

# YEARBOOK *of* ANTITRUST *and* REGULATORY STUDIES

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**YEARBOOK OF ANTITRUST AND REGULATORY STUDIES**  
**VOL. 2015, 8(12)**

**Contents**

<b>Editorial foreword.....</b>	<b>5</b>
<b>List of acronyms .....</b>	<b>7</b>
 <b>GUEST ARTICLE</b>	
SOFIA OLIVEIRA PAIS, Private Antitrust Enforcement: A New Era for Collective Redress? .....	11
 <b>ARTICLES</b>	
KATALIN J. CSERES, Harmonising Private Enforcement of Competition Law in Central and Eastern Europe: The Effectiveness of Legal Transplants Through Consumer Collective Actions.....	33
AGATA JURKOWSKA-GOMUŁKA, How to Throw the Baby out with the Bath Water. A Few Remarks on the Currently Accepted Scope of Civil Liability for Antitrust Damages.....	61
ANNA PISZCZ, Piecemeal Harmonisation Through the Damages Directive? Remarks on What Received Too Little Attention in Relation to Private Enforcement of EU Competition Law.....	79
ALEŠ GALIČ, Disclosure of Documents in Private Antitrust Enforcement Litigation .....	99
VLATKA BUTORAC MALNAR, Access to Documents in Antitrust Litigation – EU and Croatian Perspective .....	127
ANNA GULIŃSKA, Collecting Evidence Through Access to Competition Authorities’ Files – Interplay or Potential Conflicts Between Private and Public Enforcement Proceedings? .....	161

RAIMUNDAS MOISEJEVAS, The Damages Directive and Consensual Approach to Antitrust Enforcement.....	181
ANZHELIKA GERASYMENKO, NATALIYA MAZARAKI, Antitrust Damages Actions in Ukraine: Current Situation and Perspectives.....	195
ZURAB GVELESIANI, Georgia's First Steps in Competition Law Enforcement: The Role and Perspectives of the Private Enforcement Mechanism .....	215
RIMANTAS ANTANAS STANIKUNAS, ARUNAS BURINSKAS, The Interaction of Public and Private Enforcement of Competition Law in Lithuania ...	237
ONDREJ BLAŽO, Directive on Antitrust Damages Actions and Current Changes of Slovak Competition and Civil Law .....	259

## CONFERENCE REPORTS

Private Enforcement of Competition Law. Key Lessons from Recent International Developments. London, 5–6 March 2015. Reported by EMILIA WARDEGA.....	273
Abuse Regulation in Competition Law: Past, Present and Future. 10th Annual ASCOLA. Tokyo, 21–23 May 2015. Reported by KRZYSZTOF ROKITA .....	279
International Conference on the Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective. Supraśl, 2–4 July 2015. Reported by PAULINA KORYCIŃSKA-RZĄDCA.....	291
2nd International PhD Students Seminar. Competition Law in Portugal and Poland. Białystok, 1 July 2015. Reported by TERESA KACZYŃSKA .....	297
The First Polish Competition Law Congress. Warsaw, 13–15 April 2015. Reported by DARIUSZ AZIEWICZ, AGNIESZKA JABLONOWSKA, TERESA KACZYŃSKA, ALEKSANDRA KŁOCZKO, KATARZYNA SKOWROŃSKA, IŁONA SZWEDZIAK-BORK, BARTOSZ TARGAŃSKI.....	301

## ACTIVITIES OF CARS

CARS Activity Report 2013–2014. Reported by AGATA JURKOWSKA-GOMUŁKA, TADEUSZ SKOCZNY.....	323
<b>Reviewers of YARS in 2015.....</b>	<b>333</b>
<b>Articles in YARS 2008–2015 .....</b>	<b>335</b>

## **Editorial foreword**

The editorial board is pleased to present the 12<sup>th</sup> volume of the Yearbook of Antitrust and Regulatory Studies (YARS 2015, 8(12)). It contains contributions presented during the International Conference entitled ‘Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective’. The conference was organised by the Faculty of Law of the University of Białystok and the Centre for Antitrust and Regulatory Studies of the University of Warsaw (CARS). It was held on 2–4 July 2015 in Supraśl. It is the organisers’ intention for both the conference itself and the publication of its papers to contribute to the discussion on private antitrust enforcement. The conference provided a forum for a range of contributors from Central and Eastern Europe to present their approaches to the harmonisation of private antitrust enforcement. As a result, and continuing the tradition set by YARS in 2013, the research papers published in the current volume focus not only on the Polish competition law regime but also present the national competition laws of other CEE countries.

The current volume is dedicated to a whole spectrum of topics relating, in particular, to the Damages Directive (Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union). Much emphasis is devoted to difficulties in transposing the Directive into national legislation of EU Member States, which represent various legal traditions and cultures. The organisers of the conference wanted to actively engage in the vital discussion on this topic. This refers both to substantive and procedural issues, as well as private antitrust enforcement from the perspective of consumer interests.

This last issue raises the question of collective consumer redress in antitrust cases (including, in particular, legal standing and financing, as well as the opt-in *vs.* opt-out model). This aspect of the debate is analysed in the guest article by S.O. Pais, which opens the current volume of YARS, as well as in the article written by K.J. Cseres.

Two papers focus on the scope of the Damages Directive. The first specifically concerns the scope of civil liability for antitrust damages (A. Jurkowska-Gomułka), the second focuses on those issues which received too little attention in the Directive (A. Piszcz). Procedural challenges are discussed with reference to the disclosure of documents (A. Galič) and access to documents (V. Butorac Malnar), including access to the files of competition authorities (A. Gulińska). One of the papers refers to the consensual approach to antitrust enforcement (R. Moisejevas). Included in the 'Articles' section of this YARS volume are also national reports from the four CEE countries represented at the conference – Ukraine (A. Gerasymenko and N. Mazaraki), Georgia (Z. Gvelesiani), Lithuania (R.A. Stanikunas and A. Burinskas) and Slovakia (O. Blažo).

Aside from the above research papers, the current volume of YARS contains also a number of conference reports. They cover: (i) 'Private Enforcement of Competition Law. Key Lessons from Recent International Developments' (London, 5–6 March 2015), (ii) 'Abuse Regulation in Competition Law: Past, Present and Future. 10th Annual ASCOLA' (Tokyo, 21–23 May 2015), (iii) 'International Conference on the Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective' (Supraśl, 2–4 July 2015), (iv) '2nd International PhD Students Seminar. Competition Law in Portugal and Poland' (Białystok, 1 July 2015), (v) The First Polish Competition Law Congress (Warsaw, 13–15 April 2015). The current volume of YARS concludes with the CARS Activity Report 2013–2014.

I end this brief editorial note with expressions of deep gratitude. I wish to first thank the members of the Conference Organising Committee, in particular Prof. Cezary Kosikowski and Prof. Tadeusz Skoczny, for all their support. I offer thanks to the authors and various anonymous reviewers who willingly gave their time and expertise to contribute to the current volume. Finally, I would like to acknowledge the financial support of the Dean of the Faculty of Law, University of Białystok – Prof. Emil Plywaczewski – which allowed us to publish this volume.

Białystok, 2<sup>nd</sup> October 2015

*Anna Piszcz*  
YARS Volume Editor

## List of acronyms

### Institutions

- AMCU** – Antimonopoly Committee (Ukraine)  
**AMO** – Antimonopoly Office of the Slovak Republic  
**CAT** – Competition Appeal Tribunal (UK)  
**CCA** – Croatian Competition Agency  
**CCG** – Constitutional Court of Georgia  
**CFI** – Court of First Instance  
**CJ** – Court of Justice  
**CJEU** – Court of Justice of the European Union  
**EC** – European Commission  
**ECJ** – European Court of Justice  
**ECN** – European Competition Network  
**ECtHR** – European Court of Human Rights  
**GC** – General Court  
**NCA** – National Competition Authority  
**NRA** – National Regulatory Authority  
**PCA** – Portuguese Competition Authority  
**SOKiK** – Court of Competition and Consumers Protection, *Sąd Ochrony Konkurencji i Konsumentów* (Poland)  
**UOKiK** – Office for Competition and Consumers Protection, *Urząd Ochrony Konkurencji i Konsumentów* (Poland)

### Legal acts

- AA** – Association Agreement  
**APEC** – 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

- BER(s)** – Commission’s Block Exemption Regulation(s)  
**CCPC** – Slovak Civil Court Procedure Code of 1963  
**CCU** – Civil Code of Ukraine  
**CDC** – Slovak Civil Dispute Code  
**CPA** – Civil Procedure Act (Slovenia)  
**CPCU** – Civil Procedure Code of Ukraine  
**CRA** – Consumer Rights Act (UK)  
**CUCA** – Combating Unfair Competition Act (Poland)  
**EA** – Europe Agreement  
**ECHR** – European Convention on Human Rights  
**FTA** – Free Trade Agreement  
**GLC** – Georgia’s Law on Competition  
**GCC** – Georgian Civil Code  
**GCPC** – Georgian Civil Procedural Code  
**KPC** – Polish Civil Procedure Code  
**LC** – Law on Competition (Georgia)  
**LCC** – Lituaninan Civil Code  
**LCCP** – Lithuanian Code of Civil Procedure  
**LCL** – Lithuania’s Competition Law  
**LFTC** – Law on Free Trade and Competition (Georgia)  
**LPEC** – Law on the Protection of Economic Competition (Ukraine)  
**PAA** – Popular Action Act (Portugal)  
**PCA** – Partnership & Cooperation Agreement  
**PCCPA** – Polish Competition and Consumer Protection Act  
**PCPA** – Portuguese Competition Protection Act  
**PRCA-1** – Prevention of Restriction of Competition Act of 2008 (Slovenia)  
**SAA(s)** – Stabilisation and Association Agreement(s)  
**TEC** – Treaty establishing the European Community  
**TEU** – Treaty on the European Union  
**TFEU** – Treaty on the Functioning of the European Union

### **Other acronyms**

- ADR** – Alternative Dispute Resolution  
**AG** – Advocate General

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<b>CEE</b>	– Central and Eastern Europe(an)
<b>CEECs</b>	– Countries of Central and Eastern Europe
<b>CLP</b>	– Corporate Leniency Programme
<b>ECR</b>	– European Court Reports
<b>EEA</b>	– European Economic Area
<b>MLP</b>	– ECN Model Leniency Program
<b>OJ</b>	– Official Journal
<b>PA</b>	– Popular Action (Portugal)
<b>RPM</b>	– resale price maintenance



## Private Antitrust Enforcement: A New Era for Collective Redress?

by

Sofia Oliveira Pais\*

### CONTENTS

- I. Introduction
- II. The European Recommendation 2013/396/EU of 11 June 2013
  - 1. General remarks
  - 2. Opt-in vs. opt-out models
  - 3. Funding
  - 4. Cross-border mass disputes
- III. The new Belgian and British laws on consumer collective redress
- IV. The experience of collective redress in Portugal: the Popular Action
- V. Conclusions

### *Abstract*

It will be argued in this article that the EU Recommendation on common principles for collective redress might have limited impact on the field of competition law due to: several uncertainties regarding the legal standing in class actions; difficulties in their funding; and the risk of forum shopping with cross-border actions. Nevertheless, Belgium and Great Britain have recently introduced class actions into their national legal systems and addressed some of the difficulties which other Member States were experiencing already. It will also be suggested that the Portuguese model – the ‘Popular Action’ – and recent Portuguese practice may be considered an interesting example to follow in order to overcome some of the identified obstacles to private antitrust enforcement.

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## Résumé

Dans cet article nous soutenons l'avis que la Recommandation de l'Union européenne relative à des principes communs applicables aux mécanismes de recours collectif pourrait avoir un impact limité sur le domaine du droit de la concurrence, en raison de plusieurs incertitudes concernant la qualité à agir dans l'action de groupe, les difficultés de leur financement et le risque de forum shopping dans le cas des actions transfrontalières. Néanmoins, la Belgique et le Royaume-Uni ont récemment introduit dans leurs lois nationales des actions de groupes et ont répondu aux certaines difficultés qui étaient déjà vécue par d'autres États membres. Nous soutenons aussi l'avis que le modèle portugais – Action Populaire – et la pratique récente des actions collectives au Portugal, peuvent être considérés comme des exemples intéressants à suivre afin de surmonter certains obstacles à l'application privée du droit de la concurrence.

**Key words:** Recommendation 2013/396/EU; collective redress mechanisms; legal standing; funding; forum shopping; popular action.

**JEL:** K23; K42.

## I. Introduction

The European Parliament and the Council adopted on 26 November 2014 a Directive on certain rules governing actions for damages under national law for infringements of the competition law<sup>1</sup> (hereafter, Damages Directive), which might have significant impact in the 28 Member States even if the EU is still far from US experiences where private antitrust enforcement represents more than 90% of all antitrust cases<sup>2</sup>. Even so, with the introduction of the new Directive, another step has been taken in order to increase the relevance of private antitrust enforcement as a complementary tool to its public enforcement<sup>3</sup>, which

<sup>1</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, 05.12.2014, p. 1).

<sup>2</sup> See R.H. Lande, 'Benefits of private enforcement: empirical background' [in:] A. Foer, J. Cuneo (eds.), *The International Handbook on Private Enforcement of Competition Law*, Edward Elgar Publishing, 2012, p. 34.

<sup>3</sup> The Directive will not be addressed here which nevertheless be welcomed as a significant milestone to achieving a more effective enforcement of EU antitrust rules: by giving victims apparently easier access to evidence and more time to make their claims, but also by preserving the attractiveness of leniency and settlement programmes.

still plays the lead in the EU<sup>4</sup>. Yet the Directive does not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU, even if both Member States and consumers recognize that collective redress is a necessary solution in this context. In fact, a recent survey by Eurobarometer shows that almost 80% of European consumers would be more willing to go to court if collective redress procedures were available (because they would not have to carry the risk and litigation costs alone)<sup>5</sup>. This survey confirms also the explanation given by the European Court of Human Rights (hereafter, ECHR) in *Gorraiz Lizarraga and others v. Spain* which stated that ‘in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means available to them whereby they can defend their particular interests effectively’<sup>6</sup>. On the other hand, several Member States have recently introduced class actions into their national laws, confirming the urgent need for such mechanisms for effective private enforcement of competition law.

In the EU, the problem of collective redress was addressed with non-binding acts – a fact that may limit the success of such solutions. These included the European Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanism in the Member States, concerning violations of rights granted under Union Law<sup>7</sup> (hereafter, Recommendation). The Recommendation was accompanied by a Communication to the European Parliament and the Council ‘Towards a European Horizontal Framework for Collective Redress’<sup>8</sup>. According to the European Commission (hereafter, EC or Commission), EU Member States should implement the principles set forth in this Recommendation into their national collective redress systems by 26 July 2015<sup>9</sup>. On the basis of information and data that must be provided by Member

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<sup>4</sup> Another alternative to private enforcement is public compensation. According to Ezrachi and Ioannidou, public compensation ‘would enable competition authorities to award a certain form of compensation alongside the imposed fine following a public investigation’. Public compensation in the course of public investigation could, therefore, facilitate compensation, increase deterrence and encourage greater consumer involvement. The authors sustain that public compensation should be considered as another remedy (in addition to fines) and should be formalized. Cf. A. Ezrachi, M. Ioannidou, ‘Public Compensation as a Complementary Mechanism to Damages Actions: From Policy Justifications to Formal Implementation’ (2012) 3(6) *Journal of European Competition Law & Practice* 536-537.

<sup>5</sup> Flash Eurobarometer 299, *Consumer Attitudes Towards Cross-Border Trade and Consumer Protection*, [http://ec.europa.eu/public\\_opinion/flash/fl\\_299\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_299_en.pdf) (accessed 8 April 2014).

<sup>6</sup> Cf. *Gorraiz Lizarraga and others v. Spain*, App no 62543/00, ECHR 2004-III, para. 38.

<sup>7</sup> OJ L 201, 26.07.2013, p. 60 (hereafter, the Recommendation).

<sup>8</sup> COM (2013) 401/2.

<sup>9</sup> Recommendation, point 38.

States, the EC will assess the implementation of the Recommendation by 26 July 2017 at the latest<sup>10</sup>.

The Recommendation applies not only to collective redress mechanisms in consumer law but also to procedures in a wide variety of EU law fields, including competition and environmental laws as well as data protection and financial services. The Recommendation is applicable to both judicial and out-of-court collective redress measures which should be fair, equitable, timely and not excessively expensive. Its aim is to promote an efficient justice system that will contribute to European growth<sup>11</sup>.

This article will focus mainly on antitrust class actions before courts, highlighting some of the gaps and difficulties in the implementation of the principles mentioned in the Recommendation. Furthermore, it will be shown that a new era in collective redress is arising with the recent introduction of new rules on class actions in some national legal systems. It will be suggested finally that Portuguese experiences in this domain might be relevant to other Member States also.

## II. The European Recommendation 2013/396/EU of 11 June 2013

### 1. General remarks

The Recommendation ‘aims to ensure a coherent horizontal approach to collective redress in the European Union without harmonising Member States systems’, improving access to justice while ensuring appropriate procedural guarantees to avoid abusive litigation<sup>12</sup>. As Vice-President Viviane Reding explained: ‘Member States have very different legal traditions in collective redress and the Commission wants to respect these. Our initiative aims to bring more coherence when EU law is at stake’<sup>13</sup>.

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<sup>10</sup> Recommendation, point 41.

<sup>11</sup> Translated into an economic perspective, this means the increase of European social welfare, ‘including consumer and producer surplus’; cf. G. Barker, B.P. Freyens, ‘The Economics of European Commission’s Recommendation on Collective Redress’ [in:] E. Lein, D. Fairgrieve, M. Otero Crespo, V. Smith (eds.), *Collective Redress in Europe – Why and How?*, British Institute of International and Comparative Law 2015, p. 5.

<sup>12</sup> Recommendation; cf. [http://europa.eu/rapid/press-release\\_IP-13-524\\_en.htm](http://europa.eu/rapid/press-release_IP-13-524_en.htm). Collective redress is a ‘procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar claims to be bundled into a single court action’. Cf. COM (2013) 401 final, para. 12.

<sup>13</sup> Ibidem.

At the end of the public consultation process launched in 2011, and in light of the 2012 resolution of the European Parliament<sup>14</sup>, the EC was well aware of the risk of abuses involving class actions seen on the other side of the Atlantic<sup>15</sup>. The solutions adopted in the Recommendation reflect such knowledge and try to avoid that risk, overcoming Member States' opposition regarding collective redress, particularly the opt-out model<sup>16</sup>. Even so, several difficulties and uncertainties remain. It will be shown that the main problems lie in the apparent ineffectiveness of the opt-in model; encumbrances in the implementation of due process guarantees (such as the right to be heard and the adequate representation of the group); difficulties to fund class actions and; uncertainties in cross-border mass claims. Member States must thus still face the challenge of finding reasonable solutions to these problems while achieving the right balance between an effective system (that facilitates access to justice in antitrust cases regarding low value damages claims) and the need to avoid speculative claims.

## 2. Opt-in vs. opt-out models

One of the main concerns in collective redress relates to the legal standing necessary to bring a collective action. In the opt-out model, the resulting court decision is binding on everyone that did not opt-out. This solution can increase the effectiveness of this mechanism as it overcomes the passive nature of victims of antitrust infringement as well as the fact that antitrust claims are usually of small value (a fact that discourages access to courts in light of the hard work and large legal expenses involved<sup>17</sup>).

Nevertheless, the Commission favours the opt-in model where the judgement is only binding for those who opted-in. The EC argues that this

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<sup>14</sup> Cf. COM SEC (2011) 173 and the Resolution of the European Parliament of 2 February 2012, 2011/2089 (INI).

<sup>15</sup> The solution to set aside the US model was also sustained by several authors; see, for instance, L.A. Willet, 'U.S. Style Class Actions in Europe: A Growing Threat' (2005) 9(6) *Briefly* 9. On the other hand, refusing the view that the USA model leads necessarily to abuses cf. I. Tzankova, D. Hensler, 'Collective Settlements in the Netherlands: Some Empirical Observations' [in:] A. Stadler, C. Hodges (eds.), *Resolving Mass Disputes: ADR and Settlement of Mass Claims*, Edward Elgar, 2013, p. 91 ff.

<sup>16</sup> It has been suggested that, in France, the principle '*nul ne plaide par procureur*' (no one shall plead by proxy) is part of the concept of '*ordre public*' and would prevent the opt-out model; cf. E. Werlauff, 'Class Action and Class Settlement in a European Perspective' (2013) 24 *European Business Law Review* 177.

<sup>17</sup> Providing a detailed analysis of this issue, cf. S.O. Pais, A. Piszcz, 'Package on Actions for Damages Based on Breaches of EU Competition Rules: Can One Size Fit All?' (2014) 7(10) *YARS* 209.

solution is compatible with the legal traditions of EU Member States, for instance the Italian solution<sup>18</sup>, it avoids litigation abuses and respects the freedom of potential claimants whether to take part in the action or not<sup>19</sup>. In fact, the principle of party disposition, which is the right to bring an action before the court as well as to end it, still underlies the procedural traditions of most civil laws in EU member States. Opt-out proceedings should thus only be allowed when Member States can prove that they are superior to the opt-in model (justified by ‘reasons of sound administration of justice’<sup>20</sup>), namely for claims which are not expected to be fulfilled in individual proceedings because of their small amount<sup>21</sup>.

Although the concerns of the EC should be considered relevant, other safeguards can be introduced at national level in order to avoid abusive litigation. Establishing the notion of a ‘preliminary assessment’ of the claim by national judges, or introducing the ‘loser pays’ principle, are among the solutions that will be shown to clearly reduce obstacles to collective redress mechanisms in competition procedures.

On the other hand, existing Member States’ experiences show that the opt-in model is not very effective. The *JJB Sports* case<sup>22</sup> provides a paradigmatic example here which involved the Consumer Organizations ‘Which?’ that brought a class action on behalf of 130 individual consumers, despite the fact that it was estimated that two million consumers were actually affected by the contested practice. The same is true for the *UCF Que Choisir* case<sup>23</sup> that concerns a follow-on action brought forward by a French consumer association claiming damages from a cartel involving three mobile operators. The French Competition Authority estimated in its own investigation that the cartel could have had a negative impact on almost 20 million consumers, but only around

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<sup>18</sup> In Italy, Article 140-bis of the Consumer Code allows opt-in class actions, which provide for a ‘preliminary judicial filter’: an action will be declared inadmissible when (i) it is clearly unfounded; (ii) the plaintiff has a conflict of interest; (iii) the interests are not identical or similar; (iv) the plaintiff is not able to adequately protect the interests of the class. On this topic, cf. C. Tesauro, D. Ruggiero, ‘Private Damage Actions Related to European Competition Law in Italy’ (2010) 1(6) *Journal of European Competition Law & Practice* 514–521.

<sup>19</sup> EC, White Paper on Damages Actions for Breach of the EC antitrust rules, COM (2008) 165, 2.4.2008; see also Commission Staff Working Paper, SEC (2008) 404, 2.4.2008 (hereafter, Commission Staff Working Paper).

<sup>20</sup> Recommendation, point 21.

<sup>21</sup> Cf. D. Panagiotis, L. Tzakas, ‘Effective Collective Redress in Antitrust and Consumer Protection Matters: a Panacea or a Chimera?’ (2011) 48 *Common Market Law Review* 1125.

<sup>22</sup> *Price-fixing of replica football kit* (Case CP/0871/01), OFT Decision CA98/06/2003 of 1 August 2003.

<sup>23</sup> Cited by P. Buccrossi, M. Carpagano, ‘Is it Time for the European Union to Legislate in the Field of Collective Redress in Antitrust (and how)?’ (2013) 4(1) *Journal of European Competition Law & Practice* 5.

12,000 consumers joined the private action. The choice of the opt-in model should, therefore, be reconsidered at least in 2017 when the Recommendation is due for review.

Another matter that needs clarification concerns due process guarantees such as legal standing in representative actions and the right of victims to be heard, particularly in the opt-out model. In certain types of collective actions (such as group actions), the action can be brought jointly by those who claim to have suffered harm. However, in the case of a representative action, the Recommendation states that the legal standing to bring such an action should be limited to ad hoc certified entities, designated representative entities which fulfil certain legal criteria, or to public authorities. The question is: which criteria? Should legal standing be conferred only to consumer organizations? What about foreign representative entities? Should they have legal standing?

Although the Recommendation does not answer all those questions, it refers to certain conditions that the representative entity should meet: '(a) a representative entity should have a non-profit making character; (b) there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought; and (c) the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest'<sup>24</sup>.

It has been discussed whether these requirements apply to ad hoc certified foreign representative entities, as they are not clearly mentioned in the text of the Recommendation. In fact, it has been argued that points 4 and 6 of the Recommendation distinguish between 'entities which have been officially designated in advance' and 'entities which have been certified on an ad hoc basis by a Member State's national authorities or courts for a particular representative action' and for cross-border situations. Still, point 18 of the Recommendation only considers the first type<sup>25</sup>. Does this mean that entities certified on an ad hoc basis for a particular representative action in one Member State cannot act in another State? Taking into account the spirit of the Recommendation and the need to assure efficient collective redress mechanisms, ad hoc certified foreign representative entities should also have legal standing<sup>26</sup>.

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<sup>24</sup> Recommendation, recitals 17, 18, 21 and point 63

<sup>25</sup> Cf. Statement of the European Law Institute on Collective Redress and Competition Damages Claims (hereafter, Statement ELI), at p. 15; [http://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Projects/S-5-2014\\_Statement\\_on\\_Collective\\_Redress\\_and\\_Competition\\_Damages\\_Claims.pdf](http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Projects/S-5-2014_Statement_on_Collective_Redress_and_Competition_Damages_Claims.pdf) (access 01.05.2015).

<sup>26</sup> Ad hoc certification of representative entities in the context of class actions might also require, as it has been pointed out, 'training programmes' for judges who will be deciding on those claims, cf. Statement ELI, p. 15–16.

Finally, as far as the right to be heard in the opt-out model is concerned, dissemination of information is considered vital to avoid the risk of individuals being bound by the court decision without being aware of it. Problems arise when the identity of the victims is not known and notification is not possible. In the Netherlands, for instance, it is the Court of Appeal of Amsterdam that is competent to approve group settlements in this kind of actions and it makes significant efforts to ensure that potential victims are informed of class actions. In the *Shell* case, for example, ‘110,000 letters in 22 languages were sent to shareholders in 105 countries, and announcements were made via 44 newspapers throughout the world’<sup>27</sup>. A problem arises in situations where a personal notice (by post or email) is not possible because victims are unknown or costs thereof are excessive. It has been suggested that a national or European registration system for class actions should be implemented as it could contribute to solving this issue<sup>28</sup>. The problem here is that this reasonable solution does not yet exist, be it in all Member States or at the European level. For the time being, national courts should thus have the discretion to fix other solutions to ensure that an individual is aware of his/her possibility to opt-out.

### 3. Funding

Funding is another key problem of class actions. In these types of actions, the value of the individual claims is usually low, while access to courts is expensive and time consuming. It is a priority to find solutions to the issue of how to fund such actions, besides the use of the victims’ own resources. One of the interesting choices here is the creation of special funds, either through the use of *crowdfunding* ‘based on the solicitation of multiple voluntary contributions of small amounts’<sup>29</sup>, or through donations from successful litigants to fund future class actions.

It has also been proposed to use State resources in this context, such as state legal aid. The problem with public resources, particularly considering the 2008 financial crisis, is that they are usually very limited and will only address people with very limited (or without) resources of their own. As a matter of fact, national requirements concerning the use of legal aid are strict,

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<sup>27</sup> R. Hermans, J. de Bie Leuveling Tjeenk, ‘International Class Action Settlements in the Netherlands since *Converium*’ [in:] *The International Comparative Legal Guide to Class & Group Actions 2015*, p. 5, cf. <http://www.debrauw.com/wp-content/uploads/NEWS%20-%20PUBLICATIONS/ICLG-Class-Action-15-Chapter-2.pdf> (access 31.08.2015).

<sup>28</sup> Point 35 of the Recommendation. Cf. Statement ELI, p. 16.

<sup>29</sup> Ibidem.

and usually do not apply to Small and Medium Sized Enterprises (hereafter, SMEs) and to cross-border claims<sup>30</sup>.

An alternative solution might be the use of lawyers' contingency fees (which include preparation of the claim, representation in court and gathering of evidence; those fees are calculated as a % of the awarded compensation). Yet the EC does not support this option, and neither does a meaningful number of Member States who fear the risk of abusive and frivolous claims as well as the risk of conflicting interests of lawyers and their clients (for instance, whether or not to settle more quickly for a lower amount)<sup>31</sup>. Actually, according to the Recommendation: 'The Member States should ensure that the lawyers' remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties'<sup>32</sup> and 'Member States that exceptionally allow for contingency fees should provide for appropriate national regulation of those fees in collective redress cases, taking into account in particular the right to full compensation of the members of the claimant party'<sup>33</sup>. Although the risk of abusive claims should not be underestimated, it can be reduced with the 'loser pays' rule that exists in an important number of Member States. Avoiding contingency fees, as suggested by the EC, can thus represent a potentially significant barrier to full compensation. Contingency fees should, therefore, be considered a useful solution, provided certain safeguards are also introduced.

