this period has started. Referring to the exact text of the directive, the ministry did not want to amend the drafted provision and left it for possible review of the provision of the directive by the CJEU.

It has also been stressed during the consultation proceedings with the stakeholders that it might be useful to determine the ‘personal scope’ of the efficiency of a suspension in cases with multiple infringers. When only some of the infringers avail themselves of judicial review, the suspension of the limitation is probably activated only for them, whereas the NCA decision becomes final against other infringers (Vlahek and Lutman, 2017, p. 68; Vlahek, 2017). A provision clarifying this has not been inserted in the proposal (only Article 11(4) of the directive has been implemented in draft Article 62i(2) ZPOmK-1).

## 2. Joint and several liability

Rules on joint and several liability of infringers, as set out in Article 11 of the directive, have been identified as ambiguous and somewhat difficult to comprehend (see Vlahek, 2016b, p. 576–580). They have to be implemented into the ZPOmK-1 anew because of the absence in Slovenian legislation of provisions specific to SMEs and leniency recipients. A general rule on joint and several liability for damages is set out in Article 186 OZ and corresponds to the basic rule set out in Article 11(1) of the new directive (it will thus not be repeated in the ZPOmK-1). At the same time, the rules set out in Article 11(2)–(6) will be implemented into the ZPOmK-1 as special rules within private antitrust enforcement – they represent a novelty in the Slovenian system of civil law (first sentence of Article 11(5) of the directive (in particular the criteria for determining the amount of the contribution of the infringers)), however, has not been set out in the new provisions of the ZPOmK-1). Subsidiary application of general rules of the OZ on joint and several liability (e.g. the criteria for determining the contribution of the infringers that are set out in Article 188 OZ<sup>49</sup>) is previewed taking into account particularly the principle of effectiveness as required by paragraph 37 of the preamble to the directive.<sup>50</sup>

<sup>49</sup> It must be stressed that the preamble to the directive itself lists some of these criteria.

<sup>50</sup> One of the relevant questions here might be whether other debtors are required to refund the defendant debtor (part of) its expenses that accrued because of the action against it.



Article 62h ZPOmK-1 will lay down special rules on joint and several liability of SMEs. Contents of Article 11(2)-(3) are mainly copied. There are, however, some differences between the two texts. In contrast to the directive where a reference to the Commission *Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises*<sup>51</sup> is made, Article 62h(1) ZPOmK-1 contains the actual definition of SMEs set out in Article 2(1) of the Recommendation (it is to be noted that Article 11(2) of the directive mentions only small and medium sized enterprises and not also micro enterprises as would be reasonable (it does state ‘SMEs’ in the brackets), whereas the Slovenian text covers all SMEs). The Slovenian text differs from the text of the directive also as regards the condition set out in Article 11(2)(b) (‘irretrievably jeopardise’) as it states merely ‘undoubtedly jeopardise’.<sup>52</sup> Further, draft Article 62h ZPOmK-1 dealing with the SMEs, has copied the provision of Article 11(4)(b) of the directive (relevant for immunity recipients) although this is not so provided in the directive (at least not explicitly and unambiguously).<sup>53</sup>

Article 62i ZPOmK-1 will lay down special rules on joint and several liability of leniency recipients in accordance with Article 11(4)-(6) of the directive. As regards the issue of limitation set out in Article 11(4) of the directive, draft Article 6i(2) ZPOmK-1 states that the limitation period does not run between the immunity recipient and the injured party who is not the recipient’s direct or indirect purchaser or supplier, in the period between the day the action was filed by the injured party against other infringers, and the day the injured party was unable to obtain damages from these infringers.

### 3. Quantification of harm

Slovenian law (i.e the relevant provisions of the OZ and Article 62(1) of the existent ZPOmK-1) is mostly in line with the full compensation principle (Articles 1(1) and 3 of the directive). Slovenian law is based on the principle of full compensation and single damages. The actual loss,

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<sup>51</sup> 2003/361/EC, available at (in English): <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:124:0036:0041:en:PDF>> (13.07.2015).

<sup>52</sup> Ministry officials have decided to correct this mistake through the ongoing parliamentary proceedings after we have informed them of the inconsistency with the directive.

<sup>53</sup> It might be assumed (and this is why the Ministry has inserted it also in Article 62h) from the text at the beginning of Article 11(2) saying ‘without prejudice to the right of full compensation as laid down in Article 3’.

loss of profit as well as interest may be claimed. However, in order to follow paragraph 12 of the preamble to the directive, the ministry has (on the proposal of the Slovenian Bar Association) laid down in Article 62(2) ZPOmK-1 a new rule regarding interest whereby interest is due from the moment the harm occurred until the time when compensation is paid, irrespective of when the injured party files a damages action.

The ZPOmK-1 will also have to be amended in order to transpose fully the directive's provisions on the quantification of harm and the rebuttable presumption that cartels cause harm. Article 17 of the directive is implemented in draft Article 62k ZPOmK-1 titled 'Special rules for determination of damages'. The general rules of the OZ and the ZPP will apply with regard to all questions not covered in the ZPOmK-1.

Draft Article 62k(1) ZPOmK-1 states that in determining damages according to the rules of the ZPP on judicial discretion (i.e. Article 216(1) ZPP),<sup>54</sup> 'the court may take into account also part of the defendant's profit gained by the breach of competition law'. This provision has been introduced into the proposal of the ZPOmK-1G by the ministry only at the latest stage of the implementation process, depriving the stakeholders of the opportunity

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<sup>54</sup> Under Slovenian rules of civil procedure, the burden of proof rests upon the party raising an issue (more precisely, the party obliged to raise an issue). There are also some explicit rules concerning the shifting of the burden of proof (for example, in a tort case, a claimant must establish the facts concerning the harmful act, the causal link and the damage; however, Article 131 OZ sets out a presumption that the wrongdoer is liable, and it is thus the defendant who must prove the absence of his or her fault in a case concerning the damages), but do not apply with regard to harm and its amount. In Slovenia, the standard of proof (describing the amount and quality of evidence required to fulfil a burden of proof) is very high. Pursuant to Article 215 ZPP, the judge should decide according to the rules on the burden of proof (the burden rests upon the party who raises an issue) if he or she cannot reliably establish the existence/non-existence of the disputed fact. The judge must be (practically) convinced (persuaded) about the existence of a certain fact, if not, he or she should rule against the party upon whom the burden of proof for this fact rests (thus, even if the court finds it more probable – but still not beyond the doubt of a reasonable person – that this fact actually exists). Article 216(1) ZPP, however, provides that when the liability of a party is established, and only the amount in question remains in dispute, a court may, in exceptional circumstances, use judicial discretion to establish the missing facts. The court may act in such a manner if unreasonable difficulties would ensue in the determination of these facts through means of evidence; for example, the cost of evidence would be entirely disproportionate to the value of the claim. It is important to note that in such cases, judicial discretion is applied to establish the facts (e.g., the amount of damages) and not to interpret the law (e.g., the notion of 'just satisfaction'). 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. See Galič, 2008, p. 174–175.

to comment on it. It is doubtful whether any analysis of the need and of the appropriateness of the provision has been made. The 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 of the act that has been submitted to the National Assembly. The fact that the ZPOmK-1G will be adopted by way of summary proceedings is an additional factor creating discontent for using such a method of legislation drafting.