Third party funding is another solution worth noting despite the fact that the Recommendation does not clarify this concept and only requires that funding-entities do not influence procedural decisions or settlements. Third party funding is usually considered to be a practice where a 3<sup>rd</sup> party (not a party to the actual proceedings) offers financial support to a claimant in order to cover his/her litigation expenses. The 3<sup>rd</sup> party receives in return a given % of the victim's indemnity if the claim is successful, or nothing if the case is lost. As it has been pointed out, 'the logic is similar to the US-style contingency fee scheme, except that the funds come from a third party and not from the plaintiff's lawyer', allowing the victim to file the claim and, in turn, improving access to justice as well as the deterrence effect<sup>34</sup>. Several

<sup>30</sup> Cf. Statement ELI, p. 33.

<sup>31</sup> P.T. Hurst, 'Thoughts on the American rule and contingency fees' (2012) 2 *European Business Law Review* 35.

<sup>32</sup> Recommendation, points 29, 30.

<sup>33</sup> Recommendation, point 30.

<sup>34</sup> M. Morpurgo, 'A Comparative Legal and Economic Approach to Third-Party Litigation Funding', (2011) 19 *Cardozo Journal of International and Comparative Law* 343, *apud* O. Cojo Manuel, 'Third-Party Litigation Funding: Current State of Affairs and Prospects for Its Further Development in Spain' (2014) 3 *European Review of Private Law*, 441, 443.

doubts arise, however, concerning the frontiers of this concept. For instance, which litigation decisions can be taken by the ‘funders’ without turning the funder agreement into an assignment agreement?<sup>35</sup> Should insurance for legal expenses (before the event) be included in the concept?<sup>36</sup> What about individual member contributions or donations?

This is not the place to study in detail all of these situations. However, it is important to stress that the key element of the 3<sup>rd</sup> party funding concept should be that the latter does not own the claim and it is not a ‘party’ to the actual proceeding, and may lie with the court fixing the guidelines on this issue<sup>37</sup>.

#### 4. Cross border mass disputes

The Recommendation suggests that Member States should ensure that where cross-border mass disputes emerge ‘a single collective action in a single forum is not prevented by national rules on admissibility or standing of the foreign groups of claimants or the representative entities originating from other national legal systems’<sup>38</sup>. Therefore, it is possible that parallel actions against the same infringer on behalf of different groups of victims may emerge in courts of different Member States. However, the risk of *forum shopping* (and it is interesting to compare the solutions of the

<sup>35</sup> See, however, the ‘Austrian model of group litigation’ (an opt-in model) where potential claimants assign their claims to a consumer association; cf. Statement ELI, p. 6.

<sup>36</sup> Insurance for legal expenses must take into account the *Eshig* case, C-199/08, ECR I-82, 95 which concerns an Austrian national who, together with thousands of other investors, invested money in companies which became insolvent, and sought an assurance from UNIQA to cover legal expenses taken by lawyers chosen by him. The Court of Justice ruled that Article 4(1)(a) of Council Directive 87/344/EEC of 22 June 1987 (on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance) must be interpreted as not permitting the legal expenses insurer to reserve to itself the right to select the legal representative of all the insured persons concerned, where a large number of insured persons suffer losses, as a result of the same event (no. 70). With this decision, insurers may choose to exclude those actions from their insurance or may try to force settlements in order to swiftly end the case.

<sup>37</sup> In addition, for cases of private 3<sup>rd</sup> party funding of compensatory collective redress, the Recommendation says that it is prohibited ‘to base remuneration given to or interest charged by the fund provider on the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties’ (point 32). Importantly however, the assignment of claims is not easily allowed in all Member States (hereafter, MSs) (in fact, ‘funder becomes owner of the claims and the action is no longer representative’; cf. Statement ELI, at p. 56 and [http://www.justiz.nrw.de/nrwe/lgs/duesseldorf/lg\\_duesseldorf/j2013/37\\_O\\_200\\_09\\_Kart\\_U\\_Urteil\\_20131217.html](http://www.justiz.nrw.de/nrwe/lgs/duesseldorf/lg_duesseldorf/j2013/37_O_200_09_Kart_U_Urteil_20131217.html) (access 01.06.2015)).

<sup>38</sup> Recommendation, point 17.

Recommendation with those of the Injunction Directive<sup>39</sup>, as it has been pointed out)<sup>40</sup> and parallel actions have not been addressed by EU institutions yet. For instance, can Article 6 of the Brussels I Regulation<sup>41</sup> be applied, which allows claimants to sue several defendants in the Member States (as long as claims are closely connected and there is a risk of conflicting decisions), to the situation where several victims intend to sue the same defendant? What about the risk of conflicting decisions in the case of parallel actions? Or the

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<sup>39</sup> Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, p. 51. To discuss the Directive, see I. Benöhr, 'Collective Redress in the Field of European Consumer Law' (2014) 41(3) *Legal Issues of Economic Integration* 248. In the beginning, only traditional areas were covered by the Directive such as consumer law, travel packages and contracts negotiated away from business premises, and certain practices such as unfair terms and misleading advertising. However, sale of consumer goods and associated guarantees, electronic commerce, distance marketing of consumer financial services, and unfair business-to-consumer commercial practices in the internal market were also included in 2009 with Directive 2009/22/EC of 23 April 2009 on injunctions for the protection of consumers' interests (OJ L 110, 010.5.2009, p. 30). The Directive may lead to the prohibition of an infringement and the imposition of fines, but it does not allow the award of damages. As already mentioned, this issue was addressed in the Consumer Policy strategy of 2007-2013 and the EC (DG SANCO) launched a public consultation on collective consumer redress which led to the Green Paper on Consumer Collective Redress (2008). In 2011, DG Competition, DG SANCO and DG Justice issued a joint consultation paper on collective redress which produced the European Parliament Resolution of 2012 and the Recommendation of 2013.

<sup>40</sup> As it has already been explained – Statement ELI, p. 37 – according to article 4 of the Injunctive Directive, each Member State shall take the necessary measures to ensure that, in the event of an infringement originating in that Member State, any qualified entity from another Member State where the interests protected by that qualified entity are affected by the infringement, may seize the court or administrative authority referred to in Article 2, on presentation of the list provided for in paragraph 3; while point 18 of the Recommendation invites MSs to accept the legal standing of foreign representative entities in other circumstances: if in a cross-border mass claims, the infringement has its origin in one MS (normally the place where the infringer is domiciled) but causes harm to consumers in other MSs, the Recommendation asks all MSs, having jurisdiction over the case to accept the legal standing of particular representative entities from other MSs. This solution favours forum shopping. Claimants will search which jurisdiction offers better instruments of collective redress such as out of court settlements binding (as it happens in Dutch law).

<sup>41</sup> Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.01.2001, p. 1, recasted with Regulation 1215/2012/EU of the Parliament and of the Council of 12.12.2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, which entered into force on 01.01.2015, OJ L 351, 20.12.2012, p. 1 (hereafter, Brussels I Recast Regulation). With this Regulation, the geographical scope of Section 4 of Chapter I changed. Under Regulation 44/2001, that section applied only if the defendant was domiciled in a MS; according to Regulation 1215/2012/EU the section is applicable regardless of the defendant's domicile. The aim is to ensure protection for EU consumers.

risk of overcompensation (multiple recoveries of the same harm)? A specific solutions for anticompetitive practices causing damages in the territories of different States needed?

In the absence of specific rules for class actions concerning antitrust infringements, in tort cases if victims suffer damages in different States and at a different time, only the court of the defendant or the court where the harmful event occurred<sup>42</sup> will have jurisdiction to decide the case<sup>43</sup>. Moreover, the court must have jurisdiction over all the absent claimants.

The Amsterdam Court of Appeal applied Article 6(1) (now Article 8(1) of the Brussels I Recast Regulation) to establish Dutch jurisdiction over foreign tort victims who do not reside in the Netherlands; it is sufficient that one of the ‘interested parties’ resides there. This approach, as well as the use of Article 5(1) (now Article 7(1) of the Brussels I Recast Regulation) by the Dutch court, has, however, been criticized particularly due to the preclusive effect of settlement under Dutch WCAM proceedings<sup>44</sup>.

It has been argued that Brussels I Regulation is not adequate to solve the problems of collective redress<sup>45</sup> (it was mainly conceived for two-party proceedings), or at least that specific solutions should be built into the existing legal framework<sup>46</sup>. On the other hand, it has also been suggested<sup>47</sup> to apply the law of the defendant’s domicile or the law of the Member State where the majority of victims reside, in other words, to apply the ‘principle of the

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<sup>42</sup> That is to say, the place where the ‘illegal’ act was committed or the place of injury or damage.

<sup>43</sup> Articles 2 and 5 of Regulation Brussels I 44/2001 (now articles 4 and 7(2), Brussels I Recast Regulation).

<sup>44</sup> As A. Stadler mentions, cf. ‘The Commission’s Recommendation on Common Principles of Collective Redress and Private International Law’ [in:] E. Lein, D. Fairgrieve, M. Otero Crespo, V. Smith (eds.), op. cit., p. 242–246, the Dutch law (WCAM) allows the parties to negotiate an out-of-court settlement and, if the Amsterdam court approves the settlement, ‘interested parties’ (liable party and representative entity) will be legally bound and cannot sue the liable party, which can be problematic in the opt-out model.

<sup>45</sup> B. Hess, ‘Cross-border Collective Litigation and the Regulation Brussels I’ (2010) 30 *Praxis Des Internationalen Private Und Verfahrensrechts (Iprax)* 116.

<sup>46</sup> Tzakas (*supra* note 21 at 1163) argues that ‘the group plaintiffs or the represented claims must be accurately defined in order to avoid multiple recoveries of the same harm, and (...) lis pendens should apply to the extent that a potential for irreconcilable rulings is present’.

<sup>47</sup> Green Paper – Damages actions for breach of the EC antitrust rules {SEC(2005) 1732} / COM/2005/0672 final. The EC suggests that ‘the applicable law should be determined by the general rule (...) that is to say with reference to the place where the damage occurs’ (option 31); and ‘that there should be a specific rule for damages claims based on an infringement of antitrust law. This rule should clarify that for this type of claims, the general rule (...) shall mean that the laws of the States on whose market the victim is affected by the anti-competitive practice could govern the claim’ (option 32).

centre of gravity (which also raises several doubts in itself)<sup>48</sup>. Additionally, the EC proposed a system of national registers for collective redress either at national or European level<sup>49</sup>, to address, among others, the problems of parallel proceedings and irreconcilable judgements.

### III. The new Belgian and British laws on consumer collective redress

Despite some of the uncertainties still surrounding the Recommendation, several Member States have adopted domestic legislation to introduce (or improve) collective redress mechanisms. Particularly interesting are some of the solutions found in recent Belgian and British laws.

The Belgian Law of 28 March 2014<sup>50</sup> (hereafter, Belgian Law) entered into force in September 2014. It introduces a new section into the Economic Law Code entitled 'Actions for collective redress' which intends to enhance and enforce the rights of consumers. The new Belgian Law allows the parties (or the judge, if the parties cannot agree) to choose between the opt-in and the opt-out solution (the opt-in model is mandatory to those that do not reside in Belgium, or if the collective action seeks to redress moral or bodily harm). These class actions make it possible to aggregate individual consumer complaints in order to be dealt with in a single court proceeding; its aim is to obtain compensation for losses (although a claim cannot be brought against public authorities or non-profit organisations) and the judgement has *res judicata* effects on all members of the group.

Class actions can only be brought by a limited group of representatives: (1) the Federal Ombudsman; (2) a consumer organization represented in the 'Conseil de la Consommation' recognized by the Minister of Economic Affairs; (3) an association recognised by the Minister, with legal personality for at least three years, which has a corporate purpose directly related to the collective prejudice suffered by a group of consumers, and which does not pursue a sustainable economic purpose.

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<sup>48</sup> B. Añoveros Terradas argues that it would be difficult to choose the criteria for identifying the centre of gravity and it could, again, discriminate consumers whose domiciles have not been chosen; cf. 'Consumer Collective Redress under the Brussels I Regulation Recast in the Light of the Commission's Common Principles' (2015) 11(2) *Journal of Private International Law* 143–162.

<sup>49</sup> Recommendation, point 35.

<sup>50</sup> Cf. <http://www.collectiveredress.org/collective-redress/reports/belgium/overview> (access 01.04.2015).

Regarding the procedures, the national court may play a fundamental role here. In fact, the new Belgian Law establishes a two-stage procedure (admissibility of the petition and negotiation). If no settlement agreement is reached between the parties, or no settlement agreement was confirmed by the court (and the court can refuse the agreement if the compensation for the group is unreasonable, or if the indemnity exceeds the real costs), then the proceedings continue on the merits. If the judge decides that the application for collective redress is successful, a claims administrator will be appointed for the execution of the final judgement (only lawyers, ministerial civil servants and holders of a judicial mandate can fulfil that role). The Court will check the execution of the decision and if the claims administrator is not able to pay the full amount of the compensation to the consumers, the Court has discretion to decide on the distribution of the funds.

Unfortunately, the new Belgian Law has no rules on 3<sup>rd</sup> party funding and the principle is that the representative entity will support the financial risk of the procedure. The Belgian government argued, albeit not in a convincing manner, that the choice to grant standing only to selected organizations guided by the collective interest that they represent, would overcome hesitations to bring forwards claims. As it has already been suggested, the 3<sup>rd</sup> party funding option, or similar solutions, must be considered or 'the law is thus clearly not meeting the requirements of the Recommendation' regarding the funding of collective actions<sup>51</sup>.

Another recent reform regarding class actions took place in Britain in the form of the UK Consumer Rights Act of 26 March 2015 (hereafter, CRA)<sup>52</sup>, which is expected to come into force on 1 October 2015. It amends the Competition Act of 1998 gathering in one place consumer rights covering contracts for the supply of goods, services, digital content and the law relating to unfair terms in consumer contracts; it also deals with consumer collective actions for anti-competitive behaviour.

The aim of the CRA is to empower consumers and SMEs to challenge anti-competitive behaviour through the Competition Appeal Tribunal (hereafter, CAT), in addition to the clarification of other issues<sup>53</sup>. The CAT will be able to adjudicate not only follow-on actions but also stand-alone actions. The

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<sup>51</sup> J.T. Novak, 'The new Belgian law on consumer collective redress and compliance with EU law requirements' [in:] E. Lein, D. Fairgrieve, M. Otero Crespo, V. Smith (eds.), op. cit., 196.

<sup>52</sup> Cf. <http://www.legislation.gov.uk/ukpga/2015/15/notes/division/2> (access 01.04.2015).

<sup>53</sup> It (1) consolidates enforcers' powers as listed in Schedule 5 to investigate potential breaches of consumer law; (2) gives civil courts and public enforcers greater flexibility to take the most appropriate action for consumers when dealing with breaches of consumer law; (3) imposes a duty on letting agents to publish their fees and other information; (4) expands the list of higher education providers which are required to join the higher education complaints handling scheme.

new British law will, therefore, introduce a new ‘opt-out’ class action before the CAT, making it easier for private parties (SMEs and consumers) to bring damages actions for competition law breaches. As such, it will implement changes suggested by the Department for Business, Innovation & Skill<sup>54</sup> which conducted in 2012 a consultation on options for reform concerning private actions in competition law. From now on, claimants will not need to specify the regime, as it is for the CAT to decide whether the action will follow the opt-in or the opt-out solution. On the other hand, to avoid abuses, the CRA prohibits contingency fees and exemplary damages in collective actions and applies the ‘loser pays’ rule<sup>55</sup>.

British Civil Procedure Rules provide for representative actions in rule 19.6 whereby a claim can be brought by a representative entity when more than one person has the same interest in the claim. However, the opt-out class action model was set aside in the *Emerald Supplies* case where the High Court held that it was not possible to determine the ‘same interest’ until the question of liability had been tried<sup>56</sup>.

On the other hand, according to Section 47B of the British Competition Act of 1998, only certain bodies (such as consumer organizations) could, until the recent amendment, bring such claims and they had to identify the individual consumers being represented. These solutions proved to be time consuming, expensive, and ineffective as the famous *JJB Sports*<sup>57</sup> case shows where the Consumer Organization ‘Which?’ brought a class action on behalf of about 130 consumers. At the same time, it was estimated that two million consumers were actually affected by the infringement and that they incurred losses amounting to 50 million pounds. The case ended with a settlement whereby the infringer paid 20 pounds to each victim who joined the suit, and 10 pounds to all future victims who would appear within one year of the compromise.

The CRA of 2015 modified Section 47B so that other representative entities (but not law firms) besides consumer organizations or individual class members may now bring claims collectively as long as they raise the same, similar or

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<sup>54</sup> Cf. <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform> (access 01.04.2015)

<sup>55</sup> The English rule according to which the loser pays all litigation costs apparently prevails over the American rule, that is to say, each party supports its own costs; cf. O. Cojo Manuel, op. cit., p. 439–468. On the other hand, there are several statutory exceptions to the US rule; in fact, English ‘loser pays’ rule was included in tort reform legislation proposed by the Bush Administration in 1992; for more details on the Common Benefit Doctrine, cf. P.T. Hurst, ‘Thoughts on the American rule and contingency fees’ (2012) *European Business Law Review* 27.

<sup>56</sup> *Emerald Supplied Limited v. British Airways* [2010] EWCA Civ. 1284.

<sup>57</sup> *Price-fixing of replica football kit* (Case CP/0871/01) OFT Decision CA98/06/2003 of 1 August 2003.

related issues of fact or law. Therefore, claims can be brought on behalf of a defined group without having to identify each individual claimant. An opt-out collective action would cover all class members except those who opted out (and any class member who is not domiciled in the UK at the specified time and who has not opted in). Awarded damages that remain unclaimed will go to a prescribed charity, or to the class representative for costs in connection with the proceedings.

In addition, the CRA of 2015 introduces a collective settlement procedure – representative entities may settle a case prior to bringing the claim before the CAT, as long as the terms of the settlement are ‘just and reasonable’. It also provides a redress scheme – the Competition and Markets Authority can authorise voluntary redress schemes where the level of the fine can be reduced if the competition law infringer offers compensation.

This CRA of 2015 is considered a significant step forward on the road to effective private enforcement in the UK<sup>58</sup>, with safeguards being observed with a strong judicial review process (regarding the departure of certain points from the EU Recommendation, namely preliminary merits test, an assessment of the adequacy of the representative entity and whether class action is the best solution). Nevertheless, uncertainties remain such as those regarding the funding of such actions. Therefore, it is important to take into account the experiences obtained in this field in other countries such as Portugal.

#### **IV. The experience of collective redress in Portugal: the Popular Action**

In Portugal, there are no specific rules for actions for damages from antitrust infringements besides the Portuguese Competition Law (Law 19/2012, 8 May), general substantive and procedural rules established in the Portuguese Civil Code<sup>59</sup>, and its Code of Civil Procedure.

In case of an antitrust infringement, the plaintiff may complain to the Portuguese Competition Authority and its decision can be reviewed by the Competition, Regulation and Supervision Court (and subsequently by the Lisbon Court of Appeal). The plaintiff can also complain to a civil court and ask for the compensation of damages and/or challenge the validity of an agreement through common declaratory actions or (more rarely) through

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<sup>58</sup> A. Nikpay, D. Taylor, ‘The New UK Competition Regime: Radically Different or More of the Same?’ (2014) 5 *Journal of European Competition Law & Practice* 278, 285.

<sup>59</sup> Particularly Articles 483 (tort liability) and 562 (damages award).

collective actions (the decision can be reviewed by the Court of Appeal and subsequently by the Supreme Court).

As there are no specific rules for antitrust damages actions, this means that both direct and indirect purchasers may have standing. Courts can request the disclosure of documents considered relevant from the parties, opposing parties or 3<sup>rd</sup> persons; refusal to comply with such request could lead to a fine and even reverse the burden of proof. Moreover, the judge may also order the production of evidence in order to find the truth, as well as require expert evidence, such as an assessment of quantitative damages and a clarification of the economic issues at stake – the probative value of such evidence is decided by the judge<sup>60</sup>.

Concerning collective redress, Portugal has an opt-out system called ‘Ação Popular’ (Popular Action; hereafter, PA)<sup>61</sup>. It is mentioned in Article 52(2) of the Portuguese Constitution which establishes: ‘*Everyone shall be granted the right of popular actions, to include the right to apply for the adequate compensation for an aggrieved party or parties, in such cases and under such terms as the law may determine, either personally or via associations that purport to defend the interests in question. That right shall be exercised namely to (...) promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, the quality of life or the preservation of environment and the cultural heritage*’. Damages from antitrust infringements can be compensated through the PA since the list of interests mentioned in Article 1 is only exemplary and the Portuguese Supreme Court did not refuse that solution in its decision of 7 October 2003. This right was implemented through Law 83/95 of 31 August 1995 (Popular Action Act; hereafter, PAA), which establishes certain special procedural rules such as: ‘it is up to the judge’s own initiative to collect evidence and [the judge] is not bound by the initiatives of the parties’ (Article 17), and even ‘if a particular appeal has no suspensive effect,

<sup>60</sup> This kind of request was recently made in the *Portuguese Sport TV* case; the Portuguese Court of Competition, Regulation and Supervision confirmed, on 4 June 2014, the decision of the PCA (although reducing the fine), condemning Sport TV for the abuse of its dominant position in the conditional access market for channels with premium sports content.

<sup>61</sup> On this topic, see H.S. Antunes, ‘Class Actions, Group Litigation and Other Forms of Collective Litigation (Portuguese Report)’ (2009) 622 *The Annals of the American Academy of Political and Social Science* 161; S.O. Pais, ‘A união faz a força? Breves reflexões sobre os mecanismos colectivos de reparação no contexto da aplicação privada do direito da concorrência da União’ [in:] *Liber Amicorum em Homenagem ao Professor Doutor Mota Campos*, Coimbra editora 2013, p. 873; S.O. Pais, ‘Entre clemência e responsabilidade – Uma história de sucesso? – Ac. do Tribunal de Justiça (Grande Secção), de 14 de Junho de 2011, Proc. C-360/09’ (2012) 37 *Cadernos de Direito Privado* 1; L. Rossi, M. Sousa Ferro, ‘Private enforcement of competition law in Portugal (II): Actio Populari – Facts, fictions and dreams’ (2013) IV(13) *Revista de Concorrência e Regulação*, 35.

in general terms, the judge may, in a class action, give that effect, to prevent damage irreparable or difficult to repair' (Article 18)<sup>62</sup>.

According to Articles 2, 3 and 16 PAA, standing to initiate a PA is granted to: a) any citizen (and it has been argued that this reference can include foreigners)<sup>63</sup>; b) any legal association or foundation (a legal entity whose powers include the interests covered by the PA, which is not engaged in any type of professional business competing with companies or liberal professionals); c) to local authorities (concerning the interests of all those who are residing in the area) and, finally: d) to the public prosecutor's office, which may replace the claimants if the contested behaviour endangers the interests involved. While SMEs cannot seek compensation directly, they can do so through the aforementioned types of claimants referred to in the PAA. If the action is not dismissed by the judge during its preliminary assessment, the claimants will represent all of the holders of rights or interests who suffered the given antitrust damage and did not opt-out. This rule can be excluded by the court considering the circumstances of the case (for instance, if the representation was inadequate)<sup>64</sup>.

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<sup>62</sup> There are other opt-out models used in the EU such as the Dutch model, which is usually also considered 'economically and legally' interesting; cf. K. Purnhagen, 'United We Stand, Divided We Fall? Collective Redress in the EU from the Perspective of Insurance Law' (2013) 1 *European Review of Private Law* 500. In fact, the Dutch law has three mechanisms of collective action: (1) the collective action of art. 3:305 BW (Dutch Civil Code) which allows a foundation or association to obtain an injunction, but it does not allow the award of damages; (2) legal entity or individual claimants represent the victims (individual mandates) and this action allows the award of damages; (3) extrajudicial negotiations by representative entities may lead to a settlement which the court may consider binding to all those that have not opted out (WCAM Procedure). Furthermore, the Dutch Act on Collective Settlement of Mass Damage Claims (WCAM) also allows foreign applicants in the proceedings (a foreign representative organization can participate, so long as it has legal standing) and every victim who is included in one of the categories of the settlement and did not opt-out in time is bound by that settlement, including foreign parties, which happened for instance in the *Converium* case. Cf. H. Van Lith, *The Dutch Collective Settlements Act and Private International Law*, Rotterdam 2010, p. 26, available at [http://ec.europa.eu/competition/consultations/2011\\_collective\\_redress/saw\\_annex\\_en.pdf](http://ec.europa.eu/competition/consultations/2011_collective_redress/saw_annex_en.pdf). On these topics, see also the Danish solution; cf. the Danish Competition Act, consolidated Act no. 23 of 17 January 2013, as amended by Section 1 in Act no. 620 of 12 June 2013 and Section 22 in Act no. 639 of 12 June 2013, <http://en.kfst.dk/Competition/~media/KFST/English%20kfstdk/Competition/Legislation/Engelsk%20udgave%20af%20lovbekendtgørelse%207002013.pdf>. (access 01.04.2015).

<sup>63</sup> Cf. M.T. de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, Lex, Lisboa 2003, p. 178.

<sup>64</sup> Settlement agreements in the popular action must be checked by the court (and its assessment should include the adequacy of the representative entity), see M. Teixeira de Sousa, *op. cit.*, p. 247.

Regarding financial expenses, the PAA establishes that the claimant is exempt from the payment of the costs if the application is at least partially granted; if the claim is totally unsuccessful, the claimant will be obliged to pay an amount fixed by the judge, between 10% and 50% of the costs that would be normally payable, taking into account the claimant's financial situation and the formal or substantive reason for the dismissal (Article 20). Contingency fees are not allowed as the Portuguese Bar Association Statute prohibits *quota litis*. At the same time, however, 3<sup>rd</sup> party funding is not prohibited<sup>65</sup> and the role played by the Public Prosecutor may prevent abuses in this regard.

On the other hand, the court may have to fix compensation for the infringement of the interests of those not individually identified (Article 22(2) PAA). The right to damages shall be extinguished within three years from the final judgement that has recognized the damage and the unclaimed funds shall be delivered to the Ministry of Justice. The latter will create a special account and allocate the payment to attorney fees and to support access to the courts (Article 22(4)-(5) PAA). The PAA does not explicitly provide for specific entities to distribute the total compensation among the injured parties. In antitrust cases, consumer associations (or similar entities) should be considered the most appropriate to receive and manage the indemnities. Indeed, this solution is one of those suggested in the Commission Staff Working White Paper: the distribution of unclaimed funds should be directed to a public interest foundation or via "cy-pres" distribution, that is, 'damages awarded are not distributed directly to those injured to compensate for the harm they suffered (for instance because they cannot be identified) but are rather used to achieve a result which is as near as it may be (e.g. damages attributed to a fund protecting consumers' interests in general)'<sup>66</sup>.

The Portuguese Consumer Association, DECO, has already successfully used the PA to seek compensation for consumers in the famous *DECO v. Portugal Telecom* Case. The parties arrived here at a settlement amounting to 120 million EUR, paid by Portugal Telecom to its clients through free national calls provided during a certain period of time<sup>67</sup>.

Recently also, on 12 March 2015, the Portuguese Competition Observatory, a non-profit association of academics from several Portuguese universities, filed a mass damages claim against Sport TV<sup>68</sup>. The latter had a dominant

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<sup>65</sup> Ibidem, p. 247.

<sup>66</sup> Point 47 of the Commission Staff Working Paper.

<sup>67</sup> The Supreme Court decided the case in 2003; cf. Supreme Court Decision – *Portuguese Consumer Protection Association (DECO) v. Portugal Telecom*, 7.10.2003, Case 03 A1243, <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/1db6e4a1a7cadeed80256de5005292d4?OpenDocument> (access 10.02.2015).

<sup>68</sup> Lisbon Judicial Court, case no. 7074/15.8T8LSB.

position in two relevant products/services markets: the (wholesale) domestic market of conditional access channels with premium sports content (upstream), and in the (retail) market of subscription television (downstream).

In 2013, the Portuguese Competition Authority (hereafter, PCA) imposed a fine of 3.7 million EUR upon Sport TV for applying a discriminatory remuneration system in distribution agreements for Sport TV's television channels (abuse took place from 1 January 2005 to 31 March 2011). The PCA's decision concluded an investigation launched in 2010, following a complaint by the operator of subscription-based television services Cabovisão – Televisão por Cabo S.A. Sport TV had implemented a remuneration system that involved the systematic application of discriminatory conditions to pay-TV operators for equivalent services; imposing unfair transaction conditions; placing other operators at a competitive disadvantage in the market for pay-TV; limiting the production, distribution, technical development and investment for the services in question; abusing its dominant position in the market for premium sports channels to the detriment of competition and end-users. Sport TV was condemned by the PCA and the decision was upheld (in part) by both Portuguese courts. In fact, although the Competition, Regulation and Supervision Court (specialized Portuguese court of first instance for competition matters) had reduced the fine from 3.7 to 2.7 million EUR, it upheld (in part) the PCA decision. In the judgement delivered on 11 March 2015, the Lisbon Court of Appeal confirmed that Sport TV abused its dominance by applying discriminatory conditions to subscription-based television operators, at the same time dismissing the appeal filed by Sport TV. The next day, on 12 March 2015, a class action was submitted against Sport TV by the Portuguese Competition Observatory. The action seeks 'to compensate over 600,000 clients for damages allegedly resulting from a number of anticompetitive practices, but also to compensate those who were excluded from the benefit of these channels due to the inflation of prices and all Portuguese pay-tv subscribers, between 2005 and June 2013 (over 3 million at the end of the period), who suffered from a reduction of competition on this market'<sup>69</sup>.

To sum up, the Portuguese collective redress system may be considered as an interesting example to be followed by other European countries as it has the added value of giving standing to any injured consumer or consumer association. Moreover, court fees are not meaningful (they might even not exist), the public prosecutor may replace the claimant if the latter decides to withdraw from the suit, and the judge can collect evidence on his own initiative. Finally, judicial checks are available during several phases of the proceedings, providing safeguards to avoid abusive class actions.

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<sup>69</sup> M.S. Ferro, 'Collective Redress: Will Portugal Show the Way?' (2015) *Journal of European Competition Law & Practice* 1-2.

## V. Conclusions

The recent reforms in Belgium and Britain suggest a new era for collective redress. On the one hand, the introduction of opt-out systems, not only in the two above laws but also in other Member States such as Portugal for instance, should be considered a duly justified departure from the option proposed by the European Commission in its Recommendation. Taking into account the positive effects of the opt-out system in national laws, provided it is accompanied by the necessary safeguards (such as judicial checks in several phases of the proceedings), it represents a meaningful step towards a more effective collective redress system. On the other hand, although funding of collective actions is still a major issue, Member States' laws rarely address this concern and ignore the need to adapt certain traditional solutions. In this context, the prohibition of contingency fees should be reconsidered and a reduction of the amount payable for court fees should be provided, as is the case in Portugal.

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# Harmonising Private Enforcement of Competition Law in Central and Eastern Europe: The Effectiveness of Legal Transplants Through Consumer Collective Actions

by

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## CONTENTS

- I. Introduction
- II. The development of private enforcement of EU competition law
- III. Consumers' role in private enforcement of competition law
- IV. The relevance of collective actions in private enforcement of competition law
- V. Collective consumer actions in CEECs
  - 1. Europeanization of competition and consumer law in CEECs
  - 2. Europeanization of private enforcement of competition law
  - 3. Legislation and enforcement of collective actions in CEECs
- VI. Are there solutions? In the law and beyond
- VII. Conclusions

## *Abstract*

The aim of this paper is to critically analyze the manner of harmonizing private enforcement in the EU. The paper examines the legal rules and, more importantly, the actual enforcement practice of collective consumer actions in EU Member States situated in Central and Eastern Europe (CEE). Collective actions are the key method of getting compensation for consumers who have suffered harm as a result of an anti-competitive practice. Consumer compensation has always been the core justification for the European Commission's policy of encouraging private enforcement of competition law. In those cases where collective redress is not available to consumers, or consumers cannot apply existing rules or are unwilling to do so, then both their right to an effective remedy

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and the public policy goal of private enforcement remain futile. Analyzing collective compensatory actions in CEE countries (CEECs) places the harmonization process in a broader governance framework, created during their EU accession, characterized by top-down law-making and strong EU conditionality. Analyzing collective consumer actions through this 'Europeanization' process, and the phenomenon of vertical legal transplants, raises major questions about the effectiveness of legal transplants *vis-à-vis* homegrown domestic law-making processes. It also poses the question how such legal rules may depend and interact with market, constitutional and institutional reforms.

## Résumé

Le but de cet article est d'analyser de façon critique la manière d'harmonisation d'un mécanisme d'application privée du droit de la concurrence dans l'UE. Le document examine non seulement les dispositions juridiques, mais surtout la pratique actuelle des actions collectives dans les États membres de l'UE et dans les pays d'Europe centrale et orientale (PECO). Les actions collectives représentent une méthode clé pour les consommateurs, qui permet d'obtenir une indemnisation d'un préjudice subi du fait d'une pratique anticoncurrentielle. L'indemnisation des consommateurs a été toujours la justification principale de la politique de la Commission européenne visée à encourager l'application privée du droit de la concurrence. Si les actions collectives ne sont pas disponibles pour les consommateurs, ou si les consommateurs ne peuvent pas appliquer les règles existantes ou sont réticents à le faire, le droit à un recours efficace finit par son abandon, et l'objectif d'application privée du droit de la concurrence n'est pas réalisé. L'analyse des actions collectives dans les PECO place le processus d'harmonisation dans un large cadre de gouvernance, mise en place pendant l'adhésion des PECO à l'UE. Ce cadre est caractérisé par l'adoption des lois de la façon «descendante» («top-down») et une forte dépendance du processus législatif national de l'UE. L'analyse des actions collectives à travers le processus «d'eupéanisation» et le phénomène des «transplantations juridiques» verticales, provoque des questions importantes concernant l'efficacité des «transplantations juridiques» en comparaison avec le processus législatif national. Cette analyse provoque aussi une autre question, concernant la relation entre les règles juridiques et le marché, les réformes constitutionnelles et institutionnelles.

**Key words:** private enforcement of competition law; collective actions; consumer; EU law; Europeanization.

**JEL:** K23; K42.

## I. Introduction

Ever since the European Commission (hereafter, EC or Commission) has initiated its 1<sup>st</sup> proposal on private enforcement of EU competition rules, it was the success of US private antitrust enforcement that has served as the comparison

standard for the EU and its Member States. Private enforcement has proved to be a powerful enforcement tool in the US antitrust system. It could thus be argued that the EU and its Member States have been implementing legal rules to enable and foster private enforcement of EU competition law in order to establish a similarly effective system as that of the US.

Member States have gradually begun transplanting the EC's initiatives regarding damages claims, and have enacted various legal rules to facilitate private enforcement in their own legal systems. With the adoption of Directive 2014/104/EU<sup>1</sup> in November 2014, damages claims for competition law violations were formalized as a legal obligation for Member States. The Directive must be implemented by the end of 2016. Despite the fact that the final version of the Directive does not cover collective actions, and the latter are only the subject of a Recommendation on common principles concerning collective actions<sup>2</sup>, collective actions have been a core aspect of the EC's private enforcement initiative from its conception. They have been considered a powerful enforcement tool to compensate consumers who suffered harm as a result of anti-competitive practices.

The aim of this paper is to critically analyze the way in which harmonization of private enforcement is taking place in the EU by examining the legal rules and, more importantly, the actual enforcement of consumer collective actions in Member States situated in Central and Eastern Europe (hereafter, CEE). Collective actions provide a fundamental and, perhaps, even the only means for consumers, who have suffered harm as a result of an anti-competitive practice, to get compensation. Consumer compensation has always been the core justification of the EC's policy to encourage private enforcement of competition law. If collective redress is not available to consumers, or they cannot apply existing rules or are not willing to do so, then a fundamental right – the right to an effective remedy – remains futile. This would, in turn, result in the failure to realize the public policy goal of private enforcement. Analyzing collective compensatory actions in CEE countries (hereafter, CEECs) places the harmonization process in a broader governance framework, created during their EU accession, which was characterized by top-down law-making and strong EU conditionality. Analyzing collective consumer actions through this 'Europeanization' process, and the phenomenon of vertical legal transplants, raises essential questions about

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<sup>1</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, 05.12.2014, p. 1).

<sup>2</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 L 201, 26.07.2013, p. 60).

the effectiveness of legal transplants *vis-à-vis* homegrown domestic law-making processes. It also raises the question how such legal rules may depend and interact with market, constitutional and institutional reforms.

Accordingly, the paper starts with a brief overview of the development of private enforcement of competition law in the EU and the role played by consumers in this enforcement method. The paper goes on to analyze the relevance of collective actions as a way for consumers to enforce competition rules before national courts. The paper continues with the analysis of both legal rules and actual enforcement of specific collective redress schemes in CEECs. The paper closes with conclusions.

## II. The development of private enforcement of EU competition law

In the last twenty years, the EU competition law enforcement model has been subject to a fundamental reform in order to increase the deterrent effect of EU competition rules. These reforms endorsed major procedural as well as institutional changes<sup>3</sup>. At the same time, they reinforced the participation of private actors in the enforcement of EU competition law, by way of strengthening private enforcement and introducing leniency programmes. Since the *Automec II*<sup>4</sup> judgment of the Court of Justice of the EU (hereafter, CJ), the EC tried to encourage (potential) complainants to secure adequate protection of their own rights before national courts, instead of filing a complaint with the Commission<sup>5</sup>. Backed up by the EU judiciary, the EC argued that reasons pertaining to procedural economy and the sound administration of justice speak in favour of a case being considered by national courts<sup>6</sup>,

<sup>3</sup> The so-called modernization package was launched by the 1999 White Paper, which among other issues stressed the importance of complaints in the new decentralized enforcement system. The White Paper on modernization of the Rules implementing Articles 81 and 82 of the EC Treaty, Commission programme No 99/027, OJ C 132, 12.05.1999, p. 1.

<sup>4</sup> Case T-24/90 *Automec Srl v Commission of the European Communities (Automec Srl)*, ECR [1992] II-2223.

<sup>5</sup> For more details on the interplay of private actions and complaints see: K.J. Cseres, J. Mendes, 'Consumers' access to EU competition law procedures: outer and inner limits' (2014) 51(2) *Common Market Law Review* 1–40.

<sup>6</sup> This refers to private enforcement of competition law – individually initiated litigation, either as stand-alone or follow-on actions, before a court to remedy a violation of competition law. Such an action may lead to civil law sanctions such as damages, restitution, injunction, nullity or interim relief. Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.04.2004, p. 65, points 12–18; European Commission, *Report on Competition Policy*, 2005, at: [http://ec.europa.eu/competition/publications/annual\\_report/2005/en.pdf](http://ec.europa.eu/competition/publications/annual_report/2005/en.pdf) (access 21.07.2013), p. 26.

rather than by the EC, when the same matter has been, or can be referred to national courts<sup>7</sup>.

In its 2004 Notice on the handling of complaints<sup>8</sup>, the Commission clearly conveyed its view that private law actions before national courts are an alternative or even a more efficient avenue for potential complainants to secure law enforcement. The EC stressed the considerable advantages for individuals and companies of EU competition law enforcement by national courts, as opposed to public enforcement by the Commission. The EC's discretion on setting enforcement priorities and deciding whether to pursue certain complaints is, therefore, partially grounded on the argument that private enforcement serves as an alternative mechanism of consumer redress<sup>9</sup>.

Since *Automec II*, private enforcement of competition law has been a top priority of the EC's competition policy and the Commission itself. Following the CJ's judgment in *Courage*<sup>10</sup>, which formulated the right to damages resulting from EU competition law violations, the EC has put forward several proposals to harmonize both national civil procedural rules that enable private enforcement of EU and national competition laws. The effectiveness of US antitrust practice (where the majority of cases are brought by private parties) has served as an example in the process of EU harmonization of private enforcement matters<sup>11</sup>. EU Member States followed the policy of the Commission and also began to pursue an active private enforcement policy. The former manner of legal borrowing has been identified as a horizontal legal transplant, while the latter as a vertical legal transplant. Horizontal legal transplants imply an interaction among different legal systems, which can take place in relation to particular rules or institutions, or even entire branches of law, and can be determined by different reasons<sup>12</sup>. Accordingly, a horizontal legal transplant occurs when one co-equal legal system borrows from another, such as the EU borrowing from the US, or one EU Member State from another. A vertical legal transplant occurs, in turn, when a member

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<sup>7</sup> *Automec Srl*, cited *supra* note 2, para 87. Notice on handling complaints cited *supra* note 4; *Report on Competition Policy*, 2005 cited *supra* note 4, p. 26.

<sup>8</sup> *Supra* note 4.

<sup>9</sup> K.J. Cseres, J. Mendes, 'Consumers' access'.

<sup>10</sup> Case C-453/99, *Courage Ltd v Bernard Crehan (Courage)*, [2001] ECR I-6297, para. 26.

<sup>11</sup> D.J. Gerber, 'Private Enforcement of Competition Law: A Comparative Perspective', at: [http://scholarship.kentlaw.iit.edu/fac\\_schol/244](http://scholarship.kentlaw.iit.edu/fac_schol/244) (access 05.10.2015).

<sup>12</sup> See A. Watson, *Legal Transplants: An Approach to Comparative Law*, Athens 1993; A. Watson, 'From Legal Transplants to Legal Formants' (1995) 43 *American Journal of Comparative Law*, 469–476. Turkey and Armenia are examples of extreme borrowing from codes of other countries; see A. Watson, 'Legal Transplants and European Private Law', at: [http://www.alanwatson.org/legal\\_transplants.pdf](http://www.alanwatson.org/legal_transplants.pdf) (access 13.06.2009). See also B. Kviatek, *Explaining legal transplants. Transplantation of EU law into Central Eastern Europe*, Oisterwijk 2015.

of a supra-national regime borrows from its own supra-governmental system, such as EU Member States borrowing from EU institutions<sup>13</sup>.

Even despite the EU's lack of competences in private law matters<sup>14</sup>, the EC has taken a number of concrete steps in order to facilitate damages actions for breaches of EU competition rules. The Commission published a study in 2004 that found an 'astonishing diversity and total underdevelopment' of private damages actions in the EU<sup>15</sup>. In order to stimulate private enforcement, the Commission published, in December 2005, a Green Paper on how to facilitate actions for damages caused by EU competition law infringements<sup>16</sup>. The Green Paper set out the reasons for the low levels of private enforcement in Europe. It found that its failure was largely due to various legal and procedural hurdles existing at that time in Member States' rules governing actions for competition law damages before national courts. In 2008, the Commission followed up with the publication of a White Paper<sup>17</sup> that made detailed and specific proposals to address identified obstacles to effective damages actions.

All these initiatives included proposals for collective actions<sup>18</sup>. In fact, one of the most important issues in the debate on private enforcement of EU

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<sup>13</sup> While Wiener has developed a framework of legal borrowing adding the vertical dimension, he elaborates only on borrowing between States and federal and international bodies, rather than States borrowing from supra-national institutions. J.B. Wiener, 'Something Borrowed for Something Blue: Legal Transplants in the Evolution of Global Environmental Law' (2001) 27 *Ecology Law Quarterly* 1295.

<sup>14</sup> Private enforcement of competition law is, in fact, a question of national private law rules, contract, tort and corresponding civil procedural rules. The private law consequences of competition law infringements fall within the competences of Member States in accordance with the so-called 'national procedural autonomy'. The CJ has consistently held that '[I]n the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).' Joined cases C-295/04 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*, [2006] ECR I-06619, para. 62; Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland (Rewe I)*, [1976] ECR 1989, para. 5; Case C-261/95 *Palmisani* [1997] ECR I-4025, para. 27; Case C-453/99 *Courage*, [2001] ECR I-6297, para. 29.

<sup>15</sup> Ashurst (2004), *Study on the conditions of claims for damages in case of infringement of EC competition rules*.

<sup>16</sup> Green Paper – Damages actions for breach of the EC anti-trust rules, COM (2005) 672 final.

<sup>17</sup> White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165, 02.04.2008; Commission Staff Working paper accompanying the White Paper on damages, COM(2008) 165 final, SEC(2008) 404, 02.04.2008.

<sup>18</sup> Collective actions are by far more common in the EU Member States than actions brought by individual consumers. This is part of the 'European approach' that is 'rooted in

competition law was whether group actions should be based on an 'opt-out' or an 'opt-in' principle<sup>19</sup>. At the same time, one of the most important concerns was to avoid a 'US style litigation culture'<sup>20</sup>.

Accordingly, many EU Member States have revised their legislation in recent years and have given legal standing to consumers to sue for damages by way of collective actions including, for instance, collective opt-in actions and representative actions brought by consumer associations<sup>21</sup>.

In November 2014, the EU finally adopted Directive 2014/104/EU<sup>22</sup> 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 (hereafter, Damages Directive). EU Member States will have to implement the Directive and change, accordingly, their own legal system by the end of 2016<sup>23</sup>.

### III. Consumers' role in private enforcement of competition law

It is argued that the normative justification for the role of consumers in EU competition law enforcement lies in the fact that EU competition law is not only concerned with the competitive process, but also guarantees that consumers get a fair share of the economic benefits resulting from the effective working

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European legal culture and traditions'. Commission White Paper on damages actions for breach of EC antitrust rules, cited *supra* note 15, p. 3.

<sup>19</sup> The Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms now follows the opt-in approach. See also Z. Juska, 'Obstacles in European competition law enforcement: a potential solution for collective redress' (2014) 7(1) *European Journal of Legal Studies* 126–152.

<sup>20</sup> B. Wardhaugh, 'Bogeymen, lunatics and fanatics: collective actions and the private enforcement of European competition law' (2014) 34(1) *Legal Studies* 1–23; M.T. Vanikiotis, 'Private Antitrust Enforcement and Tentative Steps Toward Collective Redress in Europe and the United Kingdom' (2014) 37 *Fordham International Law Journal* 1639; V. Trstenjak, P. Weingerl, 'Collective Actions in the European Union – American or European Model?' (2014) 5 *Beijing Law Review* 155–162.

<sup>21</sup> For an overview of national legislation on types of standing for consumers see the so-called 'Lear study', Buccirossi et al., *Collective redress in antitrust, European Union*, Brussels, June 2012, at: <http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=74351> (access 05.10.2015), p. 22, table 1.

<sup>22</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, 05.12.2014, p. 1 (hereafter, Damages Directive).

<sup>23</sup> Damages Directive, Article 21: '1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 December 2016. They shall forthwith communicate to the Commission the text thereof.'

of markets<sup>24</sup>. Accordingly, the enforcement of competition law affects the economic interests of consumers. On this basis, consumers are to be involved in the enforcement of competition rules<sup>25</sup>. In EU law, consumers can bring complaints before the Commission and National Competition Authorities (hereafter, NCAs) and participate in the resulting public law procedures. Alternatively, consumers may also bring damages claims before national courts<sup>26</sup>, where they enforce competition rules in private litigation, availing themselves of compensation for the harm suffered. In these roles, consumers also contribute to the achievement of public policy goals of competition law enforcement – deterring undertakings from legal infringements and making them comply with the law<sup>27</sup>.

Moreover, consumers' access to justice through compensatory claims is based on the right to an effective remedy (before a national court or tribunal) against a violation of rights and freedoms guaranteed by the law of the EU. The right to an effective remedy is one of the fundamental rights enshrined in Article 47 of the Charter of Fundamental Rights of the EU.

The Commission has been actively pursuing these normative justifications in its enforcement policy since 2004. It was at that point in time that the EC has laid down a more pronounced role for consumers whereby consumers should actively take part in the public and in the private enforcement of competition rules<sup>28</sup>. This policy prompted a discussion on how to facilitate the role of consumers, and their benefits, in private enforcement of competition

<sup>24</sup> This is explicitly addressed in Article 101(3), which says that consumers must receive a fair share of the efficiency gains generated by the otherwise restrictive agreement. See Case C-26/76 *Metro/Saba I*, [1977] ECR-1875, para. 47; Case C-45/85 *Verband der Sachversicherer e.V. v Commission*, [1987] ECR-0405, para. 15; Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision and Others v Commission*, [1996] ECR II-00649, para. 118; Case C-309/99, *J.C.J. Wouters et al. v. Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577; Case C-519/04 P, *Meca-Medina*, [2006] ECR I-6991. See K.J. Cseres, 'Towards a European Model of Economic Justice: the Role of Competition Law' [in:] H-W. Micklitz (ed.), *The Many Concepts of Social Justice in European Private Law*, Cheltenham 2011, p. 405–450; C. Townley, 'Is Anything more Important than Consumer Welfare (in Article 81 EC)?': Reflections of a Community lawyer' (2007–2008) 10 *Cambridge Yearbook of European Legal Studies* 345-3. With regard to Article 102 TFEU see Case C-53/03 *Syfait and Others v GlaxoSmithKline*, [2005] ECR I-04609, opinion of AG Jacobs delivered on 28 October 2004; P. Akman, 'Consumer Welfare and Article 82 EC: Practice and Rhetoric' (2009) 32 *World Competition* 71–90.

<sup>25</sup> K.J. Cseres, J. Mendes, 'Consumers' access'.

<sup>26</sup> Case C-453/99 *Courage*, [2001] ECR I-6297, para. 26. Joined cases C-295/04 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*, [2006] ECR I-6619; Case C-199/11 *Otis NV and others*, judgment of 6 November 2012, not yet reported.

<sup>27</sup> See also M. Ioannidou, 'Enhancing Consumers' Role in EU Private Competition Law Enforcement: a Normative and Practical Approach' (2012) 8 *Competition Law Review* 59.

<sup>28</sup> White Paper on modernization of the Rules implementing Articles 81 and 82 of the EC Treaty, cited *supra* note 1.

law through damages actions. Consumers can, indeed, play an essential role in private enforcement of competition law. In general, their knowledge of the day-to-day functioning of markets, in particular those in mass-market consumer goods, make consumers and consumer organisations important information providers by way of initiating damages actions before national courts. It has been argued that consumers may, in principle, have optimal access to information on vertical restraints and unilateral conduct, a fact that would facilitate private litigation<sup>29</sup>.

Final consumers act as 'private attorney generals'<sup>30</sup> when they bring private law suits before their national courts with a view to enforcing competition law. It has been argued in legal and economics literature that private enforcers have greater incentives, better information and sufficient resources to enforce competition rules<sup>31</sup>. Private enforcement can provide compensation for harm suffered as a result of anti-competitive conduct and thus achieve corrective justice goals<sup>32</sup>. In addition, it has a deterrent effect, similar to public law enforcement mechanisms; insofar as it functions as an added burden that potential infringers might need to carry. As such, the fear of private enforcement might deter potential infringers from future violations<sup>33</sup>.

However, consumers' readiness to bring damages actions before courts is hindered by their general unawareness of competition rules, consumers' weak party autonomy and their common lack of recognition of the possibility of involving private actors in law-making and law enforcement. Besides the

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<sup>29</sup> K.J. Cseres, J. Mendes, 'Consumers' access'.

<sup>30</sup> The term 'private attorney general' refers to the use of private litigation in the US as a means of bringing potential antitrust infringements before courts. In the US, public enforcement has long since been assumed to be inadequate to achieve effective enforcement. Hence, private litigation has been used as a means of public enforcement. Private litigants play a public role by assisting public authorities in their enforcement role. D.J. Gerber, 'Private Enforcement of Competition Law: A Comparative Perspective' [in:] A. Möllers, A. Heinemann (eds.), *The Enforcement of Competition Law in Europe*, Cambridge 2007, p. 416–417.

<sup>31</sup> G. Becker, G. Stigler, 'Law Enforcement, Malfeasance, and Compensation of Enforcers' (1974) 3 *Journal of Legal Studies* 1–18. M. Polinsky, 'Private Versus Public Enforcement of Fines' (1980) 9 *Journal of Legal Studies* 105–127; W. Schwartz, 'An Overview of the Economics of Antitrust Enforcement' (1980) 68 *Georgetown Law Journal* 1075–1102. W.P.J. Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32(1) *World Competition* 3–26.

<sup>32</sup> Case C-453/99 *Courage*, [2001] ECR I-6297, para 26. Joined cases C-295/04 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*, [2006] ECR I-6619; Case C-199/11 *Otis NV and others*, judgment of 6 November 2012, not yet reported.

<sup>33</sup> See G. Becker, G. Stigler, 'Law Enforcement'. Private law actions impose additional sanctions on undertakings which infringed competition rules and thus make them comply with the law. The aim of private law sanctions, often in the form of damages, is to prevent the offenders, as well as other potential infringers, from breaking the law.

lack of confidence in the judiciary, consumers are greatly challenged by the significant length, costs and complexity of competition law litigations.

Final consumers are often indirect purchasers of competition law infringers. Being further away from these firms, they are often unaware of the legal breach before the actual harm has already occurred. In cases of hard-core cartels, most consumers do not even realize that they have been harmed. Still, availability of information concerning infringements, and the identity and location of the wrongdoers, are crucial for consumers in order to initiate private law actions.

Moreover, private enforcement entails additional costs for final consumers<sup>34</sup> and so they may face incentive problems due to ‘rational apathy’ and ‘free-riding’. Arguably, private consumers are much more influenced by costs and benefits than public enforcers. The costs of accessing information in order to discover an infringement, coupled with litigation costs (including lawyers’ fees and perhaps expert witnesses), are often identified as the main reasons why consumers refrain from going to the courts<sup>35</sup>. Consumers will balance the costs of searching for the necessary information with the benefits of a possible legal action. If their private incentives are insufficient to detect and litigate a case (that is, their expected private gains are lower than the costs of enforcement), then they will not act. It would be irrational for consumers to bear the high costs of legal proceedings if they cannot expect off-setting benefits. This is often the reason for the inaction of consumers<sup>36</sup>. In cases where damages are widespread and individual losses low, ‘rational apathy’ prevails among the injured individuals and thus they will not sue<sup>37</sup>.

‘Free-riding’ is an additional problem here – potential private enforcers may tend to leave the enforcement to other victims, hoping to ‘free-ride’ on

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<sup>34</sup> It may lead to strategic litigation and to an abuse of the private action mechanism. W.P.J. Wils, ‘Should Private Enforcement Be Encouraged in Europe?’ (2003) 26 *World Competition* 472–488. W. Shughart II, ‘Private Antitrust Enforcement – Compensation, Deterrence, or Extortion’ (1988) 12 *Regulation Magazine*; P. McAfee, H. Mialon, S. Mialon, ‘Private v. Public Antitrust Enforcement: A Strategic Analysis’ (2008) 92 *Journal of Public Economics* 1863–1875.

<sup>35</sup> These are costs that public entities only face if they ultimately also need to litigate. However, unlike consumers, public entities enforce competition law as part of the functions they are expected to perform. R. Van den Bergh, L. Visscher, ‘The Preventive Function of Collective Actions for Damages in Consumer Law’ (2008) 1(2) *Erasmus Law Review*.

<sup>36</sup> R. Van den Bergh, ‘Private Enforcement of European Competition Law and the Persisting Collective Action Problem’ (2013) 20 *Maastricht Journal of European and Comparative Law* 17. The losses suffered by individual consumers are smaller than society’s losses. Consumers’ financial reward is small compared to the costs of enforcement and they may benefit only marginally from the deterrent effect of enforcing competition rules against wrongdoers. S. Shavell, ‘The Optimal Structure of Law Enforcement’ (1993) 36 *Journal of Law and Economics* 255–287; M. Polinsky, ‘Private Versus Public’, p. 105–127.

<sup>37</sup> R. Van den Bergh ‘Private enforcement’.

their efforts<sup>38</sup>. Consumers who are victims of a competition law infringement have an interest to leave the enforcement efforts to others, so that profits can be obtained without having to use their own resources. The ‘free-riding’ problem reduces the number of private actions below a socially optimal level of enforcement<sup>39</sup>.

Collective and representative actions have often been considered to be the way forward to remedy these incentive problems<sup>40</sup>. Although in most EU Member States consumer organizations have standing to bring actions for injunctive relief, they do not always have the power to sue for damages<sup>41</sup>. The next section will further set out the rationale of collective actions and analyze the specific role they play in consumer compensatory claims for competition law violations.

#### **IV. The relevance of collective actions in private enforcement of competition law**

As mentioned, the recently adopted Damages Directive does not contain provisions on collective actions, despite the fact that earlier proposals of 2005 and 2008 addressed collective actions as one of the key issue in the EC’s overall private enforcement policy. Instead, the EU took a more horizontal approach culminating in 2013 in a Communication<sup>42</sup> and a Recommendation on collective consumer redress<sup>43</sup>. This Recommendation is an act of non-

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<sup>38</sup> Ibidem, p. 20, 24

<sup>39</sup> R. Van den Bergh, L. Visscher, ‘The Preventive Function’, p. 14.

<sup>40</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 final; not published in the Official Journal. Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C(2013) 3539 final; not published in the Official Journal.

<sup>41</sup> For example, the recent decision of the German Federal Court of Justice on indirect purchaser standing, passing-on defense, and new type of claim aggregation. Federal Court of Justice BGH of 28 June 2011, KZR 75/10 ORWI; BGH of 7 April 2009, KZR 42/08 CDC.

<sup>42</sup> In 2011, the EC published a public consultation working document entitled ‘Towards a Coherent European Approach to Collective Redress’ indicating a change from a sectorial to a horizontal approach towards collective redress. This was followed in 2013 by the Communication: Towards a European horizontal framework for collective redress, COM(2013) 401 final.

<sup>43</sup> The most important issue in the debate on private enforcement of EU competition law was whether group actions should be based on an ‘opt-out’ or an ‘opt-in’ principle. The Recommendation on common principles for injunctive and compensatory collective redress mechanisms now follows the opt-in approach. Commission Recommendation of 11 June 2013

binding soft law and thus Member States are not obliged to implement its solutions.

The majority of EU Member States has given legal standing to consumers, and adopted some form of a collective redress model, yet most of these schemes remain under-enforced<sup>44</sup>. Most Member States implemented collective ‘opt-in’ actions and representative actions brought by consumer association. However, some countries, such as the UK, Portugal, Denmark and the Netherlands, adopted the ‘opt-out’ model<sup>45</sup>.