Draft Article 62k(2) ZPOmK-1 copies entirely the provision of Article 17(2) of the directive.

Paragraphs 3–5 of draft Article 62k ZPOmK-1 implement Article 17(3) of the directive. The court may ask the Slovenian Agency for the Protection of Competition to send it its opinion on the determination of the amount of damages within 30 days. If the agency decides that its assistance is appropriate, it shall provide the court with an opinion. The court may also ask the competition authorities of other member states to provide it with such opinions. In turn, the Slovenian Agency may provide assistance to national courts of other member states. It will be interesting to see if and to what extent Slovenian courts will opt for such assistance and thus attract an administrative body in judicial proceedings as a type of *amicus curiae*.

#### 4. Passing-on of overcharges

Provisions on the passing-on of overcharges (Articles 12–16 of the directive) have not been regarded as problematic during the drafting of the ZPOmK-1. Slovenian general legislation already adheres to the basic rule that compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers/suppliers, that the defendant may invoke the passing-on defence, etc. In order to implement the directive accordingly, detailed substantive as well as procedural rules regarding passing-on of overcharges have to be inserted into the ZPOmK-1.

A new Article 62l ZPOmK-1 lays down the rules on overcharges (implementing Articles 12–13 of the directive) whereas draft Article 62m ZPOmK-1 regulates damages actions of indirect purchasers/suppliers (implementing Articles 14–15 of the directive). Draft Article 62m(5) ZPOmK-1 states that in cases where it is established that the overcharge was wholly or partially passed-on to the next level, but the amount of the overcharge that was passed-on cannot be determined or could be determined

only with disproportionate difficulties, the court can estimate the amount of the passed-on overcharge within its judicial discretion.

Guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser, that will have to be issued by the Commission in accordance with Article 16 of the new directive, will undoubtedly be of additional assistance to Slovenian courts.

## VI. Procedural issues

### 1. Standing

The scope of the victims seeking damages is not limited under Slovenian law making it thus in line with Articles 1 and 2 of the directive.

Neither the ZPOmK-1, nor any other piece of legislation in Slovenia regulates who has legal standing in private antitrust enforcement cases. General rules of the ZPP therefore apply. According to the ZPP, any natural or legal person (as well as anyone else if provided so by the law) has standing to file a claim with the court. An action may be filed by a person who asserts that he or she personally suffered a direct violation of his or her rights (Galič, 2008, p. 96). For an action to be admissible (as a matter of procedural law), it is not necessary to prove that the rights of a plaintiff were violated, but it is necessary to assert such a violation. A plaintiff must also possess a legal interest for the action,<sup>55</sup> which is admissible only if a plaintiff seeks to protect his or her own (asserted) rights and not the rights of a certain third person (Galič, 2008, p. 96). Thus, there are, as a rule, no popular actions (*actio popularis*) and no class actions available under Slovenian law. However, a statute can provide for a possibility to file an action, the object of which is not the protection of rights of the plaintiff but of a certain third person or of an unidentified circle of persons. Such actions exist, for example, within environmental protection where anyone can file an action for a cessation of certain acts, which impose imminent harm to the environment, whereby it is not obligatory for the plaintiff to assert any personal interest.<sup>56</sup> Similar is true for the request for a removal of a source of danger threatening to cause larger harm to the plaintiff or

<sup>55</sup> A declaratory action is the only kind of action where a claimant must expressly satisfy the court that there exists a legal interest for the action. With regard to actions for the performance and constitutive actions, the existence of legal interest is presumed. However, this presumption is rebuttable. Galič, 2008, p. 98.

<sup>56</sup> Environmental Protection Act (Official Gazette RS, No. 41/04, with further amendments).

to an unidentified number of persons, and for the request to refrain from activities causing disturbance or risk damages if these cannot be prevented by other appropriate means.<sup>57</sup> Furthermore, according to the Consumer Protection Act (CPA),<sup>58</sup> an organization for the protection of consumers may file an action for: (1) the declaration that certain general contract terms, which a trader used in contracts, already entered with consumers, are null and void;<sup>59</sup> and (2) for a cessation of applying these general contract terms in future contracts.<sup>60</sup> Similar representative actions are available also within environmental protection. Apart from these specifically regulated *actiones popularis* and representative actions, joinder of parties where several persons may under specific circumstances sue or be sued by the same action as co-litigants, is available under the ZPP.<sup>61</sup> As of October 2008, a so-called model case procedure is also available under Slovenian civil procedure regulation enabling the courts to deal with a large number of claims in a connected manner and thereby speed up the proceedings<sup>62</sup> (for further details, see Damjan, 2011, p. 262–263; Betetto, 2011, p. 231–241, 404–405). In addition, a new Article 62c ZPOmK-1 will enable the joining of civil proceedings regarding claims arising out of competition law infringements, pending before the same or different first instance courts in Slovenia, if the same person has multiple claimants or vice-versa. Upon the request of a party, the Supreme Court of Slovenia may decide to join the proceedings if this will speed the assessment of the case or lower the costs of the proceedings.

Class actions within competition law have to date not been possible in Slovenia. The previously mentioned declaratory and injunctive (obliging to cessation) representative actions filed by organizations for the protection of consumers are not particularly relevant for collective private antitrust enforcement. Collective redress (including damages actions) will, however,

<sup>57</sup> Article 133(1) OZ.

<sup>58</sup> Official Gazette RS, No. 20/98, with further amendments.

<sup>59</sup> Articles 74, 74.a and 75 of ZPP.

<sup>60</sup> Article 76 ZPP. So far, no such representative actions have been filed. For further details, see Galič, 2008, p. 96–97; Galič, 2011, p. 215–229, 402–403; Draft ZKoliT (EVA 2016-2030-0007).

<sup>61</sup> If, with respect of the cause of the action, they form a legal community; or if their rights or obligations are based upon the same factual and legal ground; or if they are joint and several debtors or creditors. If claims of different persons are based only on a similar factual and legal ground, they can act as co-litigants only if the same court has the subject matter and territorial jurisdiction over each of the claims and each of the defendants (Article 191 ZPP). Galič, 2008, p. 102.

<sup>62</sup> Article 279b ZPP.

soon be available in Slovenia (also for cases of antitrust breaches) as the Ministry of Justice is drafting a new Act on Collective Actions.

In Slovenian cases of private antitrust enforcement, actions are in practice filed by competitors while consumers have to date, at least to our knowledge, not yet instituted any proceedings. Consumers in Slovenia rarely seek court assistance in enforcing their rights as this is often way too expensive and time-consuming, having regard to the small size of the claims that are usually at stake in such cases. For these reasons, two group out-of-court activities have taken place in recent years with the aim to force the (alleged) infringers to refund the overcharges paid on the basis of their restrictive practices (see Vlahek, 2016a, p. 381–383).

## 2. Disclosure of evidence

Disclosure of evidence has been one of the most debated issues in implementing the directive in Slovenia. The implementing provisions were redrafted several times and it was not clear how to address this issue until the very end of the implementation process. The initial dilemma was whether to set out a right to access to information (a so-called substantive legal basis) or enable access merely within the disclosure of evidence system in procedural law (for further details on these two concepts, see Galič, 2015, p. 33–56). Another problem lied in the fact that the ZPP was simultaneously also subject to amendments drafted by the Ministry of Justice. Hence, it was not clear if, and to what extent the two systems (one set out in the general ZPP, the other in the ZPOmK-1) are to be aligned. At first, the draft proposal of the ZPOmK-1G set out only a procedural disclosure request submitted to the court assessing the claim for damages. Upon an intervention by the Ministry of Justice, a version providing also for a substantive legal basis was drafted and added as option no. 2 for the implementation of Article 5 of the directive. Eventually, the latter version was chosen for enabling the party to file an action requesting disclosure if the opposing party does not disclose evidence or information voluntarily. Since in existent Slovenian civil procedure party access to relevant information and documents (as well as effective sanctions for non-compliance with a disclosure order) is rather limited (for further details, see Galič, 2015, p. 33–56), the new rules on disclosure of evidence as set out in the ZPOmK-1G are a novelty in the Slovenian legal system. The rules will be set out in Articles 62a and 62č–62e ZPOmK-1 (that are to apply – although they set out also a substantive right – already to proceedings pending with the courts as of

26 December 2014). In our view, the provisions are drafted too ambiguously. Their interpretation in the proposal of the ZPOmK-1G does assist the reader to a certain extent, but the provisions are not easy to understand and our prognosis is that the Slovenian legal environment will encounter difficulties in applying them.

Draft Articles 62a and 62č ZPOmK-1 follow the regime set forth by the directive in Articles 5 and 6, whereby draft Article 62a covers the general principles and rules regarding the disclosure of evidence and information in the ambit of private antitrust enforcement. The substantive rule provides for a right to demand disclosure of evidence or information from both the claimant and defendant, whereas the obligation to disclose stretches onto third persons. 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 invent a new – similar type of standard, thus lessening the level of predictability and legal certainty.<sup>63</sup> It is also worth noting that draft Article 62a 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 diverges from the regime set forth by the directive. It does, however, stress the importance of proportionality and control over potential strategic abuse of the disclosure regime for fishing expeditions. These concerns are further touched upon in the third and fourth paragraph of draft Article 62a, respectively, where the drafters have transposed the qualitative standards regarding the proportionality test found in Article 6 of the directive. Additional rules are laid down in draft Articles 62a and 62d ZPOmK-1 for disclosure of evidence and information from the file of the competition authority. Treatment of confidential data and privileged communication is also regulated in draft Article 62a ZPOmK-1.

Draft Article 62č ZPOmK-1 regulates situations where the parties are unsuccessful in their demands for disclosure directly from the other party or third parties. In such instances, the parties have the right to ask the court to order disclosure from the other party or a third person under the conditions set out in draft Article 62a ZPOmK-1. In order to avoid fishing expeditions, the claim for disclosure will have to be accompanied by a damages claim. The right to be heard in such a procedure (Article 5(7)

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<sup>63</sup> See Proposal of the ZPOmK-1G of 17 February 2017, p. 44.

of the directive) is already present in Articles 5 and 228 ZPP, thus no amendments were necessary. The parties retain the procedural option set out in the existent ZPP to ask the court to order disclosure, whereby such disclosure is also subject to conditions set forth in draft Article 62a ZPOmK-1. An important difference between a decision issued on the basis of a party's substantive claim for disclosure and an order issued according to existent general rules of the ZPP is that the latter, i.e. the order, is not enforceable whereas the decision issued according to the novel rules of the ZPOmK-1 will be.<sup>64</sup>

Article 8 of the directive imposes on the Member States the obligation of efficient sanctioning when the rules on disclosure of evidence are breached. The regime set forth by the directive demands for the fines issued by national courts to be efficient, proportionate and deterring. Article 8 of the directive will be transposed via Articles 62e and 62f ZPOmK-1. Draft Article 62e governs the situations where a party (expressly or tacitly) refuses to abide by a court's final decision on the disclosure of evidence, or hides or destroys the relevant evidence. In such cases, sanctions pursuant to the law on civil procedure regarding the non-compliance with a court decision to submit documents are to be applied. If the person refusing to fulfil the court's final decision on the disclosure of evidence is not a party to the dispute, the court will execute such a decision *ex officio* pursuant to the rules on enforcement proceedings.

Draft Article 62f ZPOmK-1 gives the court the prerogative to issue fines in the amount of up to 5.000 EUR for natural persons or up to 50.000 EUR for 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.

### 3. Effect of national decisions

Inspired by Article 16 Regulation 1/2003, Article 62/2 of the existent ZPOmK-1 alleviates the plaintiff's position regarding the burden of proving that antitrust rules (be it European or Slovenian) had been breached. It provides that (without prejudice to the rights and obligations under Article 267 TFEU) national courts assessing damages claims are bound by final decisions issued by the Slovenian Competition Protection Agency and the European Commission finding the relevant infringement. Thus,

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<sup>64</sup> Ibid, p. 43.



in such cases, i.e. in follow-on actions, the plaintiffs need only prove that they have sustained loss, that the defendant was at fault, and that there is a causal relationship between the infringement and the loss sustained. It is important to note that, at least with regard to cases of European antitrust breaches, existent Article 62/2 ZPOmK-1 is to be read in conjunction with Article 16(1) Regulation 1/2003, which sets out additional rules to be observed by the courts that have not been copied in the existent provisions of the ZPOmK-1 (for further details, see Vlahek, 2009, p. 504–510). It must also be noted that already prior to inserting Article 62(2) into the ZPOmK-1, Slovenian courts were in principle bound by the Agency's final decisions.<sup>65</sup>

The new directive provides for a novel set of rules regulating the effect of the decisions issued by Member States' NCAs. The rules set out in Article 9(1) and 9(3) of the new directive were laid down by Slovenian legislature already in 2008 and can be found in Article 62(2) ZPOmK-1, while the rule set out in Article 9(2) of the directive has to be implemented in the ZPOmK-1 accordingly. Effects of competition authority decisions will be regulated in Article 62g of the renewed ZPOmK-1.

As regards the effect of NCAs' decisions in private lawsuits, the Slovenian legislature has not opted for the solution that would fully equate the effects of decisions of foreign NCAs with those of the Slovenian Agency. Namely, if there is a final decision of an NCA or a review court issued in another Member State, Article 62g ZPOmK-1 states that in this case it is presumed that an infringement of competition law has occurred. The presumption may be rebutted.

An interesting aspect of private antitrust enforcement in Slovenia is that the plaintiffs have been filing damages actions mostly as stand-alone actions. The NCA was often inefficient in the assessment of cases. Once it finally issued a decision, the undertakings have, as a rule, instituted lengthy court review proceedings. In order to avoid the time allowed under the statute of limitations running out, the parties have decided to file lawsuits alleging all elements of tort liability. As in practice the courts have usually been reluctant to cope with the assessment of the alleged anticompetitive practices, they tended to stall the damages proceedings and await the NCA's decision to become final and binding. It is important to note that in some cases in which private lawsuits are pending, the competition authority has terminated administrative proceedings according to Article 40 ZPOmK-1 as it had not found that an infringement had taken place or has established

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<sup>65</sup> This was stressed also by the High Court in Ljubljana in its judgment of 21.11.2013 in *Blitz v. Kolosej*.

that according to special circumstances of the case the proceedings would not be reasonable. In such decisions, the NCA does not find that there was no infringement (such a decision would enable the courts to dismiss the damages claims), it merely establishes that it had not found the infringement or that the proceedings would not be reasonable leaving the courts with the task of fully assessing the undertakings' practices. However, where the competition authority itself was unable to find an infringement, it is plausible to expect the courts to decide in favour of the defendants (Vlahek, 2016a, p. 393–394).