Irrespective of the specific model of collective redress adopted, collective actions are considered to solve both the incentive problem of individual consumers as well as the public policy concern associated with damages claims. It has been argued in literature that collective actions can increase consumers’ access to justice, can serve public policy goals (such as: market rectification, judicial economy and deterrence), as well as increase the overall effectiveness of private enforcement<sup>46</sup>. Collective actions can consolidate dispersed small-scale claims, and thus solve the incentive problem of many individual consumers in cases where the harm caused by an infringement is widespread, but the harm caused to individuals is so fragmented that they refrain from litigating. Consolidating these claims in collective actions is, therefore, critical for consumers who have suffered harm.

Collective actions are cost-spreading solutions; they can reduce litigation costs, enlarge litigation possibilities and provide optimal representation for consumers in court proceedings. Moreover, surveys show that citizens would be more willing to defend their rights before a court if they could join other consumers who complain about the same thing<sup>47</sup>. Furthermore, collective

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on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.07.2013, p. 60.

<sup>44</sup> For an overview of national legislation on types of standing for consumers see the so-called ‘Lear study’, Buccirossi et al., *Collective redress in antitrust, European Union*, Brussels, June 2012, at: <http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=74351> (access 21.07.2013), p. 22, table 1. See also Z. Juska, ‘Obstacles in European’.

<sup>45</sup> In the ‘opt-in’ model, the individual claimants have to express their wish to join the collective action in order to be recognized as a group member and be bound by the judgment resulting from the collective action. In the ‘opt-out’ model, individuals are automatically members of the group, unless they explicitly opt-out. Ch. Leskinen, ‘Collective Actions: Rethinking Funding and National Cost Rules’ (2011) 8(1) *Competition Law Review* 87–121.

<sup>46</sup> M.T. Vanikiotis, ‘Private Antitrust’, p. 1643–1647.

<sup>47</sup> Eurobarometer, *European Union citizens and access to justice*, October 2004, p. 36; 2<sup>nd</sup> Edition of the Consumer Markets Scoreboard COM (2009) 25 Part 2, page 10 and Eurobarometer n. 299, at: [http://ec.europa.eu/consumers/redress\\_cons/docs/cons\\_redress\\_EU\\_qual\\_study\\_report\\_en.pdf](http://ec.europa.eu/consumers/redress_cons/docs/cons_redress_EU_qual_study_report_en.pdf) (access 05.10.2015).

actions form litigation avenues that are less disruptive for the market than multiple individual litigations.

Despite all these arguments in favour of collective actions, consumers, who are often not in a direct contractual relationship with the wrongdoer (indirect purchasers), do not turn to their national courts to obtain redress. Although in theory consumers and small and medium sized enterprises (hereafter, SMEs) are affected by anti-competitive behaviours, and as such they should bring actions as potential claimants, empirical evidence shows that the new rules on collective actions have not yet resulted in a notable increase in consumer litigations<sup>48</sup>. The next sections will focus specifically on CEECs and analyze their legislation on collective actions as well as the actual enforcement practice of existing collective redress schemes.

## V. Collective consumer actions in CEECs

### 1. Europeanization of competition and consumer law in CEECs

In order to evaluate the way in which collective consumer actions for EU competition law enforcement have developed in CEECs, it is necessary to briefly comment on two topics: ‘Europeanization’, of more than just competition law, and on the role of consumers. First, while competition and a functioning market economy did not yet, in fact, exist in CEECs, a clear and comprehensive set of competition and consumer rules developed in the shadow of their EU accession. The introduction of both competition as well as consumer law was initially part of the legal obligations of CEECs during their accession process to the EU<sup>49</sup>. Interestingly, competition acts were enacted already at the beginning of the 1990s, but it was not until its 2<sup>nd</sup> half that CEECs enacted consumer protection acts<sup>50</sup>. In reality, consumer

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<sup>48</sup> For example, in Sweden, France and the UK, consumer associations have standing to bring representative actions for damages and yet the number of such cases is low and participation rates vary greatly. R. Van den Bergh, ‘Private enforcement’, p. 23; Z. Juska, ‘Obstacles in European’, p. 141.

<sup>49</sup> The legal basis for aligning domestic competition laws with that of the EU were laid down in various bilateral agreements between the EU and individual candidates from CEE (in the so-called ‘Europe Agreements’). In the course of the EU eastward enlargement process, *acquis communautaire* became a legally binding reference framework for the candidate countries – the approximation of their laws was formulated as a strict obligation of the candidate countries in the texts of their individual agreements.

<sup>50</sup> Czech Republic 1992, Poland 1990 amended in 2000, Hungary 1997, Bulgaria 1999, Estonia 1994, Latvia 1992 amended in 1999, Lithuania 1994 amended in 2000.

protection, as both law and policy, was slowly advancing and was put on the legislative and political agenda of CEECs due to considerable EU pressure<sup>51</sup>. This slow trend has continued also after their EU accession, partly due to the weakness of their consumer associations and often weak and fragmented civil societies.

It was the EU enlargement process that induced the adoption of an identifiable body of competition as well as consumer law in the candidate countries of CEE. It was the very same process that has led to the continuous alignment of domestic laws with legislative and policy developments in the EU<sup>52</sup>. Accordingly, the enactment of domestic competition as well as consumer laws was subject to top-down rule transfers and the law-making process was governed by strong EU conditionality<sup>53</sup>. The 'Europeanization' process<sup>54</sup> continued also after CEEC's EU accession, and often involved vertical legal transplants in both of these legal branches. For example, CEECs implemented similar procedural rules and enforcement tools (such as leniency programmes) as those used by the Commission in its enforcement system<sup>55</sup>. The underlying reason for this approach was the belief that once these rules and enforcement methods have proven effective in the EU and for the Commission, they will prove successful in Member States as well. However, the effectiveness of the transplanted rules in the specific organizational and institutional framework

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<sup>51</sup> K.J. Cseres, *Consumer protection and competition law*, The Hague 2005.

<sup>52</sup> F. Cafaggi, O. Cherednychenko, M. Cremona, K.J. Cseres, L. Gorywoda, R. Karova, H.W. Micklitz, K. Podstawa, 'Europeanization of Private Law in Central and Eastern Europe Countries (CEECs). Preliminary Findings and Research Agenda' (2010) 15 *European University Institute Working Papers LAW* 15; K.J. Cseres, 'Accession to the EU's competition law regime: a law and governance approach' (2014) 7(9) *YARS* 31–66.

<sup>53</sup> Schimmelfennig defines conditionality as a direct mechanism of Europeanization. The EU disseminates its legal rules and governance by setting them as conditions that external actors have to meet in order to obtain candidate/accession status or other rewards and avoid sanctions. F. Schimmelfennig, U. Sedelmeier, 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe' (2004) *Journal of European Public Policy* 670; F. Schimmelfennig, 'EU External Governance and Europeanization Beyond the EU', [in:] D. Levi-Faur (ed.), *The Oxford Handbook of Governance*, Oxford 2012. It was only with regard to CEECs that pre-accession conditionality became a regular feature of EU enlargement policy for all candidates.

<sup>54</sup> Europeanization is understood as 'the reorientation or reshaping of politics in the domestic arena in ways that reflect policies, practices or preferences advanced through the EU system of governance'; I. Bache, A. Jordan, 'Europeanization and Domestic Change', [in:] I. Bache, A. Jordan (eds.), *The Europeanization of British Politics*, Basingstoke 2006, p. 30.

<sup>55</sup> See K.J. Cseres, 'The impact of Regulation 1/2003 in the New Member States' (2010) 6(2) *Competition Law Review* 145–182; G. Pridham, 'The EU's Political Conditionality and Post-Accession Tendencies: Comparisons from Slovakia and Latvia' (2008) 46 *Journal of Common Market Studies* 365–388.

of CEECs was not as high as it was at its origin when they were enforced by the Commission<sup>56</sup>.

## 2. Europeanization of private enforcement of competition law

Even before the Damages Directive was adopted, certain CEECs began to adopt specific provisions on private enforcement, or harmonized some of its elements, in their civil or commercial laws. Bulgaria, Hungary, Lithuania, Romania and Slovenia implemented a specific provision in their respective Competition Acts. All other CEECs rely on the rules of their civil procedure or on the rules of their commercial codes.

However, while national legislation has indeed been aligned with the intentions of EU institutions to encourage and enable private enforcement of competition law, this fact is in sharp contrast with the number of cases where private parties have actually enforced national or EU competition rules in CEECs. These numbers are limited to a few cases per country. Indeed, in a study covering all 27 EU Member State, Rodger reveals less than 10 cases in the period of 1999–2009 in all CEE Member States except Hungary, which had 16 cases<sup>57</sup>.

Not all of the reasons behind low numbers of private enforcement cases are the same between different CEECs. There are, however, a few that form a pattern among them. It has been argued in most CEECs that private actors are not at all aware of the possibility of private enforcement. Many potential claimants remain inactive due to the overall complexity of damages cases, especially with regard to the calculation of damages, general distrust in the court system (as a result of the judiciary's lack of expertise and experience), as well as substantial litigation costs and long litigation periods<sup>58</sup>. The reported

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<sup>56</sup> This is, for example, the case with regard to the power to investigate private premises or leniency programmes. K.J. Cseres, 'Accession', p. 55; see also The Global Diffusion of Competition Law and Policy – An Exploratory Workshop, at: [https://www.ucl.ac.uk/cles/research\\_initiatives/gcl-economic/competition-law-and-policy-workshop](https://www.ucl.ac.uk/cles/research_initiatives/gcl-economic/competition-law-and-policy-workshop) (access 05.10.2015).

<sup>57</sup> See reports from Bulgaria, Czech Republic, Hungary, Latvia, Lithuania Estonia, Poland, Slovenia, Slovakia, Romania in: B. Rodger, *AHRC project Comparative Private Enforcement of Competition Law and Consumer Redress in the EU, 1999–2012*, at <http://www.clcpecreu.co.uk/> (access 05.10.2015). Rodger's project considers all cases in the courts of all EU Member States throughout a ten year period (1999–2009). His project gives a quantitative analysis of the extent to which private enforcement is taking place across Member States. See B. Rodger, *AHRC project Comparative Private Enforcement of Competition Law and Consumer Redress in the EU, 1999–2012*, Research methodology, research objectives, at: <http://www.clcpecreu.co.uk/> (access 05.10.2015).

<sup>58</sup> M.D. Kukainis, 'Latvia' [in:] B. Rodger, *AHRC project*, at: <http://www.clcpecreu.co.uk/pdf/final/Latvia-Executive%20Summary.pdf> (access 05.10.2015); P. Szilágyi, 'Private Enforcement of Competition Law and Stand-Alone Actions in Hungary' (2013) 3(6) *Global*

Hungarian cases were unfounded and frivolous<sup>59</sup>. Similarly in Slovakia, judges have dealt with rudimentary questions of law only, rather than on substantive issues on the merits. In Poland, all of the reported cases concerned the nullity of contracts, none dealt with damages claims<sup>60</sup>. It has also been argued that the fact that public enforcement is not effective, and fails in its decisional stage, hinders the development of the private enforcement system<sup>61</sup>.

Bulgaria specifically mentioned that the time needed for the adoption of a new law (as a result of external pressure) is significantly shorter than the time needed 'for its familiarization and application'. This situation was further aggravated by the abovementioned general unawareness of relevant rules, as well as reluctance to enforce them<sup>62</sup>.

It could be argued that most of the challenges are equally valid for 'old' Member States. However, CEECs do face some problems which are specific to them. The fact that private actors are unaware that private enforcement is a way to enforce competition rules and to get compensation, seems to be one of these specific challenges. The complexity of competition law cases, especially proving the causal link between the infringement and the damage, as well as the calculation of the damage itself, form a significant barrier for both private parties and national courts in all Member States. The institutional anxiety of both private parties and courts to launch private damages claims seems stronger in CEECs<sup>63</sup>. The fact that the 'Europeanization' of competition law has been

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*Competition Litigation Review* 13–142, available at SSRN: <http://ssrn.com/abstract=2396802> (access 16.02.2014); A. Braun, I. Hartmann, *Czech Republic: Overviews, The European Antitrust Review 2015*, at: <http://globalcompetitionreview.com/reviews/62/sections/210/chapters/2472/croatia-overview/> (access 05.10.2015). In Lithuania, as well as the non-litigious nature of the Lithuanian society; J. Malinauskaite, 'Lithuania', [in:] B. Rodger, *AHRC project*, at: <http://www.clcpecreu.co.uk/pdf/final/Lithuania-%20Executive%20Summary.pdf> (access 05.10.2015); V. Mircea, 'Romania', [in:] B. Rodger, *AHRC project*, at: <http://www.clcpecreu.co.uk/pdf/final/Romania-Executive%20Summary.pdf> (access 05.10.2015); K. Sein, 'Private enforcement of competition law – the case of Estonia' (2013) 6(8) *YARS* 129–139.

<sup>59</sup> P. Szilágyi, 'Private Enforcement'.

<sup>60</sup> A. Jurkowska-Gomułka, 'Private Enforcement of Competition Law in Polish Courts: The Story of an (Almost) Lost Hope for Development' (2013) 6(8) *YARS* 110–112.

<sup>61</sup> S. Sramelova, 'Slovakia', [in:] B. Rodger, *AHRC project*, at: <http://www.clcpecreu.co.uk/pdf/final/Slovakia%20report.pdf> (access 05.10.2015).

<sup>62</sup> D. Dragiev, 'Bulgaria', [in:] B. Rodger, *AHRC project*, at: <http://www.clcpecreu.co.uk/pdf/final/Bulgaria-%20Executive%20Summary.pdf> (access 05.10.2015).

<sup>63</sup> Both private individuals and national authorities face the problems of assessing complex legal and economic issues of competition law. While most of the NCAs have built up sufficient legal and economic expertise with regard to competition law issues the same cannot be said about the national courts. National courts face a double barrier: on the one hand, they lack a basic knowledge of European law and on the other, they are unfamiliar with competition law issues. The new system of European competition law substantially raised the level of economic analysis in competition cases, which will most probably create problems. The main difficulties

taking place parallel with market, constitutional and institutional reforms explains the shortcoming of the institutional framework of private enforcement.

The adoption of the necessary legal framework for private actions is certainly essential to activate actual enforcement. The above analysis shows, however, that it is also necessary to create a broader institutional framework and, more notably, to strengthen relevant institutions (also at the civil level of society). In CEECs, there is generally a strong reliance on public enforcement and prevalent view that public enforcement has to facilitate private enforcement. This might be a legitimate expectation in cases such as an *amicus curiae* intervention by a NCA in court proceedings<sup>64</sup>. However, private enforcement requires the stand-alone reliance of private actors on market-based solutions such as tort, contract and property rights.

This clearly demonstrates that there is a significant gap between transplanting the policy and the necessary rules of private enforcement and their actual application. The next section will analyze the legal framework and enforcement of collective actions in CEECs.

### 3. Legislation and enforcement of collective actions in CEECS

Table 1 below provides an overview of existing laws on collective redress schemes in CEECs. The overview shows that there hardly any specific rules for collective actions exist in this region, with the exception of Poland and Bulgaria.

Poland has introduced a class action procedure in 2009. The procedure covers consumer law, product liability law, and applies to tort claims across all sectors. It is an 'opt-in' collective redress scheme. However, all cases regarding collective claims brought so far were related to consumer protection claims, rather than competition law breaches<sup>65</sup>.

Bulgaria has three categories of collective actions. Two separate types of representative actions can be brought before the courts by consumer organizations for cases related to consumer protection issues. The first concerns

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to be expected are among others how NCAs will deal with cases that spill over much beyond their narrow competition mandate. National judges receive trainings and assistance in order to be able to manage expert witnesses and economic evidence that will be inherent and frequent parts of competition cases.

<sup>64</sup> See the possible information exchange cooperation mechanisms laid down in Article 15 of Regulation 1/2003.

<sup>65</sup> For a detailed discussion see A. Piszcz, "Class actions" in the Court culture of Eastern Europe' [in:] L. Ervo, A. Nylund (ed.), *The Future of Civil Litigation – Access to Courts and Court Connected mediation in the Nordic Countries*, Cham 2014, p. 357–379; A. Jurkowska-Gomułka, 'Private Enforcement', p. 110–112; M Tulibacka, *Poland, Report*, at: <http://www.collectiveredress.org/reports/poland> (access 05.10.2015).

Table 1. Collective redress models

	Collective redress
<b>Bulgaria</b>	Civil Procedural Code 'Proceedings under collective claims', Arts. 379–388
<b>Croatia</b>	Collective action is explicitly allowed only in consumer protection cases (Article 131 Consumer Protection Act)
<b>Czech Republic</b>	no effective instrument for collective redress; an action to seek an injunction in order to protect consumer interests can be submitted by a registered consumer organization (Sec. 25 of the Act No. 634/1992 Coll., on the Protection of Consumers)
<b>Hungary</b>	no special rules for collective redress, general rules for claim aggregation apply (Article 51 of the Code of Civil Procedure) the Competition Authority (GVH) can enforce civil law claims for consumers on the basis of Article 92 of the Hungarian Competition Act
<b>Estonia</b>	there are no collective claims, no class actions, nor actions by representative bodies or other forms of public interest litigation (no collective redress) <sup>1</sup>
<b>Latvia</b>	no mechanism for compensatory collective redress action may be brought by several plaintiffs against one defendant, however, each co-plaintiff acts independently in relation to the other party and other co-plaintiffs associations for the protection of consumer rights and the Latvian Consumer Rights Protection Centre have the right to submit claims and to represent the interests of consumers in court <sup>2</sup>
<b>Lithuania</b>	Article 49(6) of the Code of Civil Procedure provides that a group action may be submitted to protect public interest in accordance to the law, representative actions are allowed to protect the public interest of consumers. Article 30 of the Law on Consumer Protection <sup>3</sup>
<b>Poland</b>	Act of 17 December 2009 on Collective Redress, opt-in model <sup>4</sup>
<b>Romania</b>	Opt-in representative action: since 2011, the Competition Act gives rights to specified bodies <sup>5</sup> to bring representative damages actions on behalf of consumers
<b>Slovenia</b>	no specific provisions, two options available: (1) courts may join cases with the same subject matter, (2) system of 'co-litigation', a form of aggregation of individual claims <sup>6</sup>

Slovakia	no legal basis for collective redress, some elements of a collective redress mechanism present in Act no. 99/1963 Coll. Civil Procedure Code whereby claimants may bring a joint action, consumer associations cannot bring representative actions for damages but they may, on behalf of a group of consumers, bring an action <i>restitutio in integrum</i> or <i>actio negatoria</i> <sup>7</sup>
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<sup>1</sup> K. Sein, ‘Private enforcement’, p. 130.

<sup>2</sup> M.D. Kukainis, ‘Latvia’.

<sup>3</sup> V. Mizaras, *Report, Lithuania*, at <http://www.collectiveredress.org/reports/lithuania> (access 05.10.2015).

<sup>4</sup> A. Piszcz, “Class actions”; M Tulbacka, *Poland, Report*, <http://www.collectiveredress.org/reports/poland> (access 05.10.2015).

<sup>5</sup> They include: registered consumer protection associations and professional or employers’ associations having these powers within their statutes or being mandated in this respect by their members. The only rule that existed before 2011 originated in a general provision in the Consumers’ Law that allow consumer associations to file legal actions to defend consumer rights and their legitimate interests against undertakings. This legal provision, however, does not clarify whether such actions are limited to protecting the general rights recognized under the Consumers’ Law or whether it also permits collective damages actions based on anti-competitive practices or other illicit deeds. Moreover, the Consumers’ Law is also silent on whether such claims could be brought as representative actions at large or on behalf of named consumers.

<sup>6</sup> S. Stoica, M. Ion, ‘Romania’ [in:] I. Knable Gotts (ed.), *The private competition enforcement Review*, at: [http://www.pnpartners.ro/publications/articles/PCER\\_2012\\_Romania.pdf](http://www.pnpartners.ro/publications/articles/PCER_2012_Romania.pdf) (access 05.10.2015), p. 328.

<sup>7</sup> In a case concerning a concerted increase in the price of electricity, which was an example of potential follow-on litigation in the field of private enforcement of competition law, the Slovenian Consumer Association issued a public notice in different media calling upon the infringers to pay what they owed to consumers in order to avoid the costs associated with court proceedings and lengthy litigation. M. Brkan, T. Bratina, ‘Slovenia’, at: <http://www.clcpectreu.co.uk/pdf/final/Slovenia%20report.pdf> (access 05.10.2015).

<sup>8</sup> S. Sramelova, ‘Slovakia’, p. 4.

claims for damages for collective consumer interests, the second covers claims for compensation brought on behalf of consumers<sup>66</sup>. The third type refers to a general group action procedure, which can be applied for claims based on any legal branch. This procedure was adopted in 2008 and allows consumer organizations to represent unspecified persons who suffered damages from any legal infringements. Only a few of such cases have been brought forth so far (five between 2004 and 2008). It has been argued that Bulgarian consumers are often unaware of this redress mechanism and that they lack incentives to use it<sup>67</sup>.

In certain other CEECs, such as Hungary and Croatia, legislation on some form of collective actions is clearly limited to, or has so far only been applied to, consumer law cases. Representative actions can also be commenced by public authorities, including the Hungarian Competition Authority (GVH) or certain specified bodies in Romania. However, even this model is under-enforced. In Hungary, this provision has never been used in relation to a competition case, albeit it was applied in consumer deception cases<sup>68</sup>.

Publicly available studies on collective redress schemes in all EU Member States support the above picture present in CEECs. Studies demonstrate a very low proportion of consumer claims in all EU Member States<sup>69</sup>. The so-called 'Lear Study' reported six countries where collective redress cases occurred for antitrust infringements, albeit the trial stage has actually been reached only in four Member States<sup>70</sup>. Rodger's empirical study of collective consumer actions in all 27 Member States found that contractual disputes between businesses are the most common type of cases, with only very few consumer cases in existence (less than 4%)<sup>71</sup>. Even in those Member States where

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<sup>66</sup> The 1<sup>st</sup> collective scheme can be used irrespective of the fact whether the number of affected consumers is definite or definable, and regardless of whether collective consumer interests were damaged or exposed to threat. The 2<sup>nd</sup> mechanism is, however, conditional upon: two or more identifiable consumers having suffered damages of the same origin; the damages must have been caused by the same trader; and that the association has been authorized in writing by at least two consumers to take court action. BEUC, *Country survey of collective redress mechanisms, Bulgaria*, <http://www.beuc.eu/publications/2011-10006-01-e.pdf> (access 05.10.2015).

<sup>67</sup> BEUC, *Country survey*; D. Dragiev 'Bulgaria'.

<sup>68</sup> P. Szilágyi, 'Report for the 'Comparative Private Enforcement and Collective Redress Project'' [in:] B. Rodger, *AHRC project*, at <http://www.clcpecreu.co.uk/pdf/final/Hungary%20report.pdf> (access 05.10.2015), p. 7.

<sup>69</sup> Between 2006–2012, the majority of private damages claims that followed an EC decision were brought by large companies or public entities and not by SMEs or by consumers. Z. Juska, 'Obstacles in European', p. 132–33.

<sup>70</sup> Buccirosi et al., *Collective redress*.

<sup>71</sup> B. Rodger, *Competition litigation and collective redress: a comparative EU analysis with focus on Portugal and recent developments in the UK*, 3 June 2013, University of Lisbon Law School, at: [http://www.ideff.pt/xms/files/Iniciativas/varios\\_2013/Rodger\\_2013\\_Private\\_enforcement\\_Lisbon\\_presentation.pdf](http://www.ideff.pt/xms/files/Iniciativas/varios_2013/Rodger_2013_Private_enforcement_Lisbon_presentation.pdf) (access 21.07.2013). See also B. Rodger, 'Private enforcement and

consumer organizations can sue for damages, they have remained passive as enforcers.<sup>72</sup>

This leaves a remaining problem unsolved: consumers who suffered harm as a consequence of competition law violations do not receive compensation and so their fundamental right to a remedy is ineffective. At the same time, both the unjustified enrichment on the side of the infringer, as well as the public policy goals of competition law enforcement (deterrence and compensation), remain unaddressed. The next section will discuss a number of issues that could be implemented when shaping future legal frameworks for collective actions in CEECs.

## VI. Are there solutions? In the law and beyond

Barriers to consumers' access to justice are well-known and have been thoroughly analyzed.<sup>73</sup> Litigation before courts takes excessive time and money when compared to the small value of the dispute at stake. Moreover, civil procedures are often not geared to the institution of mass (collective) procedures and courts end up adjudicating cases rather than mediating or reconciling them. A part from that, there are also barriers of a psychological nature: unfamiliarity with the legal language, lack of information about the actual harm and the infringement<sup>74</sup>, combined with a lack of investigatory tools to detect them. Consumers discover harm when it has already taken place and are thus not interested in avoiding it in the future. When individual consumers face substantial costs, disproportionate to the amount of their complaint, they

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collective redress: the benefits of empirical research and comparative approaches' (2012) 8(1) *Competition Law Review* 1–6; S. Peyer, 'Private Antitrust Litigation in Germany from 2005 to 2007: Empirical Evidence' (2012) 8(2) *Journal of Competition Law and Economics* 331–359.

<sup>72</sup> The 2012 'Lear study' argued that 'the number of actions related to antitrust infringements is still very limited. This may be in part due to the fact that most of the national collective redress systems in Europe have been introduced only recently, but it might also suggest that existing legislation is scarcely effective in promoting consumer and SME access to collective redress instruments'. Buccirosi et al., *Collective redress*, p. 13, 42–43.

<sup>73</sup> W.H. Van Boom, M. Loos (eds.), *Collective Consumer Interests and How They are Served Best in Europe; Legal aspects and policy issues on the border between private law and public policy*, Groningen 2007; K.J. Cseres, 'Collective consumer actions: a competition law perspective' [in:] W.H. van Boom, M. Loos (eds.), *Collective Consumer*; R. Van den Bergh, L. Visscher, 'The Preventive Function'.

<sup>74</sup> Information concerning law infringements and the identity and location of the wrongdoer are key to consumers in order to initiate proceedings. Consumers are often unaware of the infringements before the actual harm has occurred.

will decline to seek redress and resolve disputes<sup>75</sup>. All these arguments make a strong case for collective actions. In fact, collective actions are the only means through which consumers are likely to seek redress and get compensated.

However, as the above analysis shows, even in countries with an existing, statutory collective redress model, there are hardly any, or even no cases at all of damages claims based on competition law violations. Several in-depth studies have been conducted analysing the optimal model of collective redress for consumers in competition law cases as well as in other legal branches<sup>76</sup>. These studies covered legal rules that optimize the effectiveness of collective redress schemes and, most notably, traditional rules on legal funding, which do not easily accommodate the realities of representative litigation. Yet these issues alone may not solve the entire problem of the overwhelming under-enforcement of collective schemes.

Specific problems of CEECs could lay behind the low number of such cases. These problems include the weak position of consumers, consumer organizations and associations, which reflects a general feature of CEECs, where civil society is often fragmented. The specific problems of CEECs call for solutions beyond a mere transplantation of legal rules which have proven effective elsewhere. The case of CEECs calls for home-grown solutions that strengthen private autonomy as such. Accordingly, caution is recommended with respect to some of the suggestions popular in these countries such as, for example, to rely even more heavily on public enforcement in order to facilitate private enforcement. In the public-private divide of law enforcement, public enforcement is already more dominant in CEECs than in older Member States. Certain advantages can indeed be earned by relying on effective public enforcement in order to stimulate private enforcement. These include, for example, making use of the expertise of the EC<sup>77</sup> or of NCAs who can assist national courts as an *amicus*

<sup>75</sup> Consumers have insufficient incentives to enforce the law because their personal financial reward is small compared to the enforcement costs and they will only marginally benefit from the deterrent effect of enforcing the rules against wrongdoers. They have insufficient retributive motives. These factors might even result in under-enforcement. Hence private enforcement of consumer law is inefficient to achieve deterrence because of the lack of information and the risk of under-enforcement. R. Van den Bergh, 'Private enforcement', R. Van den Bergh, L. Visscher, 'The Preventive Function'.

<sup>76</sup> Z. Juska, 'Obstacles in European'; M. Ioannidou, 'Enhancing Consumers'; Ch. Leskinen, 'Collective Actions'; D. Hensler, 'The Globalization of Class Actions: An Overview' (2009) 622(1) *The Annals of the American Academy of Political and Social Science* 7–29; Ch. Hodges, *The Reform of Class and Representative Actions in European Legal Systems*, Oxford-Portland 2008.

<sup>77</sup> According to Article 15(1) of Regulation 1/2003, national courts may ask the EC to transmit to them information in its possession or to give its opinion on questions concerning the application of EU competition rules. A national court may ask the EC for its opinion on economic, factual and legal matters concerning the application of EU competition rules. On

*curiae* in adjudicating damages claims in competition cases<sup>78</sup>. However, they will not manage to cure the incentive problems plaguing consumers when faced with the possibility to bring damages actions.