#### 4. Collective redress

Collective redress has been left out of the scope of the directive and is regulated horizontally in the 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.<sup>66</sup> Despite being a soft-law, the Recommendations have had some impact on the Slovenian Ministry of Justice, that started drafting a new, modern Act on collective actions at the beginning of 2016 (Sl. *Predlog Zakona o kolektivnih tožbah*, hereinafter, ZKoliT). The draft ZKoliT will also cover antitrust damages claims,<sup>67</sup> special rules on collective follow-on actions will be laid down as well. That is why collective redress within private antitrust enforcement is not covered by the ZPOmK-1G (even if the directive does not regulate collective redress, the ZPOmK-1G would most probably have covered it had the Ministry not decided to draft a general act on collective actions).

The proposal of the ZKoliT is currently still being refined by the Ministry and its legal consultants. It contains the following chapters:<sup>68</sup>

- 1) General provisions (Articles 1–11)
- 2) Collective settlement (Articles 12–25)
- 3) Collective damages action (Articles 26–46)
- 4) Collective actions for injunctive relief (Articles 47–57)
- 5) Costs of proceedings and financing of collective actions (Articles 58–63)
- 6) Final provisions (Articles 64–67).

<sup>66</sup> 2013/369/EU.

<sup>67</sup> Draft Article 2 lists them explicitly as falling within the scope of the act.

<sup>68</sup> For further details, see Draft ZKoliT (EVA 2016-2030-0007).

Some of the main features of the current draft of the new system are as follows (but might be amended in the course of the drafting process):<sup>69</sup>

- 1) both collective actions and collective settlements are provided
- 2) standing is given to (i) the state attorney and to (ii) a non-profit legal person of civil law whose main operational goals are connected with the rights being protected in collective proceedings
- 3) those that have standing will have to prove their representativeness as defined in the act
- 4) both opt-in or opt-out systems will be available to the courts
- 5) an e-register of collective actions will be established
- 6) a manager of the collective damages will be nominated (most probably a notary).

## VII. Consensual dispute resolution in antitrust enforcement

During the drafting process, provisions on consensual dispute resolution (Articles 18–19 of the directive addressing the issue of potential consensual resolution of competition law damages cases and their effects on damages actions and the setting of fines) have not been regarded as problematic.

### 1. Suspension of the limitation period during consensual dispute resolution

Article 18(1) of the directive states that Member States shall ensure that the limitation period for bringing an action for damages is suspended for the duration of the consensual dispute resolution process, where the suspension shall apply only with regard to those parties that are, or were involved or represented in the consensual dispute resolution.<sup>70</sup> Paragraph 48 of the preamble explains that Article 18 refers to ‘consensual dispute resolution mechanisms, such as out-of-court settlements (including those where a judge can declare a settlement binding), arbitration, mediation or conciliation’, and emphasizes that the directive is meant to facilitate the use of such mechanisms and increase their effectiveness.

Under Slovenian law, the limitation period is interrupted (Sl. *pretrgano*; it starts running anew)<sup>71</sup> by filing a lawsuit or by performing any other

<sup>69</sup> Ibid.

<sup>70</sup> Slovenian version of Article 18 of the directive as well as paragraph 49 of its Preamble incorrectly use the word *pretrganje* (interruption) instead of *zadržanje* (suspension) which is used in the English version of the text.

<sup>71</sup> Its run is not merely suspended (Sl. *zadržano*; it does not run during the suspension).

act against the debtor before the court or another competent authority in order to determine, secure or collect a claim.<sup>72</sup> The limitation period can therefore not be interrupted by all activities meant to enforce the claim, but only by those activities initiated before a competent authority.<sup>73</sup> According to theory and court practice, filing a request for arbitration or a statement of claim in arbitration proceedings equals filing a claim with the court.<sup>74</sup>

A specific provision on limitation periods is set out in Article 17 of the Mediation in Civil and Commercial Matters Act<sup>75</sup>, stating that limitation periods are suspended (rather than interrupted as in the case of court or arbitration proceedings or other proceedings before the competent authority as set out in Article 365 OZ) during mediation proceedings.<sup>76</sup> Since the drafters of the ZPOmK-1G deemed such provisions as corresponding to Article 18(1) of the directive, specific new rules on suspension during consensual dispute resolution have not been inserted into the ZPOmK-1G. Draft Article 3 ZPOmK-1 defines ‘consensual dispute resolution’ as every mechanism enabling the parties to solve their damages dispute out-of court. The drafters have possibly not regarded all possible types of out-of-court dispute resolution as consensual dispute resolution that would suspend the limitation period. According to the drafted regime, only the existent formalized types of consensual dispute resolution qualify as such. The reason behind might lie in the fact that it would be hard to assess if, and in what period any informal negotiations between the parties took place. However, the commentary to proposal of ZPOmK-1G suggests that all available ways of consensual dispute resolution are relevant in this regard, and adds that the person referring to suspension will have to prove the duration of consensual dispute resolution.

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<sup>72</sup> Articles 365 and 369 OZ.

<sup>73</sup> See, e.g., judgment of the Supreme Court of RS No. III Ips 91/2004 of 31.01.2006.

<sup>74</sup> Such conclusion can be derived from both Article 365 OZ as well as Article 38 of the Arbitration Act (Official Gazette RS, No. 45/08) stating that as regards the parties, the arbitration award has the effect of a final and binding court judgment. It is therefore not really clear whether Article 18(1) of the directive, requiring the suspension of limitation during any consensual dispute resolution process, is to be applied also to arbitration (despite paragraph 48 of the Preamble to the directive mentioning arbitration).

<sup>75</sup> Official Gazette RS, No. 56/08.

<sup>76</sup> Mediation proceedings are defined in Article 3 of that act as proceedings in which the parties voluntarily and with assistance of a neutral third person (mediator) attempt to reach an amicable settlement of their dispute arising out of, or in connection to a contractual or other legal relationship, irrespective of how such proceedings are named or referred to (mediation, conciliation, dispute intervention, or similar).

## 2. Suspension during court proceedings

Article 18(2) of the directive states that, without prejudice to provisions of national law in matters of arbitration, Member States shall ensure that national courts dealing with an action for damages may stay the proceedings where the parties to those proceedings are involved in consensual dispute resolution concerning the claim covered by that damages action. The suspension in these cases shall not be longer than two years. Article 305b ZPP states that if both parties agree to try to resolve their dispute through an alternative dispute resolution (hereinafter, ADR) scheme – out-of-court or court-annexed (Galič, 2014, p. 159)<sup>77</sup> – the court suspends the litigation period (for maximum of three months). Article 15 of the Act on Alternative Dispute Resolution in Judicial Matters<sup>78</sup> similarly states that in cases where the parties agree that they will try to solve the dispute by means of judicial ADR regulated in that act, the court may suspend the court proceedings (*Sl. prekinitev postopka*) for a maximum of three months, and refer the parties to such dispute resolution. Further, Article 19 of the Act on Alternative Dispute Resolution in Judicial Matters authorizes the court to suspend its proceedings for a maximum of three months if it decides (on its own initiative according to the circumstances of each case) to refer the parties to mediation organized within the court. In addition, Article 209 ZPP enables the parties to agree that the court proceedings are stayed (*Sl. mirovanje postopka*) until any of the parties moves for their continuation, whereby such a motion cannot be made until three months have lapsed since the day when the proceedings were stayed. If none of the parties has moved for the continuation of the proceedings within four months from the day when they were stayed, the action is deemed to be withdrawn (Galič, 2014, p. 160).