There have also been examples of other methods meant to facilitate private actions. In Hungary, a legal presumption of a 10% overcharge was introduced when calculating damages for hard-core cartels with the intention to simplify and encourage damages claims<sup>79</sup>. Similarly, in Bulgaria, a more flexible procedural rule has been implemented for damages claims for competition law violations. The Bulgarian Competition Act provides that all legal and natural persons, harmed by an anti-competitive practice, are entitled to compensation even if the infringement was not directly aimed against them. This special rule allows the compensation of damages suffered by persons or entities (such as final customers and consumers) that have not been a direct counterparty of the infringer/s, but who suffered harm because the results of the infringement were passed on to them by intermediate commercial operators<sup>80</sup>. Even though these procedural shortcuts have not yet resulted in an increase in the number of consumer cases, they substantially reduce the complexity and thereby the costs of litigation.

Another way to stimulate an increase in the number of consumers bringing claims before national courts might lay in alternative dispute resolution (hereafter, ADR), which could be a combination of collective consumer actions and normal ADR mechanisms – so-called collective ADR. The well-known Italian motor car insurance cartel case<sup>81</sup> demonstrated that if the objective is

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the basis of Article 15(3) of Regulation 1/2003, the EC, acting on its own initiative, may submit written observations (*amicus curiae*) to national courts, where a coherent application of Article 101 or 102 TFEU so requires.

<sup>78</sup> In Hungary, for example, on the basis of Article 88/B of the Competition Act, a court shall immediately notify the NCA if the application of competition rules on cartels or abuse of dominance arises in a civil action before that court. The NCA may submit observations or set forth its standpoint orally before the closing of the hearings. Upon a request of the court, the NCA shall inform the court about its legal standpoint concerning the application of competition rules in the given case. Thus, the NCA acts as an *amicus curiae* to the courts. Furthermore, if the NCA decides to initiate proceedings in a matter that is pending before the court, then the court shall stay its own proceeding until the NCA issues its final, legally binding decision. The court is bound by the final and legally binding decision of the NCA concerning the finding of an antitrust breach or the lack thereof. See also Article 9 of the Damages Directive. A final decision of a NCA (or national appellate court) will constitute irrefutable evidence in litigation in that Member State that an infringement has occurred.

<sup>79</sup> In case of a horizontal hardcore cartel, except horizontal hardcore purchase cartels, it is presumed that the competition law violation caused a 10% increase in the market price. The presumption is rebuttable.

<sup>80</sup> P. Petrov, 'Bulgaria' [in:] *International Comparative Legal Guide, Enforcement of competition laws*, London 2009, p. 44.

<sup>81</sup> Joined cases C-295/04 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*, [2006] ECR I-6619.

to provide compensation for final consumers, and to encourage them to take action to enforce competition rules, then consumers will choose this redress avenue which provides optimal conditions to have their claims adjudicated in a swift, flexible and effective way. *Manfredi*<sup>82</sup> shows that if claims are small and there is no possibility to consolidate and aggregate them, then consumers prefer to turn to small claims courts, where procedures are less formal and less demanding in terms of evidence and the burden of proof.

The Commission has, in fact, acknowledged these points earlier. In its Staff Working Paper accompanying the 2008 White Paper, collective ADR was put forward as a means of an early resolution of disputes and encouraging settlements<sup>83</sup>. Similarly, the EC's 2009 Discussion Paper on consumer collective redress recommends collective ADR, in combination with judicial collective redress for consumer disputes, as presently available in Sweden and Finland<sup>84</sup>.

## VII. Conclusions

Private enforcement of competition law has been among the European Commission's priorities for over a decade now. As a horizontal legal transplant from the US antitrust system, the EC has intended to apply this enforcement tool in order to raise the effectiveness of competition law enforcement, similarly to the success of the US private enforcement system. EU Member States have followed the 'prioritization' of the Commission and have also actively engaged in both law- and policy-making concerning damages claims. Yet the Damages Directive, which can be considered the result of the numerous efforts and proposals of the EC in this field does not contain rules on collective redress at all. The EC issued merely a Recommendation that includes soft law instruments meant to stimulate Member States to create collective redress schemes. Nevertheless, the Commission was encouraging Member States to implement legislation to enable damages claims and also collective actions. This paper has critically analyzed this policy and the 'transfer of rules' in the broader governance framework of 'Europeanization', which has been a dominant governance mode since CEECs' EU accession. Private enforcement of competition law has thus been a vertical policy transplant in CEECs. However, examining its actual enforcement practice, and especially that of collective actions, questions its viability.

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<sup>82</sup> Ibidem.

<sup>83</sup> Commission Staff Working Paper, SEC(2008) 404, 2.04.2008, points 41, 247, 248.

<sup>84</sup> [http://ec.europa.eu/consumers/redress\\_cons/docs/consultation\\_paper2009.pdf](http://ec.europa.eu/consumers/redress_cons/docs/consultation_paper2009.pdf) (access 05.10.2015), p. 16–19.

First, while rules exist for private damages claims in all CEECs that are EU Member States, most countries in this region have only experienced a handful of such cases in practice. Moreover, many of the few existing cases concerned issues other than damages claims. It is thus possible to speak of hardly any practice of successful damages actions in CEECs. The possible reason for the low number of such cases can be summed up as a weak institutional framework (composed of private actors, consumer organizations, lawyers and national courts) which is not yet sufficiently developed to actively use existing legislation. Second, the legal framework for collective actions is under-developed. Only two out of the thirteen CEECs have an effective collective redress scheme for consumers' compensatory claims. But even the two existing systems are under-enforced. Numerous studies have been conducted already that try to crystallize what would be the optimal model of collective redress, including effective funding rules. Nevertheless, a further institutional issue might exist that has to be addressed in CEECs. Institution-building initiatives have to target their fragmented and weak civil societies so as to make consumers assert their rights as well as strengthen the judicial system in order to cope with the complexity of such cases. This paper has also suggested to look into rules that simplify the procedure in collective consumer claims such as the Hungarian legal presumption of 10% overcharge as well as argued in favour of a more in-depth study of the collective ADR model.

The objective of collective actions in private enforcement of competition law is to compensate those consumers who suffered harm as a result of an anti-competitive practice. That objective can indeed be transplanted into the national legal regimes of EU Member States originating in CEE. However, the resulting domestic rules need to be further adapted to reflect the legal and social position of consumers in CEECs. Otherwise, those rules will remain law in books without being effectively used in practice.

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# **How to Throw the Baby out with the Bath Water. A Few Remarks on the Currently Accepted Scope of Civil Liability for Antitrust Damages**

by

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## **CONTENTS**

- I. Introduction
- II. Personal dimension of civil antitrust liability
  - 1. Culpability
  - 2. Joint and several liability
  - 3. Immunity recipients in leniency
  - 4. Settling co-infringers
- III. Subject-matter dimension of antitrust liability
  - 1. General rules for the scope of damages
  - 2. Passing-on of overcharges
  - 3. Umbrella pricing
- VI. Final remarks

## ***Abstract***

The Damages Directive introduces the right to ‘full compensation’ and the principle of ‘joint and several liability’ for antitrust damages (Article 3(1) and Article 11(1) respectively). The Directive does not determine the type of damage that can be awarded in civil proceedings. In theory, there are thus no barriers to establish punitive, multiple or other damages. In practice, it is rather unlikely that such types of damages will be awarded after the implementation of the Directive due to the ban placed on overcompensation in its Article 2(3).

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This paper will try to decode the concept of ‘full compensation’ and ‘joint and several liability’ in light of the Damages Directive as well as EU jurisprudence. An adequate understanding of these terms is without a doubt one of the key preconditions of correctly implementing the Directive and, consequently, a condition for making EU (competition) law effective.

While on the one hand, a limitation of the personal scope of civil liability can currently be observed in EU law (covering both legislation and case law), a broadening of its subject-matter scope is visible on the other hand. With reference to the personal scope of civil liability, the Directive itself limits the applicability of the joint and several responsibility principle towards certain categories of infringers: small & medium enterprises (Article 11(2)) and immunity recipients in leniency (Article 11(3)). Considering the subject-matter scope of civil liability, the acceptance by the Court of Justice of civil liability for the ‘price umbrella effect’ should be highlighted. In addition, the principle of the ‘passing-on defence’ can also be regarded as a manner of broadening the scope of civil liability for antitrust damage (Article 12–16).

The paper will present an overview of the scope of civil liability for antitrust damages (in its personal and subject-matter dimension) in light of the Directive and EU jurisprudence. The paper’s goal is to assess if the applicable scope will in fact guarantee the effective development of private competition law enforcement in EU Member States. This assessment, as the very title of this paper suggests, will be partially critical.

## *Résumé*

La Directive relative aux actions en dommages introduit le droit de la «réparation intégrale» et le principe de la «responsabilité solidaire» dans le contexte des préjudices causés par des pratiques anticoncurrentielles (l’article 3(1) et l’article 11 (1), respectivement). La Directive ne précise pas le type de dommage qui peut être accordée dans les procédures civiles. En théorie, il n’y a donc pas d’obstacles pour accorder des dommages punitifs, multiples ou d’autres. Néanmoins, en pratique, il est peu probable que les dommages de ce type seront accordés après la mise en œuvre de la Directive, en raison de l’interdiction de la réparation excessive introduit dans l’article 2 (3) de la Directive.

Cet article va tenter d’interpréter la notion de la «réparation intégrale» et la «responsabilité solidaire» à la lumière de la Directive, ainsi que la jurisprudence de cours européennes. Une bonne compréhension de ces termes est sans doute l’une des conditions essentielles de la mise en œuvre correcte de la Directive et, par conséquent, la condition d’efficacité du droit européen de la concurrence.

D’une part, nous pouvons actuellement observer la limitation du champ d’application personnel de la responsabilité civile dans le droit européen (dans la législation européenne et dans la jurisprudence), mais d’autre part, nous pouvons aussi remarquer un élargissement du champ d’application matérielle. En faisant la

référence au champ d'application personnel de la responsabilité civile, la Directive limite l'application du principe de la responsabilité solidaire à l'égard de certaines catégories de contrevenants : des petites et moyennes entreprises (l'article 11 (2)) et des bénéficiaires d'une immunité accordée dans le programme de clémence (l'article 11 (3)). En ce qui concerne le champ d'application matérielle, nous devons souligner l'acceptation par la Cour de justice de l'Union européenne le principe de la responsabilité civile pour «l'effet parapluie». De plus, le principe de la répercussion du surcoût peut aussi être considéré comme une manière d'élargissement du champ d'application de la responsabilité civile pour les préjudices causés par des pratiques anticoncurrentielles (les articles 12–16).

Cet article va présenter une vue d'ensemble des règles concernant la responsabilité civile pour les préjudices causés par des pratiques anticoncurrentielles (dans sa dimension personnelle et matérielle) à la lumière de la Directive et la jurisprudence européenne. Son objectif est d'évaluer si le champ d'application actuelle pourrait garantir le développement efficace de l'application privée du droit de la concurrence privée dans les États membres de l'UE. Cette évaluation, comme le titre même de cet article l'indique, sera partiellement critique.

**Key words:** antitrust civil liability; damage; Directive 12014/104; joint and several liability; immunity recipient; private enforcement of competition law; public enforcement of competition law; umbrella pricing.

**JEL:** K23; K42.

## I. Introduction

After a long-lasting debate on harmonizing the rules on private enforcement of competition law in the EU, a Directive 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 was ultimately born<sup>1</sup> in November 2014 (hereafter, *Damages Directive* or *Directive*). The Directive provides a framework of solutions, some of which are of a very general character. As a result, they must be 'completed' by much more detailed provisions of national laws. It is a commonly recognized opinion that implementing the *Damages Directive* will be quite challenging for Member States. A key reason for this realisation lies in the fact that some of the rules of the Directive nearly devastate traditional institutions (or their traditional interpretation) of

<sup>1</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, 05.12.2014, p. 1) (hereafter, *Damages Directive*).

civil law, especially in countries with legal systems shaped as statutory law. Another reason making the implementation process rather difficult lies in the jurisprudence of the Court of Justice of the EU (hereafter, CJ) that can surely not be ignored by national lawmakers. In fact, it is not only the Damages Directive itself, but also EU jurisprudence that must be ‘implemented’ in prospective national regulations on private antitrust enforcement. On the one hand, judgments of the CJ may be helpful in shaping provisions at the national level because they provide details that the Directive lacks. Yet on the other hand, some rulings, such as *Kone*<sup>2</sup>, offer solutions that can be considered rather controversial from the point of view of national civil law.

This paper aims to analyze two aspects of antitrust liability: its personal and subject-matter scope. An analysis on how these two aspects have been shaped in EU legislation and jurisprudence lead to a simple conclusion – harmonisation went partially in the wrong direction. Rather than strengthen the effectiveness of antitrust law and its private enforcement, the guidelines provided by the EU lawmaker and judiciary somehow limited the benefits resulting from private antitrust enforcement and upset the sensitive balance between both (public and private) enforcement methods of Articles 101 and 102 TFEU and corresponding national provisions.

## II. Personal dimension of civil antitrust liability

### 1. Culpability

Prohibitions of competition restricting practices can be regarded as totally free from the concept of culpability, which in fact means that ‘guilt’ does not constitute a prerequisite for applying the prohibitions. Another idea considers the antitrust bans as being dependent on the concept of ‘fault’, although both voluntary and involuntary (unintentional) activity causes responsibility for antitrust breaches within public enforcement of competition law. Regardless of the theoretical basis, approving either idea means that while applying the prohibitions (be it the ban on cartels or on the abuse of dominance) there is no need to prove if an infringer is guilty or not. ‘Fault’, as a factor reflecting the degree of involvement in, and awareness of, the anticompetitive behaviour, can be taken into account when calculating the amount of the fine to be imposed. However, one of a most appealing example of ‘ignoring’ the concept

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<sup>2</sup> Case C-557/12 *Kone AG and Others v. ÖBB-Infrastruktur AG*, ECLI:EU:C:2014:1317.

of culpability while determining antitrust liability in the public enforcement domain is the application of the single economic unit doctrine.

However, ‘fault’ cannot be treated as non-existent in private enforcement of competition law, like it usually is in public enforcement, mainly because ‘fault’ constitutes a necessary condition of civil liability in certain cases, especially liability for torts. Accepting culpability, as one of the necessary conditions for antitrust liability, would simultaneously determine which legal basis for civil liability is acceptable in private antitrust enforcement. As the CJ claimed in the recent *CDC* case: ‘[...] since the requirements for holding those participating in an unlawful cartel liable in tort may differ between the various national laws, there would be a risk of irreconcilable judgments if actions were brought before the courts of various Member States by a party allegedly adversely affected by a cartel [...]’<sup>3</sup>. For example, tort liability in the Polish Civil Code is based on the concept of culpability. Hence, making Article 415 of the Civil Code (establishing rules of tort liability) the legal basis for claims in antitrust cases requires proving ‘fault’<sup>4</sup>. In fact, accepting culpability as a prerequisite of antitrust liability should also be considered a method of determining the circle of potential defendants in private antitrust enforcement cases.

Yet the EU did not take this opportunity. The Damages Directive itself does not point to culpability as the basis for antitrust liability – Member States are (theoretically) free in their choice in this regard. This may result in a differentiation of the scope of entities held liable before civil courts for anticompetitive practices in various Member States. Having said that, the freedom that Member States have in making culpability the basis for antitrust liability is limited by the principle of effectiveness and, although to a smaller degree, by the principle of equivalence. This realisation can be traced back to Recital 11 of the Directive’s Preamble: ‘Where Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive’.

Importantly, EU jurisprudence draws a rather wide circle of entities to which a violation of Article 101 and 102 TFEU can be attributed to<sup>5</sup>. Hence, the

<sup>3</sup> C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel NV, Solvay NV, Kemira Oyj, FMC Foret SA*, ECLI:EU:C:2015:335, para. 22.

<sup>4</sup> Possible legal basis for antitrust legal liability are thoroughly analyzed by: A. Jurkowska, ‘Antitrust Private Enforcement – Case of Poland’ (2008) 1(1) *YARS* 64–67; P. Podrecki, ‘Civil Law Actions in the Context of Competition Restricting Practices under Polish Law’ (2009) 2(2) *YARS* 78–98; R. Stefanicki, *Prywatnoprawne środki dochodzenia roszczeń z tytułu naruszenia reguł konkurencji*, Warsaw 2014, p. 215–245.

<sup>5</sup> I.e. cases of undertakings who are not direct members of a cartel but who act as ‘facilitators’ for the cartelists and are held responsible for infringing Art. 101 TFEU – see Commission’s

independence of Member States to determine – at least from the perspective of culpability – the personal scope of antitrust civil liability is rather illusory, provided they want to comply with the principle of effectiveness of EU law, directly stated in Article 4 of the Damages Directive.

## 2. Joint and several liability

Surprisingly, it was the EU lawmaker itself which introduced into the Damages Directive a provision that seriously violates the effectiveness of EU competition law. Article 11(2) establishes a derogation from the principle of joint and several liability expressed directly, as the basic rule for antitrust civil liability, in Article 11(1). Under two cumulative conditions, small and medium sized enterprises (hereafter, SMEs) are exempted from joint and several liability – instead, they are liable only to their own direct and indirect purchasers. A SME is entitled to benefit from this derogation if ‘its market share in the relevant market was below 5 % at any time during the infringement of competition law’ (Article 11(2)(a)) and ‘if the application of the normal rules of joint and several liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value’ (Article 11(2)(b)).

It is assumed here that the principle of joint and several liability for antitrust infringements is fair and suitable for antitrust cases. Hence, the derogation provided in Article 11(2) has to be firmly and expressly disagreed with. First, it totally spoils the ‘democratic’ character of antitrust prohibitions expressed in Article 101 and 102 TFEU (and corresponding domestic provisions). These prohibitions are normally applied regardless of the status or size of the undertakings concerned or their financial performance. Even in calculating fines by the Commission (as well as, for example, Poland’s National Competition Authority – the UOKiK President), the size of an enterprise does not matter! The exemption provided by Article 11(2) of the Directive may thus be seen as undermining the deterrence effect of potential damages actions towards SMEs<sup>6</sup>.

An infringer’s inability to pay is an issue that can have an impact on the level of the fine imposed in public enforcement proceedings. According

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decision of 11 November 2011 (COMP/38.589) and related case T-27/10 *AC-Treuhand AG v. Commission*, ECLI:EU:T:2014:59 (appeal case C-194/14 P before the Court of Justice still pending).

<sup>6</sup> S. Peyer, ‘Antitrust Damages Directive – much ado about nothing?’ [in:] M. Marquis, R. Cisotta (eds.), *Litigation and arbitration in EU competition law*, Edward Elgar Publishing 2015, p. 41. See also a critical view of a derogation for SMEs presented by S.O. Pais, A. Piszcz, ‘Package on Actions for Damages Based on Breaches of EU Competition Rules: Can One Size Fit All?’ (2014) 7(10) *YARS* 226–228.

to paragraph 35 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003<sup>7</sup>, the Commission may grant a fine reduction to an undertaking ‘solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value’.

In truth, the wording of the abovementioned paragraph of the Guidelines and the wording of Article 11(2)(b) of the Damages Directive are identical. Some might claim therefore that the solution applied in the Directive is somehow justified. This view cannot be supported however: even if the condition for inability to pay is formulated in the same manner as the SME derogation, the objective and context of its application are slightly different. When the Commission considers the condition of inability to pay, the total fine for the given antitrust practice is decreased – this is a sort of ‘amnesty’ for the infringer. In the context of private antitrust enforcement, the prerequisite of inability to pay is not an instrument for modifying the level of damages (which can be considered a ‘fine’ in civil law). Instead, it is an instrument for modifying the way in which damages are distributed. The EU lawmaker seems to have forgotten that joint and several liability does not actually mean that only certain defendants, instead of all of them, fulfil their obligations towards plaintiffs. Joint and several liability gives plaintiffs easier access to damages. It does not exclude the possibility of recovering a relative part of damages paid to plaintiffs from ‘co-infringers’ (defendants) – this is what recourse claims are for!

In line with how the derogation guaranteed in Article 11(2) is understood here, it is regarded as a shield against an excessive number of claims being addressed towards an SME in difficulties, which could cause a further deterioration of that company’s financial condition. But why are only SMEs protected against such risk? Large enterprises can face the same difficulties – in fact, this is even more likely than for SMEs because large infringers usually generate a far greater number of antitrust ‘victims’ than SMEs (a simple result of differences in their client numbers).

The above derogation from the principle of joint and several liability was introduced into the Damages Directive by the European Parliament<sup>8</sup>. It seems

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<sup>7</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (OJ C 210, 01.09.2006, p. 1).

<sup>8</sup> See Draft European Parliament Resolution on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM(2013)0404 – C7-0170/2013 – 2013/0185(COD)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0089+0+DOC+XML+V0//EN> (access 5.10.2015).

that the Parliament still promotes the ‘SME approach’ despite the fact that the latter is currently being contested by many economists because the strength of SMEs as an economic driving force seems to have been overestimated<sup>9</sup>. In fact, a total collapse of a large company, that occurred for example as a result of fulfilling joint and several liability for antitrust torts, may have much more serious economic and social consequences than the collapse of a SMEs.

As a matter of fact, Article 11(2) of the Directive makes the enforcement of antitrust rules before national courts more difficult (at least in cases concerning SMEs fulfilling the conditions prescribed in this provision). Due to the European Parliament, it is mainly private entities (excluding situations when public authorities submit antitrust claims as the Commission did in the *Otis* case<sup>10</sup>) that must bear the burdens of public policy goals in this context. Thankfully at least, the Parliament stopped its intervention at Article 11(2) and did not ‘improve’ the Directive any further with yet another pro-SMEs rule, this time on the possibility of a court decreasing the amount of damages that SMEs are obliged to pay as their relative part of liability. It is surprising that the Preamble to the Directive does not say a word about the derogation introduced in Article 11(2).

Instead of making certain categories of enterprises somehow privileged in private antitrust enforcement, it is fair to say that the EU lawmaker should have had more trust in national legal systems and in national judiciaries – the institution of joint and several liability is well settled both in law and practice, and used in many economic and social contexts.

### 3. Immunity recipients in leniency

The principle of joint and several liability is also limited with respect to undertakings that successfully applied for leniency and gained total immunity from fines (hereafter, immunity recipient). According to Article 11(4) of the Damages Directive, an immunity recipient is generally liable jointly and severely only towards its direct or indirect purchasers or providers. However,

<sup>9</sup> See e.g. D. Hirschberg, *The Job-Generation Controversy: The Economic Myth of Small Business*, Routledge 2015; R. K. Gruenwald, ‘Alternative Approaches in Evaluating the EU SME Policy: Answers to the Question of Impact and Legitimization’ (2014) 2(2) *Entrepreneurial Business and Economics Review* 77–88; R. Levine, ‘Should government and aid agencies subsidize small firms’ [in:] L. Brainard (ed.), *Transforming the Development Landscape: The Role of the Private Sector*, Washington 2006, p. 66 et seq.; R. Parker, ‘The Myth of the Entrepreneurial Economy’ (2001) 15(2) *Work, Employment and Society*; S.J. Davis, J. Haltiwanger, S. Schuh, ‘Small Business and Job Creation: Dissecting the Myth and Reassessing the Facts’ (1993) 8(4) *Small Business Economics* 297–315.

<sup>10</sup> Case C-199/11 *Europese Gemeenschap v. Otis NV and Others*, ECLI:EU:C:2012:684.

joint and severe liability of an immunity recipient towards other injured parties is ‘restored’ ‘where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law’. It is worth noting that the scope of the derogation for immunity recipients guaranteed in Article 11(4) is more modest than that offered to SMEs in Article 11(2). Still, the Directive provides some other reservations for executing antitrust civil liability of immunity recipients. First, according to Article 11(5), when a group of liable infringers makes a claim to recover a contribution from other liable infringers, the amount of the contribution of an immunity recipient ‘shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers’. Second, in the case of liability for harms caused to entities who are not direct or indirect purchasers or providers, according to Article 11(6) ‘the amount of any contribution from an immunity recipient to other infringers shall be determined in the light of its relative responsibility for that harm’.

Leniency is one of the key tools of a successful and effective fight against cartels. Failure to provide any sort of protection for leniency applicants for private antitrust enforcement would certainly make this tool ineffective or even non-existent. The reasons behind giving special treatment to immunity recipients are explicitly listed in Recital 38 of the Directive’s Preamble. First, whistle-blowers deserve such protection because they contribute to bringing an infringement to an end, a fact that translates into a limitation of the scope of the resulting harm. Second, ‘(...) the decision of the competition authority finding the infringement may become final for the immunity recipient before it becomes final for other undertakings which have not received immunity, thus potentially making the immunity recipient the preferential target of litigation’.

Certainly, a derogation from the principle of joint and several liability for immunity recipients exemplifies a situation when private antitrust enforcement takes a backseat, giving priority to public enforcement. While supporting a rational, well-balanced and sustainable co-existence of both enforcement methods, the solution adopted in the Damages Directive must be fully approved of. The fact should be appreciated in particular that the derogation did not go too far and its application is limited to immunity recipients only.

#### **4. Settling co-infringers**

The Damages Directive contains one more limitation of the principle of joint and several liability – Article 19 sets out special rules for awarding damages in the case of a settlement. According to Article 19(1), as a result of a settlement, the claim of a settling injured party is reduced by the settling

co-infringer's share of the harm that the antitrust infringement inflicted upon the injured party. The rest of the claim can be executed only against non-settling co-infringers, non-settling co-infringers are not allowed to get a contribution for the remaining claim from the settling co-infringer (Article 19(2)). Damages be successfully demanded in full from a settling infringer only if non-settling co-infringers are unable to pay, unless that possibility is directly excluded in the text of the settlement (Article 19(3)).

It is not easy to find any good reasons for adopting an exception from the standard rule of civil antitrust liability guaranteed by the Directive for settling antitrust infringers. Recital 51 of the Directive's Preamble is not convincing, which treats leniency programmes and settlements in the same manner, as if they served the same objectives. Leniency help discover prohibited practices – it can be safely assumed that some claimants would not even know about an antitrust infringement if not for leniency. Hence, the use of leniency within public enforcement can benefit not only the leniency applicants themselves, but also (potential) claimants. By contrast, settlements are beneficial mainly to competition authorities. The fact that antitrust proceedings come to an end faster, and that a potential claimant can sue the infringers earlier, does not compensate for the limitation of the rights of claimants as set out in Article 19. Thanks to this provision, settlements can be viewed by infringers as a method of avoiding (or at least significantly limiting) follow-on damages claims. The opinion has to be supported that 'if this becomes the case, claimants would probably be denied final infringement decisions and some of the benefits of the New Directive will be undermined'<sup>11</sup>.

### III. Subject-matter dimension of antitrust liability

#### 1. General rules for the scope of damages

The Damages Directive confirms not only what the CJ used to say about the 'content' of damages (e.g. in *Manfredi*<sup>12</sup>), but what is also simply a basic rule of civil liability in a vast majority of EU Member States. Hence, the concept of 'harm' (including antitrust harm) covers: actual loss (*damnum emergens*), loss of profits (*lucrum cessans*) and – if appropriate – interests. The principle of full compensation is established in Article 3(2) of the Damages Directive. This

<sup>11</sup> M. de Sousa e Alvim, 'The new EU Directive on antitrust damages – a giant step forward?' (2015) *E.C.L.R.* 36(6) 248.

<sup>12</sup> Joined cases C-295/04 to C-298/04, *Manfredi v. Lloyd Adriatica Assicurazioni SpA et al.* [2006] ECR I-06619.

was certainly the only solution that could have been adopted in continental Europe, any other solutions would be too contradicting for domestic civil laws.

The many complaints expressed over difficulties in calculating damages in antitrust cases cannot be shared, albeit it is true that the assessment is not easy. It is fair to say however that assessing losses (actual or lost profits) caused by anticompetitive practices is not actually much more difficult than with respect to some other types of torts, either in economic/ commercial law, or other legal branches such as medical law for example. Is it really so much more difficult to calculate loss resulting from a price cartel than loss caused by the illegal use of trademarks or by the disclosure of trade secrets? These two examples come, for example, from the Polish Law on Unfair Competition<sup>13</sup> (in force since 1993) which nobody dares to criticize as ‘inapplicable’ because of problems with assessing ‘harm’.

Article 3(3) of the Damages Directive excludes the possibility of overcompensation ‘whether by means of punitive, multiple or other types of damages’. However, this provision is not formulated in a very decisive manner and so it cannot be treated as an absolute ban on punitive or multiple damages. Punitive damages, for example, might very well be equal to, or even smaller than damages reflecting all three of the abovementioned elements required by the principle of full compensation. Considering problems caused by the recognition of judgments from foreign courts granting, for instance, punitive damages<sup>14</sup>, it would probably have been much better if the Directive directly prohibited multiple and punitive damages.

## 2. Passing-on of overcharges

Probably one of the most controversial issues in private antitrust enforcement is the possibility to defend against a damages claim by proving that the overcharges were passed-on to another (other) level(s) of trade<sup>15</sup>. Overcharges may be passed-on in both directions: downwards (to purchasers)

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<sup>13</sup> Act of 16 April 1993 on Combating Unfair Competition (consolidated text: Journal of Laws 2003 No. 153, item 1503 as amended).