The new rules of Article 18(2) of the directive differ to some extent from the rules already laid down in Slovenian legislation, and thus have to be implemented anew into the ZPOmK-1. Draft Article 62n ZPOmK-1 states that that national court may stay the proceedings for a maximum of two years on request of the parties

<sup>77</sup> Galič, 2014, at p. 114 explains that the ZPP acknowledges to a limited extent also the forms of out-of-court ADR – irrespective of the fact whether these are performed independently from the court or whether they concern the programmes of ADR established as court-annexed.

<sup>78</sup> Official Gazette RS, No. 97/09, with further amendments.

### 3. Effects of consensual settlements on fines

Article 18(3) of the directive states that a competition authority may consider that compensation paid, as a result of a consensual settlement, prior to its decision imposing a fine, to be a mitigating factor in the setting of the antitrust fine. The Slovenian minor offences legislation (the Minor Offences Act<sup>79</sup> which applies next to ZPOmK-1) states that when determining the fine, the following circumstances of the case are, in particular, to be taken into account by the authority: the level of the offender's liability for the offence, the offender's incentives for committing the offence, the level of threat to, or breach of the insured interest, the circumstances in which the offence was committed, former lifestyle of the offender, his or her personal circumstances, his or her conduct after committing the offence, in particular whether he or she has compensated the damage. Slovenian legislation therefore already pays due regard to the fact that the offender has repaid damages to the victims of the infringement, though not mentioning consensual settlement explicitly (for further details on criminal antitrust enforcement in Slovenia, see Fatur, Podobnik and Vlahek, 2016, p. 130–138). This is probably the reason why the Ministry has not inserted provisions corresponding to Article 18(3) of the directive into the ZPOmK-1G.

### 4. Effect of consensual settlements on subsequent actions for damages

Article 19 of the directive is transposed in draft Article 62o ZPOmK-1 titled 'Effect of a concluded settlement on other damages actions'. Paragraphs 1, 2, 3 and 5 of draft Article 62o ZPOmK-1 are verbatim transposition of paragraphs 1, 2, 3 and 4 of Article 19 of the directive, whereas paragraph 4 of draft Article 62o ZPOmK-1 adds that non-settling injured parties may exercise their claim against all co-infringers according to special rules on joint and several liability.

Both the provisions of the directive and consequently the provisions of the ZPOmK-1 are difficult to understand (same goes for Article 11 of the directive and its corresponding national provisions). We would thus appreciate if the Commission provided the interested parties with a simulation of hypothetical cases falling under these articles.

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<sup>79</sup> Official Gazette RS, No. 7/03, with further amendments.

## VIII. Conclusions

Even considering the best case scenario, whereby all of the stated potential and actual problems would be successfully manoeuvred, we must express an underlying doubt in the complete realisation of the Commission's goals and, truth be told, in the general efficiency of private enforcement of competition law in Slovenia. The reasons behind such scepticism are twofold.

Firstly, one should point out a general absence of anything resembling the elusive concept of 'competition culture'. As an economy in transition, Slovenian society (with some prominent economists leading the way) is still characterised by the ideas of 'national interest', 'national champions', distrust of foreign goods, etc. It is to be emphasized that modern, market-economy based competition law represents a relatively immature area of law, its true beginnings dating to the early nineties of the twentieth century. Although having its place in the Slovene constitution, competition is rarely recognized as a cultural, political or economic tenet. To the contrary, the field of competition, competition policy and, above all, competition law is frequently viewed as an unnecessary impediment by law-makers and politicians alike. This results, *inter alia*, in minimal media interest (save for the most notorious cases and most notorious attorneys) and, consequently, in a virtual public anonymity of the field of competition law itself. As noted before, we believe that the described issues are basic grounds for a relatively limited magnitude of litigation before civil courts.

Secondly, the most tangible problematic issue arising in the Slovene judicial system after it gained independence has to be the ever-decreasing promptness in the administration of justice. The backlog of pending cases – although substantially reduced in the last years – has adversely affected the level of trust in the judicial system. In recent years, the number of cases in which plaintiffs are seeking compensatory damages caused by anticompetitive behaviour and other forms of relief has been rising in Slovenia. As a result, the courts, businesses and their representatives, to some extent even national competition authorities, are faced with novel and complex issues of private antitrust enforcement. Private antitrust enforcement in Slovenia is still in its initial stage with the majority of cases still pending before the courts (for an analysis of the relevant Slovenian case-law, see Vlahek, 2016a, p. 407–426).

In this regard, we also identify the absence of a specialized antitrust court as additional grounds for insufficient private enforcement. Judges of the commercial law division in district courts are not versed in competition

law, and are generally perceived as inefficient by potential petitioners. Even in cases where judges are bound by the NCA's findings of a breach of competition law, and must therefore assess only the loss sustained, the defendant's fault and causal link between the breach and the damage sustained, they are somewhat reluctant to tackle the cases. Instead of taking an active role in the proceedings by asking appropriate questions and promoting clarification, as well as preparing diligently for the main hearing by carefully studying the file and performing an in-depth legal analysis of the case, judges unfortunately often remain passive up to the main hearing (or even later) and end up with unmanageable files posing a threat to the quality of their decision-making. An analysis we are currently working on is also showing an alarming absence of understanding and use of basic concepts of antitrust economics by the judges, such as notions of 'consumer welfare', 'market power', 'theory of harm', 'allocative and productive efficiency' et al. What is more, the new limitation system and new co-operation mechanism for determining the amount of damages set out in the directive might send a disturbing signal to the national courts that it is appropriate not to tackle the substantive competition law issues. Instead, they might simply wait for the NCAs' final decision on the merits of the case, consequently deciding solely on the elements of loss, causal link and fault. It stems from these rules that the Commission's great reform of 2004 (Regulation 1/2003) giving national courts broader jurisdiction has proven unsuccessful (Vlahek and Lutman, 2017, p. 70).

It is clear, then, that the legislative effort in transposing the regime set forth by the directive alone will not suffice, no matter how intense it may be. We believe that a gradual, but rapid 'Bildung' of a competition culture within all key areas of society is a prerequisite (with specialisation in the sense of setting up a specialised antitrust court at its core) for success in the field of private enforcement of competition law.

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## Quo vadis CEE? Summary

### I. Introductory remarks

The Latin phrase *Quo vadis* in the title of this summary is, unsurprisingly, intended to reflect the question of where we, Central and Eastern Europe, are going regarding the implementation of the EU Damages Directive. More precisely even, whether the ‘routes’ taken by the legal drafters and/or legislatures of CEE countries implementing the EU Damages Directive correspond very closely to the model provided by the Directive or, to the contrary, are the CEE legislatures and/or drafters using the opportunities to do something different than only to copy and paste the Directive. Are the already existing provisions, plus the newly introduced ones, compliant with the Directive? If yes, further amendments to national legal frameworks are most probably not necessary at this stage at all, or maybe it is necessary to introduce only a few amendments. If not, what further improvements are necessary?