<sup>14</sup> See an order of the Polish Supreme Court of 11 October 2013, I CSK 697/12.

<sup>15</sup> There is extensive literature on this issue e.g.: A.S. Gehring, ‘The power of the purchaser: the effect of indirect purchaser damages suits on deterring antitrust violations’ (2010) 5 *New York University Journal of Law and Liberty* 208-246; F. Cengiz, ‘Passing-On Defense and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition Law: What Can EC Learn from US?’ (2007) 21 *ESRC Centre for Competition Policy and School of Law, University of East Anglia, CCP Working Paper*; W.M. Landes, R. Posner, ‘Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick’ (1979) 46 *University of Chicago Law Review* 602 et seq.; J. Cirace, ‘Price-Fixing,

as well as upwards (to suppliers). Admitting the significance of passing-on of overcharges has varied consequences. First, it makes it possible to exclude, or at least limit, antitrust liability of infringers. Second, it prolongs the list of entities – ones located in a vertical order – which may be liable (and may be sued) for an antitrust harm. Third, the circle of potential claimants grows including both direct and indirect purchasers/suppliers, which did not necessarily have any (direct) relations with the infringer.

Despite all controversies concerning the passing-on of overcharges, reflected by attempts to overrule ‘classical’ judgments denying the passing-on defence in the US<sup>16</sup> and expressed at various stages of the lawmaking process in the EU, the European lawmaker decided to introduce the passing-on defence into the Damages Directive (Article 12(1)). On the flip side, it also introduced the possibility to claim damages from undertakings other than those that, for instance, directly sold products covered by the infringement (Article 13). An infringer may get relief from antitrust civil liability if it is able to prove that it had passed-on the overcharges, entirely or partly, to its purchasers or suppliers (Article 13). Trying to prove the loss, an infringer may use either its own evidence or evidence ‘already acquired in the proceedings or evidence held by other parties or third parties’ (recital 39 of the Damages Directive’s Preamble).

The Directive’s provisions establishing rules for the disclosure of evidence will certainly be very helpful to infringers eager to use the passing-on defence. In addition, if the ‘passing-on’ decreases sales, a loss of profit is then considered to constitute ‘harm’ that should be fully compensated in accordance with general rules (Article 12(3)). The duties and the privileges of direct and indirect purchasers seem to in balance, due to the Directive indirect purchaser suits are not remain subsidiary (‘taking place in the few cases when direct purchasers benefit from the cartel and are unwilling to commence litigation’<sup>17</sup>), although a subsidiary nature of indirect purchaser suits is suggested in literature as a possible solution to the ‘passing-on standing matrix’<sup>18</sup>.

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Privity, and the Pass-On Problem in Antitrust Treble-Damages Suits: A Suggested Solution’ (1977) 19(2) *William & Mary Law Review* 171–202.

<sup>16</sup> *Hanover Shoes Inc. v. Unites Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Illinois Brick Co. et al. v. Illinois et al.*, 431 U.S. 720 (1977). The most important attempt to change the so-called Illinois Brick doctrine (rules) was a report by the Antitrust Modernization Commission (2007). See: D. R. Karon, ‘Your Honor, Tear Down that Illinois Brick Wall!: The National Movement Towards Indirect Purchaser Antitrust Standing and Consumer Justice’ (2004) 30 *William Mitchell Law Review* 1351–402.

<sup>17</sup> T. Dumbrovský, ‘Passing-on-standing Matrix in Private Antitrust Enforcement: a Reconciliation of Economic and Justice Approaches’ (2013) 30 *EUI Working Papers MWP*, p. 22.

<sup>18</sup> *Ibidem*, p. 1–22.

Accepting passed-on overcharges as a source of antitrust civil liability is linked to many problems and dangers. One of them is the probability of overcompensation – the EU lawmaker warns Member States against it in Article 12(2) of the Directive, but does not provide any specific tools or institutions that could help avoid such risk. Overcompensation is quite probable in light of Article 14(2) that establishes a sort of presumption regarding the proof of the passing-on of overcharges. The presumption may be eliminated by credibly demonstrating that a defendant did not, in fact, pass-on the overcharges to an indirect purchaser.

The possibility to make a damages claim against an undertaking, to which overcharges were passed-on, makes antitrust liability almost unlimited. This is so especially because the Directive does not set any limits regarding the number of levels of trade from which damages can be demanded. The situation of claimants seems to be pretty comfortable also in the context of their duties to prove the passing-on of overcharges and so it is probable that claimants will benefit from these provisions. But the very construction of the passing-on defence, as well as the way in which it was regulated, is quite sophisticated. The application of these new rules requires very deep knowledge of the market and of specific trade relations, as well as of competition law mechanism as such. It is fair to fear therefore – albeit being aware of the fact that the problem is considered here through the prism of Poland's underdeveloped private antitrust enforcement system<sup>19</sup> – that the issue of 'passing-on' will prove too difficult for national courts to deal with<sup>20</sup>. Taking into account national perspectives, and barriers that exist in individual Member States to the development of private enforcement (obstacles that are mainly mental), it would have been better to not include passing-on as a source of antitrust liability in the Damages Directive and instead, to learn first how to enforce competition law before civil courts in a 'traditional' manner.

The regulation of private enforcement of competition law can take place in two stages: basic rules on private enforcement as a starting point first, followed by more advanced rules, including those on passing-on, a few years later. It is however completely clear that the European debate on private enforcement did not leave much space for such a solution. Indeed, the opinion

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<sup>19</sup> A. Jurkowska-Gomułka, 'Private Enforcement of Competition Law in Polish Courts: The Story of an (Almost) Lost Hope for Development' (2013) 6(8) *YARS* 107-128; M. Gac, 'Individuals and the Enforcement of Competition Law – Recent Development of the Private Enforcement Doctrine in Polish and European Antitrust Law' (2015) 8(11) *YARS* 53-82.

<sup>20</sup> A similar opinion was expressed by E. Büyüksagis who writes: 'From the perspective of courts, direct purchasers and indirect purchasers, it is unfortunate that the new Directive did not prohibit the passing-on defence' – E. Büyüksagis, 'Standing and Passing-on in the New EU Directive on Antitrust Damages Actions' (2015) 87(1) *Swiss Review of Business Law* 24.

has to be supported that the EU lawmaker acknowledges the rules on the passing-on defence as too complicated – this uncertainty about applying them is confirmed by Article 15 of the Damages Directive which ‘grants national courts discretion to avoid instances of multiple liability, or no liability due to the rules expressed in Articles 12 to 14’<sup>21</sup>.

### 3. Umbrella pricing

In recent years, the CJ delivered a few significant rulings referring to private antitrust enforcement including, importantly, the *Kone* judgment. It was confirmed therein that cartel members were liable also for harm caused by a price increase resulting from the cartel’s activity (the so-called ‘umbrella pricing’). The core problem in this case related to the fact that Austrian law and jurisprudence required – for non-contractual liability – an adequate causal link between the loss and the activity that caused it as well as the link of unlawfulness (paragraph 13 *Kone*). According to the adequate causal link criterion, a plaintiff may also be liable for indirect losses if these are results that he could have foreseen *in abstracto*, including accidental ones, but not for atypical consequences (paragraph 14 *Kone*). By contrast, Austrian case-law used to see umbrella pricing as an extraordinary result of a cartel, so there was no possibility of obtaining compensation from cartel members for resulting losses. Neither the CJ nor, earlier, Advocate General Julianne Kokott approved the Austrian approach. The CJ referred to the full effectiveness of Article 101 TFEU which ‘would be put at risk if the right of any individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto, whose pricing policy, however, is a result of the cartel that contributed to the distortion of price formation mechanisms governing competitive markets’ (paragraph 33 *Kone*).

Two findings must be criticised with respect to the *Kone* judgment. First, it has to be argued that liability of cartel members for harms resulting from umbrella pricing goes too far. This is so not only because such liability seems unlimited and impossible to estimate or calculate, but mainly because liability in such a dimension somehow loses its individual character (a typical feature of civil liability). As such, it turns into general liability for the performance of the entire market. It is especially difficult to accept the above approach considering

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<sup>21</sup> S. Peyer, ‘Antitrust Damages Directive...’, p. 45.

the fact that an undertaking applying umbrella prices may certainly have not suffered any losses from it. In other words, liability for umbrella prices, which in fact translates into liability for the overall effects of a cartel, implements to some extent goals of public rather than private antitrust enforcement.

Worse yet, the CJ did not specify the detailed criteria for liability for umbrella pricing (in particular, it did not develop the concept of causation<sup>22</sup>). In addition, the CJ once again showed that the principle of effectiveness of EU law wins the battle on the scope of private enforcement, and that procedural autonomy of EU Member States is nothing but an illusion. This conclusion is alarming in a view of the fact that the Damages Directive leaves much to domestic legislation, or even just to the activities of national courts. ‘Blank spaces’ in the Directive are considered necessary limits for intervening in private law which is still – despite a strong influence of EU law – a sensitive area concerning a State’s independence from external influences. Yet after the *Kone* case, it seems that the principle of effectiveness of EU law is actually able to eliminate all elements of Member States’ freedom. If so, it would have been more rational to adopt a Damages Regulation instead of a Damages Directive.

## VI. Final remarks

The Damages Directive cannot be read separately from EU jurisprudence on private enforcement of competition law. First, because the Directive’s content was partly based on EU judgment and second, because the CJ, the creator of the ‘negative harmonization framework’<sup>23</sup>, is and will remain active in the interpretation of the rules and ideas supporting (or sometimes rather discouraging) private enforcement of Article 101 and 102 TFEU (and corresponding national rules).

A key issue in the rules and jurisprudence on private antitrust enforcement is to achieve and sustain a good balance between the private and public methods of enforcing the two prohibitions of competition restricting practices. A desired balance means that both enforcement models are able to achieve their key goals: repression and deterrence for public enforcement and compensation for private enforcement. The Damages Directive generally tries to reach such balance but there are some issues that spoil the effect. Rules and case law that

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<sup>22</sup> I. Lianos, ‘Casual certainty and damages claims for infringement of competition law in Europe’ (2015) 2 *CLES Research Paper Series* 4.

<sup>23</sup> L.F. Pace, ‘The ECJ’s judgment in *Kone* and private enforcement’s “negative harmonization framework”: Another Brick in the Wall’ (Part 6) (2015) 2(1) *Italian Antitrust Review*.

can endanger the desired balance can be found both in the purely procedural sphere as well as in material rules establishing the scope of antitrust civil liability. The paper focuses solely on the latter.

The hardest criticism should relate to Article 11(2) of the Damages Directive – the basis for a derogation of SMEs from the general rule of joint and several liability. Worst yet, this derogation does not even support public antitrust policy but covers other, not necessarily fully justified, public policy objectives. Other provisions of the Directive, those on the scope of antitrust civil liability and those that allow the modification of general rules for reasons of public policies (such as the derogation for immunity recipients), deserve complete approval as they maintain a balance between both methods of antitrust enforcement.

However, far more has been done to extend the scope of antitrust civil liability in order to strengthen private enforcement of competition law. The approval of ‘passed-on’ damages and liability for ‘umbrella pricing’ may become, for private antitrust enforcement, a typical example of throwing the baby out with the bath water. Very broad, almost unlimited, civil liability may be devastating for undertakings. Private enforcement might thus ultimately be effective *a rebours*: instead of strengthening competition, private enforcement might kill it as a result of forcing individual undertakings out of business due to excessive damages.

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# **Piecemeal Harmonisation Through the Damages Directive? Remarks on What Received Too Little Attention in Relation to Private Enforcement of EU Competition Law**

by

Anna Piszcz<sup>\*</sup>

## **CONTENTS**

- I. Introduction
- II. Range of remedies
  - 1. Range of remedies under the body of sources predating the Directive
  - 2. Claims for damages under the Directive – how broad is the meaning of this concept?
  - 3. Other remedies
  - 4. Attempt at assessment
- III. A few other narrow concepts
- IV. Summary

## ***Abstract***

On 11 June 2013, the European Commission adopted a package of measures to tackle the lack of an efficient and coherent private enforcement system of EU competition law in its Member States. In particular, a draft Damages Directive was proposed in order to meet the need for a sound European approach to private enforcement of EU competition law in damages actions. The Damages Directive was ultimately adopted on 26 November 2014. This paper explores some aspects of private antitrust enforcement which have not received sufficient attention from the EU decision-makers during the long preparatory and legislative works preceding the Directive. The paper discusses also some of the remedies that have not been harmonised, and shows how these ‘gaps’ in harmonisation may limit the

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Directive's expected influence on both the thinking and practice of private antitrust enforcement in Europe. It is argued in conclusion that further harmonisation may be needed in order to actually transform private enforcement of EU competition law before national courts.

## Résumé

Le 11 Juin 2013, la Commission européenne a adopté un train de mesures pour lutter contre l'absence de système efficace et cohérent d'application privée du droit de la concurrence dans l'UE et dans ses Etats membres. En particulier, un projet de la Directive relative aux actions en dommages a été proposé afin de répondre au besoin d'introduction d'une approche européenne à l'application privée du droit européen de la concurrence. La Directive relative aux actions en dommages a été finalement adoptée le 26 Novembre 2014. Cet article analyse certains aspects de l'application privée du droit de la concurrence qui n'ont pas reçu l'attention suffisante de la part du législateur européen durant les longs travaux préparatoires et législatifs qui ont précédés l'adoption de la Directive. L'article aborde également certaines solutions qui n'ont pas été harmonisées et montre comment ces « lacunes » dans le processus d'harmonisation peuvent limiter l'influence de la Directive à la pratique et l'interprétation d'application privée du droit de la concurrence en Europe. En conclusion, l'article affirme que l'harmonisation plus profonde peut être nécessaire afin de transformer réellement l'application privée du droit européen de la concurrence devant les cours nationales.

**Key words:** private enforcement; competition; remedies; action for damages; claim for damages; unjust enrichment; undue performance; declaration of invalidity; injunctions.

**JEL:** K23; K42.

## I. Introduction

National courts of EU Member States are required to safeguard rights created under Articles 101 and 102 of the Treaty on the functioning of the European Union (hereafter, TFEU). As the Court of Justice of the EU eloquently explained in *Courage/Crehan* and *Manfredi*<sup>1</sup>, detailed national procedural rules governing private actions for safeguarding such rights must not be less favourable than those governing similar domestic actions (principle

<sup>1</sup> See ECJ judgments in cases: C-453/99 *Courage/Crehan* (ECR 2001, I-06297); C-295-298/04 *Manfredi et al.* (ECR 2006, I-06619).

of equivalence), and must not render the exercise of rights conferred by EU law practically impossible or excessively difficult (principle of effectiveness).

The European Commission (hereafter, Commission or EC) has been working for many years to make private enforcement viable for victims of EU competition law infringements. Some degree of harmonisation of the enforcement of rights granted under EU competition law has been considered necessary, especially because the major divergences in applicable national rules might threaten the proper functioning of the internal market. The 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 (hereafter, Directive or Damages Directive), proposed in 2013 by the Commission, was finally adopted on 26 November 2014<sup>2</sup>. The Directive seems to have the potential to transform the legal landscape with respect to actions for damages (damages actions) for infringements of competition law. Although commentators seem to take the scope of the Directive for granted, the act actually only covers rules concerning actions for damages. Indeed, only this type of claim is covered by the harmonisation. Is this appropriate?

This leads to the question whether it will be possible to make private antitrust enforcement emerge and develop in Member States, which have clearly lacked such enforcement so far. If the Directive is not complete enough to achieve this goal, how remote is the system from ‘complete’ harmonisation? The term ‘piecemeal’ used in the title of this paper means ‘made out of bits and pieces’. Given that actions for damages are only one bit or one piece of private enforcement of competition law, and that the Directive refers solely to actions for damages (why is it like this?), is it possible that the above EU act is only the first bit or the first piece of a wider harmonisation process concerning private enforcement of EU competition law? Is there going to be a piecemeal harmonisation of private enforcement of EU competition law? The reason this question is asked here is that there are some aspects of private antitrust enforcement that have received too little attention from EU decision-makers in the many years of the preparatory and legislative works on the Directive<sup>3</sup>.

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<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, 05.12.2014, p. 1.

<sup>3</sup> See also K. Havu, ‘Quasi-Coherence by Harmonisation of EU Competition Law-Related Damages Actions?’ [in:] P. Letto-Vanamo, J. Smits (eds.), *Coherence and Fragmentation in European Private Law*, Sellier European Law Publishers, Munich 2012, p. 41. Two years before the adoption of the Directive, the author was afraid that the project was likely to leave a significant portion of relevant law out of the scope of the harmonisation. In her view, it was questionable what kind of effects such harmonisation would have.

The scope of the Directive seems too limited overall. Furthermore, some of its definitions are characterized by a considerable degree of narrowness. A number of examples of such definitions will be considered in this paper, which were drafted in the Directive in a way which makes national interpretation (and drawing inspiration from national legal tradition) pretty difficult.

## II. Range of remedies

### 1. Range of remedies under the body of sources predating the Directive

It is widely assumed that the discussion on private enforcement of EU competition law has been provoked by the Court of Justice (hereafter, CJ or Court) which ruled on, *inter alia*, the seminal *Courage/Crehan* and *Manfredi* cases<sup>4</sup>. Actions (claims) for damages for harm caused by infringements of EU competition rules have dominated the attention of the CJ in the above cases. In *Manfredi*, the Court held, however, that ‘any individual can rely on the invalidity of an agreement or practice prohibited under that article [current Article 101 TFEU] and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm’. In considering this, the CJ has tended to expand the scope of the articulated remedies to include not only actions for damages, but also declaratory relief. Indeed, victims of EU antitrust violations rely on invalidity in practice – their claims are not only for damages but also, for example, for the declaration of invalidity.

In turn, the main sources of relevant information on the Commission’s approach to private enforcement of EU competition rules can be identified as: (1) the Green Paper of 2005 – Damages actions for breach of the EC antitrust

<sup>4</sup> See eg I.S. Forrester, ‘Searching Beneath the Cherry Tree in the Garden: European Thoughts on How to Enhance the Task of Uncovering and Thereby Deterring Cartels’ [in:] C.-D. Ehlermann, I. Atanasiu (eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Hart Publishing, Oxford-Portland 2007, p. 179–181; A. Johnston, ‘“Spillovers” from EU Law into National Law: (Un)intended Consequences for Private Law Relationships’ [in:] D. Leczykiewicz, S. Weatherill (eds.), *The Involvement of EU Law in Private Law Relationships*, Hart Publishing, Oxford-Portland 2013, p. 363 et seq., A. Jurkowska-Gomułka, *Publiczne i prywatne egzekwowanie zakazów praktyk ograniczających konkurencję: w poszukiwaniu zrównoważonego modelu współistnienia*, Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, Warszawa 2013, p. 122; A. Piszcz, ‘Dyrektywa odszkodowawcza 2014/104/UE – przegląd niektórych rozwiązań’ (2015) 4(4) *internetowy Kwartalnik Antymonopolowy i Regulacyjny* 76. See also G. Niels, R. Noble, ‘Quantifying Antitrust Damages – Economics and the Law’ [in:] K. Hüschelrath, H. Schweitzer (eds.), *Public and Private Enforcement of Competition Law in Europe: Legal and Economic Perspectives*, Springer, Berlin-Heidelberg 2014, p. 122–123, regarding policy principles behind damages claims.

rules (hereafter, the Green Paper)<sup>5</sup> and (2) the White Paper of 2008 on damages actions for breach of the EC antitrust rules (hereafter, the White Paper)<sup>6</sup>. It is clear already from their titles that the Papers were both devoted to damages actions alone. However, the Green Paper explained that: *'damages claims are part of the enforcement system of Community antitrust law. Private enforcement [...] means application of antitrust law in civil disputes before national courts. Such application can take different forms. Article 81(2) of the Treaty states that agreements or decisions prohibited by Article 81 [current Article 101 TFEU] are void. The Treaty rules can also be used in actions for injunctive relief. Also, damages awards can be awarded to those who have suffered a loss caused by an infringement of the antitrust rules. This Green Paper focuses on damages actions alone'*.

This seems to confirm the view that the Commission knew perfectly well already over a decade ago that private antitrust enforcement might occur also in ways other than by way of damages actions (albeit the above remedies are still not the 'whole story' of private antitrust enforcement). The first other remedy that can be deduced from the Green Paper is declaratory relief (the declaration of invalidity of an agreement, decision of association of undertakings or practice), the second is injunctive relief (where the plaintiff requests the court to order the infringer to stop the violation and/or remove its effects).

Predictably, the White Paper focused on damages actions alone. In fact, it did not even contain an explanation similar to the one provided in the Green Paper. This shift might have been a reflection of a simultaneous change in the approach of the Commission towards the determination of the (ultimate) aims of the harmonisation. What followed was an extensive debate on this topic which seemed to view the choice in that matter as one between the contribution of private enforcement to the EU competition law enforcement system (plus its full effect), and the victims' right to compensation<sup>7</sup>. While the Green Paper focused on the 'system-oriented' goal, in the White Paper, private enforcement was conceived more in terms of compensation to be available to victims who suffered harm as a result of EU antitrust infringements.

## **2. Claims for damages under the Directive – how broad is the meaning of this concept?**

In the Directive, it is evident that the scope of the harmonised remedies for breaching EU competition rules is confined merely to actions (claims) for damages. According to its very title, the scope of the Directive is limited

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<sup>5</sup> COM(2005)672.

<sup>6</sup> COM(2008)165.

<sup>7</sup> See also K. Havu, 'Quasi-Coherence', p. 31.

to 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.

An action for damages is merely one possible tool among a far more varied set of remedies that might be used for breaches of EU competition rules. The Directive alone confirms that '[a]ctions for damages are only one element of an effective system of private enforcement of infringements of competition law' (Recital 5 of the Preamble). If they are only a partial cutaway of a diverse system, how are they complemented by other elements? The Directive states that they are complemented by 'alternative avenues of redress'. It is clear therefore that the Parliament and the Council believe that a system of private enforcement comprises redress or, more precisely, avenues of redress – both 'traditional' (damages actions brought before courts) and 'alternative' ones.

The first issue here is the meaning of the word 'redress'. According to its ordinary meaning as used by the EC<sup>8</sup>, redress is apt to encompass: (1) compensatory redress and (2) injunctive redress. The latter covers legal mechanisms that ensure a possibility to claim (respectively): (1) compensation of harm, (2) cessation of the illegal behaviour and/or removal of its effects. Yet it is justifiable to say that a broader meaning, which includes not only monetary relief and injunctive relief but also declaratory relief (the declaration of invalidity), more accurately reflects the current system of private enforcement in Europe. The second issue concerns 'alternative avenues' of redress. Two of them are determined in Recital 5 of the Preamble to the Directive. The latter addresses, first, consensual dispute resolution, which receives a great deal of emphasis in the Directive in general. It is a striking fact, however, that the same Recital also suggests that – in an effective system of private antitrust enforcement – actions for damages are complemented by alternative avenues of redress in the form of 'public enforcement decisions that give parties an incentive to provide compensation'. It seems fair to claim that ideally private and public enforcement should be designed so that they complement each other<sup>9</sup> and that infringers should be first persuaded to compensate their victims

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<sup>8</sup> See eg 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 L 201, 26.07.2013, p. 60.

<sup>9</sup> See eg F.G. Jacobs, T. Deisenhofer, 'Procedural Aspects of the Effective Private Antitrust Enforcement of EC Competition Rules: A Community Perspective' [in:] C.-D. Ehlermann, I. Atanasiu (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oxford-Portland 2003, p. 198; A.P. Komninos, 'The Relationship between Public and Private Enforcement: *quod Dei Deo, quod Caesaris Caesaris*' [in:] P. Lowe, M. Marquis (eds.), *European Competition Law Annual 2011: Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing,

voluntarily<sup>10</sup>. The view cannot be accepted, however, that public enforcement decisions, which incentivise parties, are an element of private enforcement. Public enforcement decisions are still an element of public enforcement, no matter how much both parts of the antitrust enforcement system interact with each other. To sum up, Recital 5 seems to add little to the understanding of the concept of a 'private antitrust enforcement system'.

Switching back to damages actions, it should be said first of all that an 'action for damages' is, in short, an action under national law by which a claim for damages is brought before a national court (Article 2(4) of the Directive). Furthermore, a 'claim for damages' is a claim for compensation for harm caused by a competition law infringement (Article 2(5)). How should this notion be understood? What are 'compensation' and 'harm'? It is essential to remember that the delimitation of these two concepts will have major implications for how the scope of actions (claims) to be harmonised is conceived by national legislators. Actions (claims) classified by them as damages actions (claims) shall benefit from the provisions of the Directive. They will thus place claimants, at first glance, in a privileged position. They range from provisions on disclosure of evidence, on the effect of decisions issued by National Competition Authorities (hereafter, NCAs), limitation periods, joint and several liability, the passing-on of overcharges, quantification of harm, to provisions on consensual dispute resolution.

As rightly observed by K. Havu<sup>11</sup>, some elements of the Directive shall require national interpretation and drawing inspiration from national legal tradition. The notion of an action (claim) for damages and underlying concepts seems to be one of these concepts. Central to these issues is the notion of harm. In Poland, civil theorists construe harm in a restrictive manner. It is essentially a difference between the position of the injured party caused by the harming event, and the position he would have been in had there been no harming event<sup>12</sup>. Compensating for harm represents a specific category of phenomena within a broader category of remedies. Under Polish law, restitution based on unjust (baseless) enrichment is a category of remedies different from compensation for harm<sup>13</sup>. It is not aimed at compensating the claimant, but at reversing the enrichment. It forces the other party to disgorge

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Oxford-Portland 2014, p. 141 et seq. See also A. Jurkowska, 'Antitrust Private Enforcement – Case of Poland' (2008) 1(1) *YARS* 75.

<sup>10</sup> A. Piszcz, 'Still-unpopular Sanctions: Developments in Private Antitrust Enforcement in Poland After the 2008 White Paper' (2012) 5(7) *YARS* 76.

<sup>11</sup> K. Havu, 'Quasi-Coherence', p. 32.

<sup>12</sup> See M. Kaliński, *Szkoda na mieniu i jej naprawienie*, CH Beck, Warszawa 2011, p. 168 and literature cited therein; W. Czachórski, A. Brzozowski, M. Safjan, E. Skowrońska-Bocian, *Zobowiązania. Zarys wykładu*, Wydawnictwa Prawnicze PWN, Warszawa 1999, p. 95 et seq

<sup>13</sup> See also M. Kaliński, *Szkoda*, p. 206–208.

benefits (which would be unjust for him to keep) in kind or, should this be impossible, refund their value in cash. It is argued that in practice, claims for restitution based on unjust enrichment generally entail evidentiary difficulties comparable to the assertion of damages claims<sup>14</sup>.

Undue performance is a special type of unjust enrichment<sup>15</sup>. In this case, a benefit is obtained in the form of a received performance. The unjustness of the enrichment results from, *inter alia*, the fact that the legal action which obliged a party to make the performance was void and did not become valid after the performance was made (Article 410 of the Civil Code<sup>16</sup> of 23 April 1964). Restitution based on undue performance is a remedy available in Poland in the case of antitrust infringements. It results from the fact that both anticompetitive agreements and agreements (legal actions) concluded as a result of the abuse of dominance are void – irrespective of whether they simultaneously infringe Article 101 or 102 TFEU or not (Article 6 para 2 and Article 9 para 3 of 16 February 2007 on competition and consumers protection<sup>17</sup>). In some competition cases, claims submitted by injured parties shall thus be classified as claims for restitution resulting from the invalidity of the agreement, rather than claims for damages (compensation of harm).

While the above discussion focused on the Polish example, the same issue seems to exist in other Member States also. To name but a few, the Czech Republic and Germany are mentioned in literature to have this type of claim in competition cases<sup>18</sup>. Moreover, German law allows for the skimming-off of profits made as a result of illegal market conduct (ill-gotten gains), provided that the defendant's conduct has been intentional and the defendant has gained economic benefits at the expense of a wide range of market participants<sup>19</sup>. In the case of small and dispersed claims, no single market participant (like a consumer) has an incentive to sue the infringer. Associations representing the interests of an industry, trade or service sector

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<sup>14</sup> See P. Podrecki, 'Civil Law Actions in the Context of Competition Restricting Practices under Polish Law' 2009 2(2) *YARS* 92.

<sup>15</sup> See A. Brzozowski, 'Civil Law (Law of Contracts, Property and Obligations)' [in:] S. Frankowski (ed.), *Introduction to Polish Law*, Kluwer Law International, the Hague 2005, p. 74.

<sup>16</sup> Consolidated text Journal of Laws of 2014, item 121, as amended.

<sup>17</sup> Consolidated text Journal of Laws of 2015, item 184.

<sup>18</sup> L. Bányaiová, 'Czech Republic' [in:] S. Mobley (ed.), *Private Antitrust Litigation in 27 jurisdictions worldwide*, Law Business Research Ltd, London 2010, p. 35; P.L. Landolt, *Modernised EC Competition Law in International Arbitration*, Kluwer Law International, the Hague 2006, p. 352.