### II. *Status quo* of the works on the implementation

The national reports narrated, first of all, the history of the works on the implementation of the EU Damages Directive in CEE countries. It is a truth acknowledged by the Authors that as of early March 2017, only three out of the eleven CEE countries (Hungary, Lithuania and Slovakia) had national provisions transposing the EU Damages Directive into their

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laws already in force. At that time, Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Poland, Romania and Slovenia were all still awaiting the transposition of the Directive. Irrespective of how remote the time of the transposition is, the majority of the Authors had to use draft provisions as the basis for their national reports. The first chapters of the national reports answered therefore not the question of ‘where we go’ but rather, the question of ‘how we go’. The answer is certainly, ‘too slowly’.

### III. Scope of the implementation

In subsequent chapters of the national reports, the Authors paid close attention to the scope of the implementation of the Directive, which is quintessential from the perspective of the question asked in the title of this summary. First, it seemed common knowledge that it would not be reasonable for Member States to have double standards with respect to the two different types of infringements – prohibited practices with and without EU effect. As expected, the national reports say that, reasonably, all the CEE countries chose to broaden the scope of the implementation going beyond only infringements with EU effect. Did the EU use a back door wanting to harmonise also national legal frameworks governing actions for damages for infringements of the competition law provisions without EU effect?

Second, the legal drafters and/or legislatures of CEE countries have not proven overly creative regarding the scope of the remedies to which the harmonised rules are going to be applied. All CEE countries are going to apply the harmonised rules only to claims for damages. Slovenia seems to be the only one that tried, at some stage of the legislative works, to broaden the scope of the implementing rules to all possible civil claims; however, the final draft has ultimately restricted their scope to claims for damages only.

So if in those two areas the CEE countries chose ‘minimal’ implementation in line with the Damages Directive, what about the types of infringements to which the harmonised rules are going to be applied? In the majority of the CEE countries these cover only: (1) agreements, decisions by associations of undertakings or concerted practices and (2) abuses of a dominant position. But it is not the same with Latvia, Hungary and Bulgaria. The new Latvian law is going to be expanded to include also unfair competition practices. Since Latvian Competition Law prohibits also unfair competition practices and the new provisions are going to contain a more general reference to

violations of any provision of the said Latvian statute, the implemented provisions will be broadened to encompass also unfair competition practices. Interestingly, the approach to this question in Bulgaria and Hungary is a bit different. In Bulgaria, the broadened implementation with regard to unfair competition practices is going to regard only the right to full compensation. In Hungary, some of the new rules (Chapter XIV/B of the Competition Act) relate to a very specific type of prohibited practices, that is the unfair manipulation of business decisions.

As to the personal scope of the implementation of the Directive, the CEE countries chose 'minimal' implementation in line with the Damages Directive. They have never followed one pattern as regards the liability of a parent company for infringements of competition law committed by a subsidiary. The concept of a 'single economic entity' has been defined in legal provisions (Croatia) or adopted in jurisprudence (Bulgaria and Slovenia). In some CEE countries, legislation provides for the liability of a parent company for the obligations of its subsidiaries – public (Hungary) or private (Lithuania). The 'own fault' of a parent company is assessed, for example whether it gave instruction to a subsidiary (Croatia, Bulgaria, Lithuania). In some countries however, there is only the concept of a 'single legal entity', rather than the concept of a 'single economic entity' (Poland, Hungary). That might have been about to change. Passing legislation to regulate the civil liability of a parent company for competition law infringements of its subsidiaries would, without any doubt, be a move welcomed by scholars and practitioners. But, as the national reports say, this is not going to take place.

#### IV. Competent courts

The national reports focus next on the issue of competent national courts before which the right to compensation is enforced. The Directive does not provide for any specific organizational model of private enforcement of competition law. Therefore, Member States have plenty of options. Some CEE countries are going to be characterised by having only one court competent to hear actions for antitrust damages. These include Lithuania (Vilnius Regional Court as the court of 1<sup>st</sup> instance and the Court of Appeal of Lithuania as the court of 2<sup>nd</sup> instance) and Latvia (Riga city Latgale district court as the court of 1<sup>st</sup> instance and Riga Regional court as the court of 2<sup>nd</sup> instance). Out of the three countries that implemented the Directive already (Hungary, Lithuania, Slovakia), Slovakia decided

to have only one court competent to hear actions for antitrust damages (District Court Bratislava II as the court of 1<sup>st</sup> instance and the Regional Court in Bratislava as the court of 2<sup>nd</sup> instance). In Croatia, actions for antitrust damages are heard by specialised commercial courts. Some CEE countries are going to be characterised by the competence of regional courts irrespective of the amount of the claim (Czech Republic, Hungary, Poland, Croatia). However, if we take a closer look at the composition of the judicial panel, it turns out that those cases are usually heard by a single judge only (Czech Republic, Hungary, Croatia, Poland). In Bulgaria, general courts – district or provincial (regional) – are competent depending on the amount of the claim. Interestingly, Bulgarian courts limit their own competence and consider stand-alone actions inadmissible. Regrettably, in the majority of the CEE countries, courts described by the Authors as non-specialised remain competent to hear actions for antitrust damages.

## V. Substantive law issues

Further, the national reports contain an overview of relevant substantive law issues.

Examined first in the national reports are developments of the rules governing limitation periods for bringing actions for antitrust damages. The new provisions or draft provisions correspond in principle to Article 10 of the Directive. It is interesting, however, that some countries have difficulties with the transposition of the conditions relating to the beginning of the limitation period. Namely, according to the Slovenian draft, the limitation period shall begin to run when, *inter alia*, the claimant knows, or can reasonably be expected to know, of the behaviour of the infringer constituting an infringement of competition law. By contrast, the Directive mentions ‘the fact that the behaviour constitutes an infringement’ (Article 10(2)(a) of the Directive). Furthermore, the Slovenian draft requires that the claimant knows, or can reasonably be expected to know, of the harm caused by the infringement of competition law, while the Directive refers to ‘the fact that the infringement of competition law caused harm’ to the claimant (Article 10(2)(b) of the Directive). Second, the Hungarian provisions mention ‘damage caused by infringement’ rather than the content of the Directive. Third, the Czech draft mentions the person liable to pay the damages, where the Directive requires knowledge of the identity of the infringer (Article 10(2)(c) of the Directive).

In almost all CEE countries, the limitation periods for bringing actions for damages shall be five years (period *a tempore scientiae*). Latvia, unlike the majority of CEE countries, is going to retain the longer 10-year limitation period resulting from its civil law, which is compliant with the minimum harmonisation clause contained in Article 10(3) of the Directive. A significant shortcoming of the Latvian draft Competition Act is, however, that it does not deal with the issue of the conflict between civil law and commercial law provisions on limitation periods. In the latter case, the limitation period is three years and the application of this provision to cases where a commercial transaction exists between the infringer and the person that has suffered harm caused by an infringement of competition law would be contrary to the requirements of Article 10(3) of the Directive. There is one thing in common between the above approaches in Latvia and Slovakia. Also in Slovakia, provisions on limitation periods exist both in civil law and commercial law. In the latter case, a general limitation period exists that shall start to run when the injured party knows or can reasonably be expected to know of the harm suffered and the identity of the person liable for damages. Aside from that, there is also a rule according to which the limitation period shall anyways expire not later than 10 years from the end of the injurious behaviour that caused the harm (an absolute limitation period or a period *a tempore facti*). Under the Slovak law, it is ambiguous if this absolute limitation period shall be applicable to actions for antitrust damages between undertakings, or if it shall be excluded. It is worth mentioning that absolute limitation periods have been proposed also in Poland and Slovenia (10 years) as well as in Croatia (15 years).

Second, the national reports analyse the type of liability of the infringer as well as joint and several liability of co-infringers. Recital (11) sentence 5 of the Directive states 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 Directive. This provision is not such as to discourage CEE countries from maintaining a fault-based model of liability in private antitrust enforcement. To put it simply, the majority of them have opted for a fault-based model of liability (Bulgaria, Latvia, Lithuania, Poland, Romania, Slovenia), in some cases accompanied by the presumption of fault (Czech Republic, Hungary, Lithuania, Poland). Only Croatia and Slovakia differ in this respect in that they have done something completely different and chosen strict liability.

The next pages of the national reports are devoted to the principle of joint and several civil liability of competition law infringers. As a rule, CEE countries do not need to introduce this principle, as embodied in Article 11(1) of the Directive, since – as the national reports assert – they already have it in their laws with regard to competition law infringements. The focus is then on the transposition of the details contained in Article 11(2)–(6) of the Directive. Whether it has anything to do with the ambiguity of some of the provisions of Article 11, or with the fact that it seems to contain some mistakes, but certain CEE countries tend to supplement and correct the transposed provisions. For example, Article 11(2) regarding small or medium-sized enterprises (SMEs) refers to their definitions contained in a piece of ‘soft’ law, namely *Commission Recommendation 2003/361/EC*. Slovakia corrected this reference so that now it refers to *Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty*.<sup>1</sup> The drafters of the new Slovenian rules, instead of making a reference to ‘soft’ or binding law, copied the definitions into the draft law transposing the Directive. Both countries realized that micro enterprises are missing from Article 11(2) of the Directive, and so they made efforts aimed at correcting this in their national transposing provisions. The Hungarian legislature added to the elements of the definition of SMEs that the infringing enterprise must be a SME during the whole duration of the unlawful behaviour, in order to take advantage of the analysed provision. Article 11(2) states that the infringer is liable only to its own direct and indirect purchasers. Direct and indirect providers are missing from this paragraph, so when drafting their national transposing provisions, the Czech Republic and Poland filled this gap. When transposing Article 11(2)(b), the drafters of the new Slovenian rules, replaced the word ‘irretrievably’ with ‘undoubtedly’. Moreover, Slovakian, Czech, Estonian and Slovenian legal drafters copied into national provisions related to SMEs the provision of Article 11(4)(b) of the Directive relevant to immunity recipients, even though this is not so provided in the Directive. On the other hand, the Croatian standpoint is that adding such provisions is impermissible, since SMEs have received preferential treatment in the Directive. Interestingly, Croatian draft law transposing the Directive sets out exemplary objective criteria for determining the relative share of co-infringers in the entire harm caused by the infringement. Such determination shall be based upon all the circumstances of a case, such as market share, turnover, role in

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<sup>1</sup> OJ L 187, 26.06.2014, p. 1.

the cartel or other infringement etc. The proposed provision is going to codify Recital 37 of the preamble of the Directive. Last, in Hungarian law, the scope of the liability of the immunity recipient has been extended as a result of the transposition of the Directive, since Hungary previously had rules restricting their liability inspired by the European Commission's White Paper of 2008.

Next, the national reports grasp the crucial issues of quantification of harm. All CEE countries either drafted a rebuttable presumption following Article 17(2) of the Directive or had such rules beforehand (Czech Republic, Hungary). The scope of the presumption is different in various countries. In the majority of CEE countries, the presumption is limited only to cartels. On the other hand, the scope of the Polish draft includes both types of infringements covered by the Directive (anticompetitive agreements, decisions by associations of undertakings or concerted practices and abuses of a dominant position). The Romanian draft covers anticompetitive agreements, decisions by associations of undertakings or concerted practices. Hungary, from 2009, has a rebuttable presumption that a cartel results in a price increase of 10%. It is not a presumption of 'some' harm but a presumption of harm in a given amount. The same solution can be found in the Latvian draft. This type of provisions may raise doubts as to their conformity with Recital (47) sentence 3 of the Preamble of the Directive ('This presumption should not cover the concrete amount of harm'). CEE countries already had provisions giving their courts the power to estimate the amount of harm sustained. However, some of them are going to introduce *leges speciales* to their general principles (Czech Republic, Croatia). Out of the three countries that implemented the Directive already (Hungary, Lithuania, Slovakia), Slovakia is in this group and discrepancies between the national law and the Directive have not been avoided here. The Directive allows for the estimation of harm if it is practically impossible or excessively difficult to precisely quantify the harm. Slovak law allows for such estimation where it is absolutely impossible or disproportionately difficult to precisely quantify the harm.

As to interest, even though the solution contained in Recital (12) of the Preamble of the Directive, whereby interest is due from the time when the harm occurred, was so far uncommon in CEE countries, most of them decided to introduce it. However, Estonian drafters proposed that interest is due from the time when the injured person filed a claim for damages. According to the Polish draft, if the basis of calculating damages are prices from a date other than the date of calculating damages, the party injured by the infringement of competition law can also claim interest for the period



from the day the prices of which were the basis of calculating damages to the day when the claim for damages is due.

Rules on passing-on of overcharges (Articles 12–16 of the Directive) seem the least problematic when it comes to substantive law issues. The laws of the majority of CEE countries have already embodied general rules regarding this topic and detailed rules on this issue were transposed to their national draft statutes quite literally.

## VI. Procedural issues

With respect to procedural issues, the transposition of the effect of national decisions does not seem to be subject to difficulties, but only with regard to the effect of infringement decisions adopted in individual Member States by their own competition authorities (non-cross-border effect of such decisions). CEE countries unanimously opt for the binding effect of this type of decisions ('irrefutably' establishing an infringement) in compliance with the maximum harmonisation clause contained in Article 9(1) of the Directive. However, even here there are some differences between the choices of particular CEE countries with regard to the scope of the concept of 'decision'. For example, in Bulgarian draft provisions contain the binding effect of not only 'positive' decisions (infringement decisions) but also 'negative decisions' where the NCA has not ruled that a party is in breach of competition law. Interestingly, the same approach was taken by Hungary but only before the transposition of the Directive. In Romania, the draft provisions on the binding effect of decisions cover not only administrative decisions by its NCA, but also earlier civil court decisions rendered in a private litigation case involving the same plaintiff and the same infringement.