<sup>19</sup> See A. Stadler, 'Collective Action as an Efficient Means for the Enforcement of European Competition Law' [in:] J. Basedow (ed.), *Private Enforcement of EC Competition Law*, Kluwer Law International, Aalphen aan den Rijn 2007, p. 206 et seq.

(but not consumer associations), and meeting the criteria set by competition law, are therefore entitled to request from the court that the defendant's illegally-gained profits be remitted to the federal treasury (rather than to the association or its members). Actions by associations are subsidiary to decisions of the competition authority, depriving the violator of the benefits of illegal conduct. This seems to be a means to aggregate claims arising from the same facts and to make sure that they do not remain unpaid. Even if they cannot satisfy the injured parties, it is better if ill-gotten gains are transferred to the federal treasury, than left with the infringer. This 'half-a-loaf-is-better-than-no-loaf' philosophy might have increased the number of private antitrust lawsuits and might have deterring effects on possible antitrust violations. However, the skimming-off mechanism seems at first glance to deter potential plaintiffs. Associations which are granted standing do not appear to be in a position to have a financial interest in a successful lawsuit. This may explain why, as of 2013, no such case has ever been brought before German courts<sup>20</sup>.

Are the abovementioned causes of court actions distinct from the causes of damages actions within the meaning of the Directive? To this question, the answer is in affirmative. Even if they take the form of actions for monetary claims (other than damages), their function is not to compensate for harm suffered by the injured party. Article 3 para 2 of the Directive, which stipulates the principle of full compensation, provides that the meaning of the term 'harm' is similarly narrow to the Polish context. It is said therein that full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed; it shall therefore cover the right to compensation for actual loss (*damnum emergens*) and for loss of profit (*lucrum cessans*), plus the payment of interest. It is also worth mentioning that EU law draws a distinction between claims for damages and claims for restitution. This is shown in the wording of Article 5 para 4 of Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>21</sup> which refers to 'a civil claim for damages or restitution'.

However, would this line of reasoning be followed by the Court of Justice if it were to decide on the scope of the notion of damages under the Damages Directive? The possibility should not be ruled out that the Court could go beyond the direct meaning of the text of the Directive and the need for coherence in the wording of the EU legislation. However, such broad interpretation cannot be considered to have a sound basis. Undoubtedly, private antitrust

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<sup>20</sup> S.V. Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective*, Maklu, Antwerpen-Apeldoorn 2013, p. 180.

<sup>21</sup> OJ L 12, 16.01.2001.

enforcement in EU Member States consists of a heterogeneous, complex and perhaps even chaotic group of remedies with varied procedural characteristics. This does not seem in line with the trend towards an effective system of private antitrust enforcement. Yet the scope of the Directive – too narrow to make the system into an efficient and cohesive ‘whole’ – must not become broadened by jurisprudence and an expansive functional interpretation employed thereby. This is so especially because EU Member State must rely on the specific definitions contained in the Directive for the purpose of its transposition.

### 3. Other remedies

Mentioned besides claims for damages must also be claims for restitution based on unjust enrichment and the abovementioned claims for the skimming-off of profits. The second part of a private antitrust enforcement system consists of civil disputes where: (1) declaratory relief is claimed (the declaration of invalidity, that is, the declaration that an agreement, decision of association of undertakings or practice is void); (2) injunctions are claimed (a court order to bring the infringement to an end and/or remove its effects<sup>22</sup>).

As to declaratory relief, it should be noted that practices prohibited by Article 101(1) TFEU are void, no prior decision to this effect being necessary. Interestingly however, the scope of the TFEU’s rule of invalidity does not cover agreements concluded as a result of an abuse of dominance. By doing so, the EU legislator let EU Member States decide freely on whether agreements (legal actions) infringing EU competition rules in the area of abuse are legally void or not.

Polish competition law stipulates the ‘automatic’ sanction of invalidity for agreements (legal action) infringing both of the antitrust prohibitions – anticompetitive agreements and the abuses of dominance. In Poland, invalidity is used primarily as a defensive strategy (‘shield’)<sup>23</sup> in response to claims for performance or claims for damages because of non-performance. Burden of proof lies here on the party asserting the invalidity of the agreement (pleading the invalidity of a contractual provision it has itself signed). A contractual party can also seek a determination of the agreement’s (or affected clauses’) invalidity, upon a petition for a declaratory judgment, if there are no other possibilities to protect its rights. Nevertheless, above all, the invalidity must be invoked by a court *ex officio*.

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<sup>22</sup> See also P. Podrecki, ‘Civil Law Actions’, p. 83.

<sup>23</sup> A. Jurkowska, ‘Antitrust’, p. 74.

The Damages Directive does not refer to actions using invalidity, irrespective of whether they use it defensively or offensively – except for actions for antitrust damages where invalidity is invoked for particular purposes.

Importantly in relation to injunctions, victims of EU competition law violations may, instead of using private enforcement, file a complaint to a competition authority or – where the initiation of proceedings on a complaint basis is not available (for instance in Poland) – inform the competition authority of the violation. It is possible that in the wake of such complaint or information an infringement decision will be rendered by the competition authority. Public enforcement, compared to private actions for injunctions, may be extremely effective both in terms of the length of proceedings and costs on the part of victims (Polish public enforcement is an example thereof). The latter, turning towards public enforcement, may avoid costly and long-lasting litigation. Nevertheless, it is argued that applications for injunctive relief hold in many EU jurisdictions a prominent place in their private enforcement system; they are common, certainly more common than actions for damages<sup>24</sup>. This may be caused, *inter alia*, by the fact that competition authorities (EC, NCAs) usually do not have the resources to investigate every problem brought to their attention, thus they have to set priorities (case prioritisation) and focus on most serious infringements only. Where competition authorities refuse to initiate public proceedings, and a party decides to a court for an injunction, harmonised pro-plaintiff provisions on the effect of NCAs' decisions would be useless. However, the Directive does contain many other pro-plaintiff provisions that would help fulfil the claimant's burdens. However, claims for injunctions are not referred to by the Directive at all, as their main function is not to compensate for harm incurred but to allow those being harmed (or threatened with harm) by an antitrust violation to prevent (further) harm from occurring. Therefore, they do not fall within the scope of the notion of actions for damages as defined in the Directive.

#### 4. Attempt at assessment

The question arises why did the EU legislator leave private enforcement actions other than actions for damages outside the scope of the Directive. Was it a matter of faith in the effectiveness of damages actions alone? It seems that decision-makers knew that their goal should have been more than just to try to ensure effective actions for damages. Yet they faced a fundamental dilemma surrounding the problem of 'quickness versus completeness'.

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<sup>24</sup> S.V. Walle, *Private Antitrust Litigation*, p. 203, 224.

Emphasis on actions for damages is deeply rooted in EU jurisprudence and the EC's Green and White Papers. By contrast, assessments providing greater insights into other private enforcement remedies were not easily available. More importantly, a political agreement was reached on the harmonisation of national rules to enable private enforcement of EU competition rules via damages actions – the consensus did not cover other types of actions. When drafting the proposal for the Directive and accompanying documents ('harmonisation package'), the EC opted so to speak for a 'bird in the hand', rather than 'two in the bush'.

The attempt to harmonize private enforcement of EU competition law through the Damages Directive may in fact result in evolutionary rather than revolutionary effects. The outcome is fragmented, as it focuses on how to reduce differences in national rules governing actions for damages, and omits other remedies for EU antitrust breaches. The Directive can cause a real change in private enforcement of competition law, but subject to strict limits on remedies.

Recital 6 of the Preamble to the Directive declares that effective private enforcement actions under civil law and effective public enforcement by competition authorities must interact to ensure the maximum effectiveness of competition rules. It is therefore necessary to 'regulate the coordination of those two forms of enforcement in a coherent manner'. Yet it is said in Article 1 para 2 that the Directive sets out rules coordinating the enforcement of competition law by competition authorities and their enforcement **in damages actions**<sup>25</sup> before national courts. This harmonisation scope may have consequences for the effectiveness of the private EU antitrust enforcement system, endorsed so frequently in the text of the Directive. Some Member States have a system of procedural and substantive rules that shows a predominance of other private enforcement actions over claims for damages. In those jurisdictions, an increase in the effectiveness of private enforcement can probably not be achieved thanks to the Directive and its focus on damages actions. This aim may be undermined even after the rules for the transposing of the Directive are fine-tuned and come into force.

It is worth adding that it seems slightly misleading to speak of 'the competition law provisions of the Member States' in the title of the Directive. In the definition contained in Article 2(3), national competition law is limited to provisions of national law that are applied to the same case and in parallel to EU competition law pursuant to Article 3(1) of Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>26</sup>. The Directive should not affect

<sup>25</sup> Emphasis added by the author.

<sup>26</sup> OJ L 1, 04.01.2003, p. 1.

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 (last sentence of Recital 10 of the Preamble). It is thus justified to say that for these matters the Directive does not require Member States to model their legal frameworks on the Directive; albeit they are free to do so. However, it does not seem reasonable for Member States to have double standards with respect to the two different types of infringements (those with and those without EU effect), as this would make private antitrust enforcement even more difficult for courts and parties. Most probably, national rules governing actions for damages will be modelled on the Directive not only with regard to infringements of EU competition rules (and national rules applied in parallel) but also with regard to violations of national competition law which do not affect EU trade (infringements of a purely national scope). Private claimants enforcing EU competition rules through actions other than actions for damages may find themselves in the ‘missing middle’ between those two beneficial frameworks.

Particularly for private antitrust actions for monetary claims other than damages, it is difficult to understand why claimants should not be able to benefit from ‘privileges’ enjoyed by those claiming damages. These could include rules on the effect of NCAs’ decisions, rules on disclosure of evidence, or rules on limitation periods (and in particular their suspension or interruption). An antitrust infringement found by a final decision of a competition authority shall be deemed to be irrefutably established in the case of damages actions. Why then should a ‘non-damages’ claimant be required to prove an infringement, instead of relying upon a final decision, in case of other private enforcement actions?

On the other hand, there is no clarity as to the application of the law in a situation where various claims are combined in the same proceedings, such as a claim for restitution based on undue performance and a claim for damages (this is permissible under Polish laws). At first glance, it seems that national courts should apply two different sets of rules in such cases – this may prove quite ineffective. Admittedly, this will not be very difficult in the case of rules on, for instance, limitation periods. However, many more complications may arise because of the application of two different sets of rules on evidence disclosure or the effect of NCAs’ decisions. This will result in a double standard in relation to evidence. How should this issue be reasonably approached? Will it be possible to adduce evidence disclosed for the purpose of claiming damages in support of the other claim? Will it be possible to claim damages (even ‘symbolic’) just so it is easier to prove other claims and withdraw the former at a later stage of the proceedings? The narrowness of the concepts of an ‘action’ and a ‘claim’ employed by the Directive may result

in considerable difficulties not only for national legislators, but also courts and procedural parties. Something should be done to solve them.

Therefore, it is postulated here to harmonize rules on a wide range of private antitrust remedies – it is better to turn to a ‘piecemeal’, progressive harmonisation than to confine ourselves to the Damages Directive only. It is not alleged here that Member States voluntarily model their legal frameworks for claims other than damages on the framework adopted for the latter. Therefore, looking further ahead, it is suggested here that not later than after the first review of the Directive ‘Private Antitrust Enforcement I’, works on a proposal for a ‘Private Antitrust Enforcement II’ Directive should be commenced. There may be important lessons to be learned (from the practical application of national rules on damages actions introduced as a result of the Damages Directive) about how to shape rules on other private enforcement actions. Yet nothing suggests at the moment that further legislative works aimed at completing the system are envisaged for the future.

### III. A few other narrow concepts

As shown above, certain problems with the interpretation of the Damages Directive and, consequently, its transposition by Member States, may lie in the narrowness of the scope of the concepts used in the Directive. A few further points are added below about the restrictiveness of some of the other notions covered by the Directive.

Among concepts worth addressing are the notion of a ‘leniency statement’ (related to the concept of a ‘leniency programme’<sup>27</sup>) and a ‘settlement submission’. These are concepts of public antitrust enforcement defined – for the purpose of private enforcement in the form of damages actions – in Article 2(16) and 2(18) of the Directive. Provisions of the Directive on the protection of these types of ‘presentations’ satisfies the Commission’s concerns about the impact of the harmonised rules on its leniency policy (which allows infringers to confess their part in breaches of competition laws in exchange for leniency in the imposition of fines)<sup>28</sup>. The aim of these provisions is to protect certain public interests in relation to the cooperation of parties with the competition authority. Article 6 para 6 of the Directive provides therefore for the absolute protection from disclosure of leniency statements

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<sup>27</sup> Defined in Article 2(15) of the Directive.

<sup>28</sup> See eg C.H. Bovis, C.M. Clarke, ‘Private Enforcement of EU Competition Law’ (2015) 36 *Liverpool Law Review* 65–66.

and settlement submissions<sup>29</sup>. However, neither definition translates well into the Polish national context for example. Both definitions were designed in a way strictly modelled on the respective concepts employed in EC soft law for the purpose of its own enforcement system. The scope of these concepts under national laws seems to have been simply ignored.

A 'settlement submission', within the meaning of the Directive, is not part of the Polish 'settlement' procedure – so called 'procedure for a voluntary submission to a fine' – which may be used in the case of any anticompetitive practices (unilateral or collective), hence not necessarily cartels. Therefore, the Directive does not provide a basis for Poland to maintain rules which – in cases regarding infringements of EU competition rules – would lead to the absolute protection of any 'settlement' documents at all, be it self-incriminating or not<sup>30</sup>. It shall be for national courts to decide, on a case-by-case basis, as to whether such documents shall be protected from disclosure or not. When assessing the proportionality of an order to disclose information, national courts shall consider, *inter alia*, the need to safeguard the effectiveness of public enforcement of competition law<sup>31</sup>.

Second, the Polish leniency programme differs from its EU equivalent to a considerable extent as it refers not only to cartels, but also to other agreements, decisions of associations of undertakings and concerted practices (horizontal or vertical). The transposition of the Directive shall result in the creation of two categories of leniency statements in cases with an EU element – those absolutely protected from disclosure (in the case of cartels in the meaning of the Directive<sup>32</sup>) and those subject to protection or disclosure based upon the decision of the court issued on a case-by-case basis (in other cases). The scope of national provisions implementing the Directive's rule on the absolute protection of leniency statements cannot be extended beyond cartels. Article 5 para 8 of the Directive only allows Member States to maintain or introduce rules which would lead to **wider** disclosure of evidence (subject to exceptions providing for absolute protection), and never to a narrower scope of disclosure.

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<sup>29</sup> Such an absolute protection has, however, been criticised on the basis of the EU jurisprudence (preceding the Directive) and the CJ's interpretation of principles of primary law; see Ch. Kersting, 'Removing the Tension Between Public and Private Enforcement: Disclosure and Privileges for Successful Leniency Applicants' (2014) 5(1) *Journal of European Competition Law & Practice* 3–4.

<sup>30</sup> In practice, self-incriminating information may be delivered by the party although provisions on the procedure of a voluntary submission to a fine does not actually require it.

<sup>31</sup> See Article 6(4)(c) of the Directive.

<sup>32</sup> Article 2(14) of the Directive. Significantly, this is the first definition of a 'cartel' drafted in a hard law instrument (an this instrument consists of civil law provisions rather than competition law provisions). Through its implementation, this definition is going to spread across EU Member States (but only for the purpose of private enforcement of EU competition rules).

This is undisputable. However, this also provokes a question regarding another aspect of leniency referred to in the Directive – its provisions set out benefits to immunity recipients with regard to their joint and several liability.

Focusing on cartels is a matter of policy choice. The scope of the EU leniency programme is limited to cartels (similarly with the EU settlement procedure)<sup>33</sup>. Consequently, the definitions of a leniency programme and leniency statement, contained in Article 2(15) and 2(16) of the Directive, are limited to cartel-related issues only. In some Member States<sup>34</sup>, the respective definitions are designed and used – for the purposes of public enforcement – more broadly to also cover agreements (and decisions of associations) other than cartels. In such cases, the transposition of the Directive shall result in a situation where a leniency applicant reporting a vertical agreement infringing Article 101 TFEU to the NCA will receive immunity from fines (or reduction thereof) but – in the event of private action for damages – will benefit neither from the absolute protection of his leniency statement nor the limitation of joint and several liability. These cartel-related privileges are intended to prevent cartel participants from: (1) being deterred from cooperating with competition authorities (Recital 26 of the Preamble) and (2) undue exposure to damages claims (Recital 38 of the Preamble). The question this provokes is whether participants to other anticompetitive agreements deserve, or not, incentives and rewards just as much as cartel participants do (especially since non-cartel practices are much less dangerous to market competition). If not, does a ‘wider-than-cartels’ scope of a national leniency programme constitute a wrong policy choice? Should national leniency programmes be redesigned? An afterthought arises at this point. Maybe the circumstances have been too premature for the harmonisation of civil procedures, since Europe is still characterised by a great complexity of national solutions and considerable divergences in, for instance, leniency programmes or settlement procedures.

On the other hand, the Directive provides certain special ‘benefits’ not only for cartel participants but also for their victims. As a rule, provisions of the Directive apply equally to infringements of Article 101 and infringements of Article 102 TFEU. There is, however, one presumption – benefitting injured parties – which would only apply in the case of cartels. This is the rebuttable

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<sup>33</sup> The definition of a leniency programme contained in Article 2(15) refers to a ‘secret cartel’. This additional adjective seems superfluous, especially since sometimes cartels are not as secret as it might seem at first glance; see an example analysed in: J. Faruga, ‘Case comment on the decision issued by the European Commission in the case AT.39792 – *Steel Abrasives*’ (2014) 8(2) *Studia Prawnicze i Administracyjne* 5.

<sup>34</sup> As to Sweden see K. Karlsson, P. Hansson, ‘Sweden’ [in:] J. Buhart, *Leniency Regimes: Jurisdictional Comparisons*, Sweet & Maxwell, London 2012, p. 302.

presumption implying that cartel infringements cause harm (Article 17 para 2 of the Directive). The existence of presumptions is believed to serve as an incentive to litigation or, reversing the argument, the lack of presumptions can act as a barrier to private enforcement<sup>35</sup>. Unlike cartels, other infringements of EU competition rules shall not result in such presumption.

The key reason for this is presented in Recital 47 (fourth sentence) of the Preamble which states that ‘It is appropriate to limit this rebuttable presumption to cartels, given their secret nature, which increases the information asymmetry and makes it more difficult for claimants to obtain the evidence necessary to prove the harm’. This justification does not seem convincing – the presumption seems too narrow and should cover more than just cartels. Secrecy is not exclusive to cartels, and neither is lack of information, which makes it difficult for claimants to obtain the evidence necessary to prove their harm. Similar problems can be identified in particular in the case of pricing practices other than cartels such as, for example, exploitative abuses of dominance. On the other hand, there are other reasons for a narrow scope of such presumption. It is argued, that the risk that non-cartel infringements are actually not harmful for consumers (‘false positives’) is much higher than in cartel cases, where harm to consumers is almost certain<sup>36</sup>. Therefore, the presumption only seems too narrow ‘on the surface’ – it is indeed appropriate that only cartel victims shall benefit from it.

By way of digression, a question should be asked whether the presumption is actually going to prove of real benefit for victims of antitrust violations. Subject to Article 17(1) of the Directive, injured parties will still have to prove the amount of the harm suffered. Although victims received the above presumption ‘in exchange for’ the introduction of absolute protection of settlement submissions and leniency statement (which affects them adversely), this ‘barter’ appears unfavourable to the injured parties. The problem lies also in the current trend that sees a truly extensive use of settlement decisions and leniency applications, at least in proceedings before the Commission. This may result in practice in even more difficulties with access to evidence included in the competition authorities’ cartel files. As a result, the procedural position of a cartel victim – even with the presumption of harm – is not going to be much better than the position of other injured entities.

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<sup>35</sup> See also O. Odudu, ‘Developing private enforcement in the EU: Lessons from the Roberts Court’ (2008) 53(4) *The Antitrust Bulletin* 875 et seq.

<sup>36</sup> J. Alfaro, T. Reher, ‘Towards the Directive on Private Enforcement of EC Competition Law: Is the Time Ripe?’ (2010) *The European Antitrust Review* 44.

## IV. Summary

The Directive is selective – hence the harmonisation of private enforcement of EU competition law is selective. While in charge of the preparatory works on the harmonisation package, the EC has admittedly recognised that private antitrust enforcement might occur also in ways other than by way of actions for damages (see Part II.1 of this article). This paper considers a number of possible reasons (Part II.4) why the scope of the harmonisation was ultimately limited to actions (claims) for damages only. However, as it has been exemplified in Part II.2 and II.3, other private enforcement remedies are available alongside damages actions in proceedings before national courts. To name but a few, victims of EU competition law violations might pursue restitution or injunctions claims as well as claims for the declaration of invalidity. Undoubtedly, claims for injunctive relief and claims for declaratory relief do not fall within the scope of the Directive (Part II.3 of the article). On the other hand, the monetary nature of some restitution claims (or skimming-off of profits known in German law) has prompted a reflection upon the question whether they fall within the category of claims for damages according to the definition contained in the Damages Directive (Part II.2 of the article). An affirmative response would seem to defy the logic of the legal source that the definition operates in. Based on arguments that have been developed above, a negative response has thus been given.

The paper has shown that the Directive's narrow scope is an important characteristic of the recent harmonisation effort concerning private enforcement of EU competition law. However, the advantage of the narrow approach of EU decision-makers to the harmonisation scope lies in that it made the harmonisation possible at an earlier stage, albeit it is incomplete (piecemeal?). As a result, a comment *de lege ferenda* has been presented here (Part II.4) suggesting that the Damages Directive should not become the end of the harmonisation story for private antitrust enforcement in Europe and that further works thereon should be seen as more than merely an abstract idea.

The narrowness of the concepts employed by the Directive can also be seen in some of the definitions referred to in this paper (Part III) – the EU legislator modelled them on concepts that exist in EC soft law for the purpose of the Commission's own public enforcement. Possible difficulties for EU Member States have been identified when it comes to adapting their laws because of the divergence that persists across Europe. As a result, some definitions contained in the Directive do not translate well into specific national contexts. In order to implement the Directive, EU Member States will indisputably need to conduct an intensive scrutiny of varied domestic legal fields including competition law, civil law and procedural law.

To sum up, the narrowness of the scope of the harmonisation through the Damages Directive and the problems that are likely to arise when working on its transposition may partly waste the capacity for improvements in private antitrust enforcement in Europe.

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# Disclosure of Documents in Private Antitrust Enforcement Litigation

by

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## CONTENTS

- I. Introduction
- II. Disclosure of documents pursuant to the Damages Directive
  - 1. Introduction: from enforcement of intellectual property rights to private antitrust enforcement
  - 2. Main features of the EU-wide litigation disclosure mechanism
  - 3. A basic outline of special rules concerning access to the files of competition authorities
- III. Limited scope of disclosure of evidence in Slovenian civil procedure
  - 1. Documents in possession of the party adducing them
  - 2. Documents in possession of the other party
  - 3. Protection of business secrets?
  - 4. Sanctions for non-compliance
  - 5. Documents in possession of 3<sup>rd</sup> parties and public authorities
  - 6. Lack of specific rules for private antitrust enforcement litigation
- IV. Assessment and conclusions

## *Abstract*

Procedural tools aimed at access to information in general, and disclosure of documents in particular, are crucial for the effectiveness of private antitrust enforcement litigation and for facilitating more genuine equality of arms. Currently, profound differences exist among EU Member States' civil procedure laws concerning disclosure of evidence held by the opponent. The transposition of the litigation disclosure mechanism contained in the Damages Directive will undermine the existing principles of Slovenian

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civil procedure. However, this is due to the fact that Slovenian law is outdated with regard to evidence disclosure. Not only that, it is also partially based on an erroneous premise, typical for the traditional civil law approach, whereby the principle against self-incrimination applies in civil cases in the same way as in criminal cases. As a result, the obligatory transposition of the Directive's requirements should be perceived as a positive step for Slovenia. Yet this step will be successful only if followed by a general reassessment of evidence disclosure rules in Slovenian civil procedure law.

### *Résumé*

Les outils procéduraux visant à l'accès à l'information en général et à la divulgation des documents en particulier, sont nécessaires afin de garantir l'efficacité de l'application privée du droit de la concurrence et d'assurer l'égalité des armes. Actuellement, des divergences profondes concernant la divulgation de la preuve détenue par l'adversaire existent entre les procédures civiles des États membres de l'UE. La transposition du mécanisme contentieux de la divulgation de la preuve contenue dans la Directive relative aux actions en dommages va mettre en danger les principes existants de la procédure civile slovène. Cependant, cela est dû au fait que la législation slovène est obsolète à l'égard de la divulgation des preuves. De plus, cela est conséquence d'une prémisse erronée, typique à l'approche traditionnelle du droit civil, selon laquelle le principe interdisant l'auto-incrimination est appliqué dans les affaires civiles de la même manière que dans les affaires pénales. En conséquence, la transposition obligatoire des exigences posées par la Directive doit être perçue comme une étape positive pour la Slovénie. Pourtant, ce changement ne sera réussi que s'il est suivi d'une réévaluation générale des règles de divulgation de preuve incluses dans la procédure civile slovène.

**Key words:** disclosure of documents; privilege against self-incrimination; business secrets; principle of proportionality; civil procedure; antitrust; damages.

**JEL:** K23; K42.

## **I. Introduction**

Antitrust damages litigation usually involves complex questions of law and facts. Such litigation cannot be effectively pursued without extensive access to information. Yet the aggrieved party rarely has sufficient knowledge of such information, or sufficient access to it. Instead, relevant information is kept secret in the hands of wrongdoers<sup>1</sup>. Antitrust damages litigation is thus

<sup>1</sup> Commission Staff Working Document Executive Summary of the Impact Assessment: Damages actions for breach of the EU antitrust rules Accompanying the proposal for a Directive

characterized by an information asymmetry to the detriment of the claimant. It is therefore not surprising that the new Damages Directive<sup>2</sup> puts much emphasis precisely on the rules of evidence disclosure<sup>3</sup>. Once the Directive is transposed into national laws of EU Member States – the deadline is set for 27 December 2016 – access to relevant evidence held by defendants, public authorities and 3<sup>rd</sup> parties will be easier in antitrust damages actions brought by individuals as well as businesses.

The impact of these new instruments and their underlying policies will, however, not remain limited to the specific area of antitrust litigation. Neither will the transposition of the new rules on evidence disclosure merely require a technical adjustment of national procedural laws. On the contrary, at least some Member States will have to re-evaluate the fundamental principles governing their administration of justice in civil and commercial cases. Such developments on the EU level, although restricted to specific types of legal disputes only, might trigger a move towards a more general recognition of the duty to disclose and produce documents in national legislations<sup>4</sup>.

On the one hand, disclosure of evidence (or a further reaching US-style discovery) has long since been an integral part of civil justice in the common law procedural model. The key idea behind disclosure lies here in that the parties should, as early as possible, give advance notice of all relevant documents – these include not only documents supporting their case but also those which affect their case adversely, or which support the case of their opponent<sup>5</sup>. The so-called ‘cards on the table’ approach strives to fulfil the overriding objective

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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, SWD/2013/0204 final.

<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, 05.12.2014, p. 1.

<sup>3</sup> See e.g. C. Caufmann, N.J. Philipsen, ‘Who Does What in Competition Law: Harmonizing the Rules on Damages for Infringements of the EU Competition Rules?’ (2014) 19 *Maastricht European Private Law Institute Working Papers* 5, available at: <http://ssrn.com/abstract=2520381> or <http://dx.doi.org/10.2139/ssrn.2520381> (last accessed 11 July 2015).

<sup>4</sup> G. Wagner, ‘Harmonisation of Civil Procedure: Policy Perspectives’ [in:] X.E. Kramer, C.H. van Rhee (eds.), *Civil Litigation in a Globalising World*, Springer, Cham-Heidelberg-Dordrecht-New York-London 2012, p. 105.

<sup>5</sup> Cf.: ‘In this country litigation [...] is conducted ‘cards face up on the table’. Some people [...] regard this as incomprehensible. ‘Why’, they ask, ‘should I be expected to provide my opponent with the means of defeating me?’ The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object’. Sir John Donaldson MR in *Davies v. Eli Lilly & Co.* [1987] 1 WLR 428 (England).

of ensuring justice, to enable better preparation and unfolding of a trial, and to prevent ambush strategies (taking the opponent by surprise) during the trial<sup>6</sup>. In addition, enabling parties to realistically assess the strength or weakness of their positions at an early stage of the case is also a powerful tool for the promotion of settlements<sup>7</sup>.

On the other hand, however, the traditional approach in civil law jurisdictions is entirely different. Party access has been limited to relevant information and documents in possession of their opponent (documents which could adversely affect the opponent's civil case). Based on the German and Austrian heritage of civil procedure, the principle applied that no one was obliged to help his adversary win the case (*nemo tenetur edere contra se*) or 'to put weapons in the hand of its opponent'<sup>8</sup>. This approach perhaps derives from a serious misconception that principles of criminal procedure, notably the privilege against self-incrimination<sup>9</sup>, are easily and automatically transferable to civil cases<sup>10</sup>. For certain additional reasons<sup>11</sup>, lack of effective access to information has been particularly characteristic for civil justice systems of post-communist countries.