A much more visible diversity can be found with regard to a cross-border effect of national decisions referred to in Article 9(2) of the Directive, constituting a minimum harmonisation clause ('at least *prima facie* evidence'). None of the CEE countries chose to provide them with the same standard of effect as in the case of non-cross-border effect of their own decisions. The majority opted for a rebuttable presumption (Croatia, Czech Republic, Latvia, Romania, Slovakia, Slovenia). In Slovakia, however, there are serious doubts regarding the interpretation of the adopted provision whereby the final decision on a competition infringement issued in another Member State is considered evidence of the infringement unless it is proven otherwise in the court proceedings on damages claims. Furthermore, in Lithuania, circumstances indicated in decisions of NCAs of other Members

States shall be considered fully proven until and unless they are contradicted by other relevant evidence, except for witness evidence (as a rule). Estonian drafters plan to retain a rule according to which it is allowed to present decisions of NCAs of other Members States as evidence. Polish drafters proposed not to change its procedural rules at all, claiming that they already contain the concept of *prima facie* evidence in the form of the so-called factual presumption. Last, Bulgaria disregarded Article 9(2) of the Directive and no special effect is going to be accorded to decisions of NCAs of other Members States when presented before Bulgarian courts.

Regarding disclosure of evidence, CEE countries have, as a rule, established or are going to establish the same principles as the Directive (Articles 5–8 of the Directive). However, the Czech provisions will allow for pre-trial discovery, whereas the Directive prescribes disclosure of evidence only after the proceedings concerning damages are initiated. Article 5(2) of the Directive requires Member States to ensure that national courts are able to order the disclosure of specified items of evidence or relevant categories of evidence. The last concept seems to generate doubts in CEE countries. The Croatian draft provisions make it possible for the parties to obtain court-assisted disclosure of specified or specifiable evidences; the drafters of these provisions believe that the latter will be considered equivalent to ‘relevant categories of evidence’. On the other hand, the Czech Republic has not drafted any provisions on this concept at all but proposed the usage of the minimum harmonisation clause of the Directive (Article 5(8)) that allows for maintaining or introducing rules which would lead to wider disclosure of evidence than provided for in the Directive. Another unique Czech solution refers to the obligation of the claimant requesting evidence disclosure to pay an up-front guarantee of up to 4,000 Eur and a limitation, in the case of damages claims, regarding the abuse of disclosed evidence. Rules on the disclosure of evidence need some ‘muscle behind them’, therefore CEE countries introduce sanctions for failure to comply with those rules, including fines. It seems that if undertakings or their representatives risk a fine, it can prevent such behaviour. At least in some CEE countries, the planned or introduced fines seem a sufficiently deterrent: in Croatia – up to 1% of the annual turnover, in Romania – from 0.1% to 1% of the annual turnover, in the Czech Republic – up to 1% of the annual turnover or 400,000 Eur (and joint and several liability for the fine), in Bulgaria – up to 250,000 Eur, in Hungary – up to 160,000 Eur, in Slovenia – up to 50,000 Eur. By contrast, in Lithuania such fines may only reach up to 10,000 Eur, in Estonia – 3,200 Eur, in Slovakia – 800 Eur or 2,000 Eur (in case of repeated infringements) and in Latvia – 40 Eur (!).

As to standing to sue, that is who is entitled to apply for judicial proceedings, in CEE countries, as a rule, general rules apply. The standing to sue does not suffer from any material limitations, except in Bulgaria where stand-alone actions have not been permissible so far. Even though the Directive does not require Member States to provide for the standing of ‘someone acting on behalf of one or more alleged injured parties’ (Article 2(4) of the Directive), some CEE countries already have such solutions (Romania, Hungary) or plan to introduce them (Poland).

The legal bases for collective private enforcement of competition law in CEE countries exist in only three CEE countries – Bulgaria, Lithuania and Poland. The transposition of the Directive has not been used in any of them as an opportunity to make amendments to the existing solutions. None of the remaining CEE countries decided to introduce a legal framework for collective private enforcement of competition law alongside the transposition of the Directive. In Slovenia, however, a draft law on collective redress is being prepared.

## VII. Consensual dispute resolution

As a rule, provisions on consensual dispute resolution in antitrust enforcement (Articles 18–19 of the Directive) were, or are going to be transposed into national laws of CEE countries without substantial changes to the text of the Directive. Most of them already have provisions on the suspension of limitation for the duration of any consensual dispute resolution process, or are going to introduce them. The Czech Republic is the exception here – there is no such provision under Czech law. However, in the case of Slovenia and Poland, their legal drafters have not regarded all possible types of out-of-court dispute resolution as consensual dispute resolution which would suspend the limitation period – only the existent formalized types of consensual dispute resolution qualify as such. The majority of CEE countries either already have, or intend to introduce a rule whereby their NCAs may consider compensation paid as a result of a consensual settlement, and prior to its decision imposing a fine, to be a mitigating factor with respect to setting the amount of such fine (Article 18(3) of the Directive). This does not refer to Croatian draft provisions but their drafters do not see this omission as a particular problem; most consensual settlements will follow a prior infringement decision and the application of this rule will most likely be quite uncommon. Last, Slovakian law differs

with regard to its equivalent of Article 19(1) of the Directive – where the Directive excludes from the claim the whole ‘share’ of the settling infringer, Slovak law excludes only the extent to which the injured party was satisfied.

## VIII. Conclusions

To sum this up, it seems that in many instances CEE countries introduced, or are going to introduce the changes required by the Damages Directive. They have conducted a more or less intensive scrutiny of legal areas such as civil law, procedural law and competition law. However, at the same time, they have also added further complications to an already quite complex and inefficient systems of competition law enforcement. The system of competition law enforcement is becoming a more highly regulated and codified field in CEE countries. It is very unlikely that after the amendments claimants will find redress much easier, cheaper and quicker. After making the above comparisons, I believe that the solutions used in the neighbouring countries may be described a ‘patchwork’. At the point of departure, the national solution of CEE countries represented a puzzle that posed difficulties when being harmonised according to the EU model. Not very much has changed after the harmonisations works. However, this is so largely also because the EU model is imperfect to some extent.

The Authors of the national reports seem partly optimistic and partly pessimistic as to the future of private antitrust enforcement in CEE countries. Admittedly, some of the rules of the Directive will contribute to the improvement of tools available to claimants and authorities. For example, limitation periods will be more reasonable and will suffice to allow injured parties to bring actions, even follow-on actions. Access to evidence will probably be better. On the other hand, some areas of private antitrust enforcement have been omitted by the Directive and/or the legal drafters and/or legislatures of CEE countries, which may result in that pursuing claims will not become much easier at all. For example, no incentives for consumers were introduced, in particular to initiate collective actions. It does not seem likely that any of the CEE countries could become the ‘target’ of forum shopping, with their respective legal frameworks for private antitrust enforcement. It remains to be seen whether and how the new rules will be applied in practice and how their deficiencies will be overcome by national courts.

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**From the book reviews:**

(...) I consider the publication of the book very valuable. All analyses are deep, thorough and well structured. They will serve as a gold mine of information for all those who are interested in private enforcement of competition law, be it legislators, judges, practitioners and academics. The comparative dimension of the book will allow readers to evaluate each statements and solutions in the light of the legislative choices and judicial practice of other countries. The publication of the book will certainly contribute to the development of this kind of competition law enforcement in Central and Eastern Europe.

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All CEE (EU-) countries have recently been facing common need for implementation of the Damages Directive. These countries share something more common than geographical proximity and neighbourhood only. Their legal history and tradition and so called path-dependence often resemble, too. It is therefore important and useful to compare the starting positions of these countries, main problems accompanying the process of implementation and to discuss the possibilities how to solve and overcome the difficulties and obstacles connected therewith. The book contributes without any doubts to achieving this goal.

**Prof. Dr. Josef Bejček  
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