Only recently has the idea been gradually gaining ground, also in civil law jurisdictions, that if effective access to justice is inherently linked to adequate results on merits, the procedural system must provide legal instruments that

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<sup>6</sup> N. Andrews, *English Civil Procedure*, University Press, Oxford 2003, p. 597.

<sup>7</sup> Ibidem.

<sup>8</sup> D. Leipold [in:] Stein & Jonas, *ZPO-Kommentar*, 22. Aufl., Mohr Siebeck, Tübingen 2005, para. 142, No. 9.

<sup>9</sup> The principle against self-incrimination has roots in common law. In the USA, it is enshrined in the fifth Amendment which provides, *inter alia*, that none shall be compelled in any criminal case to be a witness against himself. The US Supreme Court defined that this privilege forbids the government from compelling any person to give testimonial evidence that would likely incriminate him/her during a subsequent criminal case (*Lefkowitz v. Turley*, 414 U.S. 70 (1973)). It entitles a person to refuse to answer questions or provide information on the grounds that to do so might expose them to criminal prosecution (see eg Section 60 of the 2006 New Zealand Evidence Act). It should be noted that defining the extent as to which the production of documents is covered by this privilege, which originally was intended to cover merely testimonial evidence, is both very complex and difficult. For common law developments see A. Choo, *The Privilege Against Self-Incrimination and Criminal Justice*, Hart Publishing, 2014, p. 2 and 56 et seq. For the case law of the ECHR see *ibid*, p. 25 et seq. and A. Ashworth, 'Self-Incrimination in European Human Rights Law – a Pregnant Pragmatism' (2008) 30(3) *Cardozo Law Review* 751–774.

<sup>10</sup> Cf.: S. Triva, S. Belajec, M. Dika, *Građansko parnično procesno pravo*, Narodne Novine, Zagreb 1986, p. 425, (Yugoslavia): 'Nobody is obliged to testify against himself and to offer evidence, unfavourable to him'.

<sup>11</sup> See *infra*, subsection IV.

give parties access to items of evidence not in their possession<sup>12</sup>. Extensive rules on evidence disclosure contained in the new Damages Directive will inevitably support this trend. In this manner, at least long term, additional convergence between civil procedure laws could be achieved, and the traditional divide between civil and common law categories of civil procedures could be further diminished.

This paper aims to evaluate such possible broader impacts of the evidence disclosure rules found in the new Damages Directive for national laws of those Member States – in particular Slovenia – which traditionally have not had adequate possibilities for (prospective) claimants to obtain evidence held by others. The paper will also assess to what an extent legitimate interest (such as the protection of business secrets and the prevention of excessive burdens and costs inevitably connected with the disclosure duty) should act as a barrier for a far-reaching disclosure obligation. The key question is thus how to strike a proper balance between competing values – not only from the viewpoint of the individual interests of the given litigants. In order to enable such an assessment in the final part of the paper, a short outline of the disclosure rules found in the new Directive will be given first, followed by an assessment of the existing possibilities of access to evidence in Slovenian civil procedure law.

## II. Disclosure of documents pursuant to the Damages Directive

### 1. Introduction: from enforcement of intellectual property rights to private antitrust enforcement

The Damages Directive is not the first EU law instrument that introduced an EU-wide litigation disclosure mechanism. Extended disclosure obligations appeared already in Directive 2004/48/EC on the enforcement of intellectual property rights<sup>13</sup> (hereafter, Enforcement Directive). A typical feature of patent infringement litigation – like private antitrust litigation – is that claimants experience many difficulties in obtaining the evidence they need

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<sup>12</sup> N. Trocker, V. Varano, 'Concluding remarks' [in:] N. Trocker, V. Varano (eds.), *The reforms of civil procedure in comparative perspective*, Giappichelli Editore, Torino 2005, p. 255. Especially the English Civil Procedure Rules of 1998 (which have eliminated some extremes of US-style discovery) seem to be an important source of inspiration for legislatures in civil law jurisdictions nowadays. See e.g. C.H. van Rhee, *Dutch Civil Procedural Law in an International Context* [in:] M. Deguchi, M. Storme, *The Reception and Transmission of Civil Procedural Law in the Global Society*, Maklu, Antwerpen 2008, p. 206 et seq.

<sup>13</sup> OJ L 157, 30.04.2004.

to bring a successful claim. Pursuant to Article 6(1) of the Enforcement Directive, Member States must ensure that ‘on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information’. Furthermore, the opposing party may be ordered to produce banking, financial or commercial documents relevant to the resolution of a dispute involving the infringement of intellectual property rights on a commercial scale (Article 6(2) of the Enforcement Directive).

The Damages Directive builds on the system established by the Enforcement Directive. However, it also elaborates it further by substantially extending disclosure obligations on the one hand, and by setting out exemptions from the disclosure duty on the other. In addition, the Directive carefully addresses the complex issue of access to files held by competition authorities<sup>14</sup>. By harmonizing disclosure rules, the Directive intends, *inter alia*, to ensure more equality in the treatment of cartel victims across the EU, as well as to prevent excessive forum shopping. The huge divergences existing between national disclosure rules have been the very key factor in the popularity of some jurisdictions (such as the UK) with claimants seeking to bring damages actions for antitrust infringements<sup>15</sup>. On the one hand, the Directive aims to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim. On the other hand, it also contains safeguards meant to ensure the protection of business secrets and legitimate privileges, as well as to prevent excessive costs and burdens. In addition, due care is given to preserving existing incentives for offending companies to voluntarily cooperate with competition authorities. Article 5 of the Damages Directive specifies the tools aimed at disclosure of evidence; Article 6 sets out further provisions relating to access to the files of competition authorities.

## 2. Main features of the EU-wide litigation disclosure mechanism

Pursuant to Article 5(1) of the Damages Directive, the court shall, upon request of a claimant, order the defendant or a 3<sup>rd</sup> party to disclose relevant evidence which lies in their control. The same rule applies *vice versa* as well – the defendant can also use the disclosure mechanisms against the claimant or

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<sup>14</sup> See e.g. C. Caufmann, N.J. Philipsen, *supra* note 3 at p. 31–32.

<sup>15</sup> E. Burrows, R. Sander, ‘Impact of the EU Directive on Antitrust Damages Actions – England & Wales – Competition Litigation 2015’ [in:] *Competition Litigation 2015. International Comparative Legal Guides*, 7th edition, 2014.

a 3<sup>rd</sup> party (Article 5(1)). The Directive wants to prevent full scale US-style discovery and, in particular, so-called ‘fishing expeditions’ of non-specific searches for information which are meant to develop a case for which the party has no support yet<sup>16</sup>. However, the Directive simultaneously rejects the strict traditional civil law requirement, which states that a request for disclosure must precisely identify (specify) and describe the document sought, which is in the hands of the opponent, and that all material facts relevant to the case must be asserted already prior to the disclosure order. Recital 14 of the Directive clarifies that the effective exercise of the right to compensation can be unduly impeded by strict legal requirements for claimants to assert in detail all facts of their case at the beginning of an action, and to proffer precisely specified items of supporting evidence.

The Directive hence adopts a ‘mid-way’ solution. According to Article 5(2), the claimant’s request can only be granted if there is a ‘reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages’<sup>17</sup>. In this context, Recital 16 states that it follows from the requirement of proportionality that disclosure can be ordered only where a claimant has made a plausible assertion, on the basis of facts which are reasonably available to that claimant, that the claimant has suffered harm that was caused by the defendant. Article 5(2) of the Directive furthermore stipulates that the disclosure may only relate to ‘specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification.’ Recital 16 explains that where a disclosure request aims to obtain a certain ‘category of evidence’ (instead of specified items of evidence), that ‘category’ should be identified by reference to common features of its constitutive elements. They include: the nature, object or content of documents, the time during which they were drawn up, or other criteria, provided that the evidence falling within that ‘category’ is relevant for the determination of the damages claim.

When determining disclosure requests, the court is bound by the principle of proportionality. The system is based on the balancing of 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. Pursuant to Article 5(3), disclosure of evidence must be limited to that ‘which is proportionate, taking into account the legitimate interests of all parties and third parties concerned.’ The principle *nemo contra se edere tenetur*

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<sup>16</sup> Cf. R. Stürner, ‘Duties of Disclosure and Burden of Proof in the Private Enforcement of European Competition Law’ [in:] J. Basedow (ed.), *Private Enforcement of EC Competition Law*, Kluwer Law International, 2007, p. 169.

<sup>17</sup> See e.g. C. Kaufmann, N.J. Philipsen, *supra* note 3, at p. 27.

is explicitly rejected. Article 5(5) stipulates that ‘the interest of undertakings to avoid damages actions following an infringement of the competition rules does not constitute an interest that warrants protection.’ Nevertheless, legitimate interests of the party that opposes disclosure must be taken into account as well. Disclosure must be limited to what is proportionate. The Directive provides for some guidance as to the issue of proportionality. Pursuant to Article 5(3), in assessing legitimate interests of the parties and 3<sup>rd</sup> parties concerned, the court must consider, in particular: (a) the extent to which the claim or defence is supported by available facts and evidence justifying the disclosure request; (b) the scope and cost of disclosure, especially for any 3<sup>rd</sup> parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure; and (c) whether the requested evidence contains confidential information, especially concerning 3<sup>rd</sup> parties, and what arrangements have been put in place in order to protect such confidential information.

Hence the protection of business secrets does not, *per se*, constitute a ground for a disclosure refusal. On the contrary, Article 5(4) determines that the courts must have the power to order the disclosure of evidence containing confidential information where the judiciary considers it relevant to the damages action. National laws must however also ensure that, when ordering the disclosure of such information, national courts have at their disposal effective measures to protect such information. According to Recital 18 of the Directive, those measures could include redacting sensitive passages, conducting hearings *in camera*, limiting those allowed to view the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form<sup>18</sup>. Full effect must also be given to the applicable legal professional privilege when ordering the disclosure of evidence (Article 5(6)).

National law must also equip their courts with powers to impose effective, proportionate and dissuasive sanctions for parties that refuse to comply with disclosure orders or destroy evidence. These sanctions must include 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 (Article 8).

Another important safeguard included in the Directive relates to the right to be heard. Since the court deciding on the disclosure request must carefully weigh competing interests of both parties, and because the disclosure order can significantly affect legitimate interests of the person from whom disclosure is sought, the latter must be provided with an opportunity to be heard before a decision ordering disclosure is taken (Article 5(7)). The Directive also

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<sup>18</sup> Cf. R. Stürner, *supra* note 14, at p. 182.

clarifies that (without prejudice to its provisions relating to the protection of legitimate interests of those from whom disclosure is ordered) Member States are not prevented from maintaining or introducing rules which would lead to wider disclosure of evidence (Article 5(8)). Where cross-border evidence disclosure is necessary, and a court in one Member State requests a competent court in another Member State to take evidence, or requests for evidence to be taken directly in another Member State, the provisions of Council Regulation (EC) No 1206/2001<sup>19</sup> apply.

### **3. A basic outline of special rules concerning access to the files of competition authorities**

Documents or records held by competition authorities can be particularly valuable for victims of antitrust violations. Although it is certainly true that access to such documents is an extremely complex matter, this paper will consider it only briefly since this issue is covered specifically and in-depth by other authors in this volume<sup>20</sup>.

Already before the adoption of the Damages Directive, the Court of Justice (hereafter, CJ) has long since been confronted with questions about the relationship between effective private antitrust enforcement on the one hand, and the effectiveness of leniency proceedings on the other. In cases relating to Articles 101 and 102 TFEU, the CJ ruled that a blanket ban on access to documents held in the file of a competition authority and relating

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<sup>19</sup> Council Regulation (EC) No 1206/2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters. It should be noted, however, that it is practically necessary to apply the Regulation only where disclosure is requested from 3<sup>rd</sup> parties or public authorities. On the contrary, if the disclosure is requested by the opponent and the national law provides for intra-procedural sanctions (such as drawing adverse inferences) for non-compliance, the national court does not need to use the methods of taking evidence provided by this Regulation. It is sufficient to order disclosure and, in case of non-compliance, apply procedural sanctions provided by national law. See the recent case in the UK Court of Appeal: *Secretary of State for Health and others v Servier Laboratories Ltd and others; National Grid Electricity Transmission plc v ABB Ltd and others* [2013] EWCA Civ 1234, discussed in: J. Cary, L. Kilaniotis, A. McGregor, S. Smith, 'United Kingdom: Private Antitrust Litigation' [in:] *The European Antitrust Review, 2015*, Chapter 71, at footnote 35; accessible at: <http://globalcompetitionreview.com/reviews/62/sections/210/chapters/2530/united-kingdom-private-antitrust-litigation/> (last accessed 10 March 2015).

<sup>20</sup> V. Butorac Malnar, *Access to Documents in Antitrust Litigation – EU and Croatian Perspective* (2015) 8(12) YARS; A. Gulińska, *Collecting Evidence Through Access to Competition Authorities' Files – Interplay or Potential Conflicts Between Private and Public Enforcement Proceedings?* (2015) 8(12) YARS.

to leniency proceedings is not permitted (*Pfleiderer*<sup>21</sup> and *Donau Chemie*<sup>22</sup>). The CJ rejected pleas for an almost absolute protection of voluntary, self-incriminating statements held on file by competition authorities and made by leniency applicants from disclosure to 3<sup>rd</sup> parties which claim damages for antitrust infringements<sup>23</sup>. According to the CJ, a balanced approach must be adopted and any request for access to the documents in question must be assessed on a case-by-case basis. This balancing of interests does not only apply to conflicting private interests of the individual parties concerned. In the course of the assessment, national courts must also consider public interests. These include, first of all, the public interest relating to the effectiveness of leniency programmes – it is essential that cartel members *bona fide*, and fully cooperate with competition authorities, disclose incriminating documents and voluntarily provide information concerning their knowledge of a cartel. Second, it is necessary to consider the public interest of ensuring effective private antitrust enforcement and the maintenance of effective competition through individual damages claims<sup>24</sup>. The above jurisprudence was of some, yet limited assistance to undertakings in determining the plausibility of access to leniency statements being granted by national courts<sup>25</sup>.

The Damages Directive brought much needed clarification – it aims to improve the interaction between public and private enforcement of competition rules<sup>26</sup>. To this end, it provides that if a party or a 3<sup>rd</sup> party is unable or cannot reasonably provide the evidence requested, national courts shall be able to request disclosure from the competition authority. EU legislation is thus well aware of the fact that information gathered by a competition authority may be very valuable for the victims of antitrust violations. At the same time, the Directive also contains safeguards meant to ensure that the effectiveness of

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<sup>21</sup> CJ judgment of 14 June 2011, C-360/09. For a critical analysis see: B. Wardhaugh, *Cartel Leniency and Effective Compensation in Europe: The Aftermath of Pfleiderer*, Queen's University Belfast Law Research Paper No. 23, available at SSRN:<http://ssrn.com/abstract=2330243> or <http://dx.doi.org/10.2139/ssrn.2330243> (last accessed 15 March 2015).

<sup>22</sup> CJ judgment of 6 June 2013, C-536/11, *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*.

<sup>23</sup> Such view was advocated also by AG Jääskinen in his opinion of 7 February 2013 in case C-536/11 *Donau Chemie and Others*.

<sup>24</sup> CJ judgment of 6 June 2013, C-536/11, *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*.

<sup>25</sup> A. Vlahek, 'Nova Direktiva 2014/104 o nekaterih pravilih glede odškodninskih zahtevkov in postopka zaradi kršitev evropskega in nacionalnega prava' [in:] P. Grilc (ed.), *Liber Amicorum Bojan Zabel*, Pravna fakulteta v Ljubljani, 2015, p. 181; A. Vlahek, 'Challenges of Private Enforcement of Antitrust in Slovenia' [in:] A. Gerbrandy, M. Kovač (eds.), *Economic Evidences in EU Competition Law. European Studies in Law and Economics*, Intersentia, Mortsels-Cambridge 2015, forthcoming (Chapter: Disclosure of documents).

<sup>26</sup> See e.g. C. Kaufmann, N.J. Philipsen, *supra* note 3.

public antitrust enforcement is protected and in particular, that the incentives for offending companies to voluntarily cooperate with the authorities are not diminished<sup>27</sup>. Article 6(6) of the Directive clearly states that leniency statements and settlement submissions are immune from disclosure – a rule considered to be a welcome step forward from the somehow reserved positions of the CJ<sup>28</sup>. The EU legislature duly recognized that allowing such disclosure would be act as a disincentive for potential leniency participants, and without effective leniency programmes, many cartels would not be discovered at all (Recital 26). In order to safeguard the public interest, which might be jeopardized by ordering disclosure, a competition authority may submit observations on the proportionality of a disclosure request to the national court before which a disclosure order is sought (Article 6(11)).

The disclosure of certain other categories of evidence (such as responses to requests for information, information prepared specifically for the proceedings, information drawn up by the authority and sent to the parties) may only be ordered after the competition authority has closed its proceedings. Strict limits on use apply to evidence that has been obtained solely through access to the file of a competition authority. In general, however, all other evidence in the file of a competition authority is disclosable, provided that the principle of proportionality is complied with. This should, as explained in Recital 27, ensure that injured parties retain sufficient alternative means by which to obtain access to relevant evidence, which they need in order to prepare their actions for damages. Recital 22 states in addition that in order to ensure the effective protection of the right to compensation, it is not necessary for every document relating to Article 101 or 102 TFEU proceedings to be disclosed. According to the Directive, it is highly unlikely that the damages action will need to be based on all evidence accumulated in the public enforcement file. In this regard, Recital 23 further explains that particular attention should be paid to preventing ‘fishing expeditions’. Disclosure requests should thus not be deemed to be proportionate where they refer to the generic disclosure of documents in a given case file of a competition authority, or the generic disclosure of documents submitted by a party in the context of a particular case. In any event, it is necessary to distinguish between documents prepared ‘for’ or ‘in the course of’ public enforcement proceedings *versus* those documents that exist independently of the proceedings of a competition authority (‘pre-existing information’). The latter category of documents is fully disclosable (Recital 28).

Another important instrument aimed at greater effectiveness of private antitrust enforcement is set out in Article 9 of the Directive. Claimants in

<sup>27</sup> Ibidem, p. 31–32.

<sup>28</sup> B. Wardhaugh, *supra* note 18.

antitrust damages actions will further be able to rely on a final decision of a National Competition Authority (hereafter, NCA) that establishes an infringement. Such decisions will automatically constitute proof of the violation before courts of the Member State where that infringement occurred<sup>29</sup>. This rule is of great practical importance, given the fact that almost all individual antitrust damage actions take the form of 'follow-on actions', that is, they are brought forward only after the decision of a competition authority regarding an antitrust infringement was adopted. Such rule existed, so far, only in some EU Member States (Slovenia including; see *infra* Section 3.6).

### III. Limited scope of disclosure of evidence in Slovenian civil procedure

#### 1. Documents in possession of the party adducing them

It is understandable that parties are required to produce documents in their possession, to which they themselves have made reference. As this will normally concern documents that support the party's case, it is in principle in the party's own interest to produce them<sup>30</sup>. Still, a major practical dilemma surrounds the question when exactly such documents should be produced. It should be noted that Slovenian civil procedure does not have a general pre-trial disclosure rule. Pursuant to the Yugoslav Civil Procedure Act of 1976, parties were free to submit new facts and evidence until the end of the last session of the main hearing. Such system did not allow for a proper organization of the preparatory stage of the litigation, the structuring of the proceedings, the early identifying of disputed, or the relevant issues of the case. It was also not able to prevent the common – and yet outright fatal from the efficiency point of view – practice whereby attorneys filed further preparatory briefs, adducing new facts and evidence, as late as during the main hearing. The lack of effective tools ensuring the timely gathering of procedural materials used to result in frequent

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<sup>29</sup> A decision of a foreign NCA does not have such conclusive effects but claimants can rely on them as if they amount to at least *prima facie* evidence of the infringement.

<sup>30</sup> The party's consideration might be different if such document contains business or trade secrets. However, the party must take into account that if it submits the document to the court, the opponent will inevitably get full access to it. The option that business and trade secrets could be protected in civil litigation by way of some sort of a 'secret trial' so as to keep them secret from the opponent (and disclosed solely to the court or a court-appointed expert entrusted with the task to inspect the document and provide its non-confidential, edited summary) was rejected by Slovenian courts (Ljubljana Court of Appeals No. I Cpg 708/2013 dated 21 November 2013). The party who chooses to submit documents to the court must take into account that these documents will inevitably be accessible to its opponent ('lose the case or lose the secret').

adjournments of hearings. It also resulted in a ‘piecemeal’ manner in which the facts and evidence of the case were being presented, and in culpably delaying a case’s progress. Another feature of the former system’s litigation style was the frequent use of ‘ambush tactics’ by attorneys. Since there were no time limits for the adduction of fresh evidence, and no obligation regarding advance disclosure, parties often filed documentary evidence only at the oral hearing. As such, they counted on the other party being taken by surprise. Admittedly though, such late disclosure of relevant evidence was often not the result of a deliberate tactic, but a mere consequence of negligent case preparation, or, more often, a tool that enabled the achievement of a desired adjournment<sup>31</sup>.

Already the first Slovenian Civil Procedure Act of 1999 (hereafter, CPA<sup>32</sup>) introduced the rule that parties may assert new facts and evidence no later than at the first main hearing. At a latest stage, parties are allowed to present new facts and new evidence only with a proper justification for the belated submission (Article 286 CPA). Further steps were taken through an amendment in 2008<sup>33</sup>. In order to enable the opposing party’s right to be heard and organize its case, the other party is now obliged, whenever possible, to file new preparatory briefs in sufficient time for them to be served on its opponent, with adequate time before the main hearing. Furthermore, judges now have the discretionary power to require (and to impose binding time limits) that parties make further submissions and clarifications concerning facts, evidence and legal positions in a set time limit (Article 286a(1) CPA). The judge may exercise this discretion already in a written form before the main hearing. The system of procedural sanctions is flexible. The judge is empowered, but not obliged, to use the above tools – he has the discretion to relieve the parties of the sanctions. It is moreover acknowledged that preclusions restrict the parties’ right to be heard and thus they should be applied carefully and so as to ensure a proper balance between competing policies<sup>34</sup>.

## 2. Documents in possession of the other party

In Slovenian (and former Yugoslav) civil procedure, a party has limited access to relevant information and documents held by its opponent and which could adversely affect the opponent’s case. Traditionally, based on the

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<sup>31</sup> See also A. Uzelac, ‘Survival of the third legal tradition?’ 2010 *Supreme Court Law Review* 384.

<sup>32</sup> Zakon o pravdnem postopku, Official Gazette, No. 26/99.

<sup>33</sup> Zakon o spremembah in dopolnitvah Zakona o pravdnem postopku (ZPP-D), Official Gazette, No. 45/2008.

<sup>34</sup> Judgment of the Supreme Court of Slovenia No. II Ips 197/2009 of 7 April 2011.

German and Austrian heritage of civil procedure, the principle applied that no one was obliged to help his adversary win the case (*nemo tenetur edere contra se*)<sup>35</sup>. Hence, the Slovenian CPA only provides for a rather narrow scope of the duty to produce documents upon request of the opposing party (Article 227 CPA)<sup>36</sup>. First of all, a party can request that the opponent produces documents, which the latter itself has referred to in its pleadings, without any restrictions. Second, a party can request disclosure when the opposing party, under substantive laws<sup>37</sup>, has a legal duty to produce certain documents (for instance: share-holders *vis-à-vis* a corporation<sup>38</sup>, agents *vis-à-vis* their principals, keepers of accounting books). Finally, a party can request the disclosure of documents which are, due to their contents, regarded as mutual for both parties (for example, a contract between these parties). In the abovementioned circumstances, the obligation to produce the requested documents is absolute<sup>39</sup>.

Different rules apply for all other documents material for a given case. If the requesting party is aware of the existence of such documents, and can identify them to a sufficient degree (and can also explain how the documents requested are relevant to the case and material to its outcome), the other party that holds them may be required to produce them. However, the duty to disclose is not absolute here as the rules determining witnesses' privileges (cases where witnesses are excused from the obligation to testify) apply *mutatis mutandis* (Article 227 CPA and Articles 231-234 CPA). Hence, disclosure of a document may be denied if the document relates to what the party has confessed to the possessor of the document as their legal counsel (or their religious confessor), or facts discovered while acting as a lawyer, a doctor or in pursuit of another profession, if bound by the duty to protect the confidentiality of communications made during the pursuit of such professions

<sup>35</sup> S. Triva, V. Belajec, M. Dika, *supra* note 10, at p. 425.

<sup>36</sup> It is unclear whether data stored in an electronic form (eg documents that are stored on servers or back-up systems, email and other electronic communications, word-processed documents, documents stored on memory sticks and mobile phones) are considered documents or tangible things subject to proof by observation (see e.g. J. Zobec [in:] L. Ude, *Pravdni postopek – zakon s komentarjem* [Civil Procedure: Act with the Commentary], vol. 2, GV Založba in ČZ UL, Ljubljana 2006, p. 419; compare also R. Stürner, *supra* note 14, at p. 174). However, the dilemma is not really practically important since the rules concerning the duty to disclose and the right to deny disclosure, applicable to documents, apply *mutatis mutandis* also to the inspection of tangible things in the possession of the opponent or 3<sup>rd</sup> persons (Art. 222 CPA).

<sup>37</sup> It has not been settled yet either in case-law or legal writing whether the reference to the statutory duty to submit a document should be construed broadly and hence include also cases where such duty is established on a contractual basis.

<sup>38</sup> See e.g. judgment of the Ljubljana Court of Appeals No. I Cpg 590/2006.

<sup>39</sup> C.f. M. Brkan, T. Bratina, 'Private Enforcement of Competition Law in Slovenia: A New Field to Be Developed by Slovenian Courts' (2013) 6(8) *YARS* 86.

(Article 231 CPA). Nevertheless, the document may not be withheld on the grounds of the protection of a professional secret (applicable, for example, to attorneys at law, medical doctors, mediators, bankers, journalists etc) if the disclosure of certain facts is to the benefit of the public or some other person, provided that such benefit outweighs the damage caused by the disclosure of the secret (Article 232 CPA). A proportionality test must be applied here.

Moreover, a document may also be withheld if by producing it the party might expose herself, her spouse or her close relatives to a serious disgrace, considerable financial loss or criminal proceedings (Article 233 CPA). In such an event, the right to withhold the document is absolute, thus, irrespective of whether the benefit of disclosure for the requesting party would outweigh the damage caused by it to the possessor of the document.

The above system enables therefore only a limited scope of documents disclosure. The first key difference between this system and the common law approach is that in Slovenia a party has no duty to disclose unfavourable documents in its possession on its own motion. Although the law establishes the obligation of truth for the parties (Article 9 CPA), this is merely a proclamation without any sanctions and adverse consequences for non-compliance attached to it. The second major difference is that a party seeking disclosure in Slovenia must sufficiently identify the document it is requesting<sup>40</sup>. A request for the presentation of a document can only be successful if the party is able to describe its content in sufficient detail so as to clearly identify it. This rule is hence only useful for preventing the concealment of documents, the existence of which is already known. It is not useful for documents the content or existence of which is not sufficiently known to the requesting party. This system fails to facilitate any kind of discovery of new information<sup>41</sup> and purely exploratory evidence is not admissible<sup>42</sup>. The duty of the opponent to produce documents only applies if the requesting party has submitted its substantiated pleadings and explained its cases in detail beforehand. It should also be noted that in line with the continental tradition (and in contrast to the US-style of 'notice pleading'), the principle of fact pleading applies in Slovenian civil procedure. This means that a party must plead detailed facts and offer specified means of evidence already in the statement of its claim. According to the continental procedural tradition of fact pleading, the judge will only order the taking of evidence on individual facts that have been asserted by the party.

Parties often try to avoid this limitation by requesting 'the entire correspondence' or 'all documents relating to a certain transaction' to be

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<sup>40</sup> Cf. N. Bucan Gutta, *The Enforcement of EU Competition Rules by Civil Law*, Maklu Uitgevers, 2014, p. 224.

<sup>41</sup> Judgment of the Supreme Court No. II Ips 544/2002, dated 11 September 2003.

<sup>42</sup> See e.g. judgment of the Supreme Court No. II Ips 560/2006.

disclosed, but courts are usually quite restrictive in this regard<sup>43</sup>. Disclosure orders involving generic categories of documents are not allowed<sup>44</sup>. It should be noted in addition that a party cannot demand the opponent to disclose evidence – only the court is authorized to do so upon a party's motion. More importantly, a court order for document disclosure cannot be rendered at the preparatory stage of civil litigation – it can only be issued after the commencement of the main hearing – disclosure mechanisms are thus designed to be used after the commencement of the main hearing. Consequently, they can hardly contribute to a better preparation of the trial, and even less so to stimulate settlements at an early stage of the proceedings. It has been already mentioned that since the amendment of the CPA that took place in 2008, judges have the powers to order documents to be produced already before the main hearing. But this – at least according to the wording of the law – merely relates to documents in possession of that procedural party which has, in its pleadings (the claim, the defence plea), adduced (but still not produced) them. Unfortunately, there is no explicit provision authorizing the court to order, in the preliminary stage of the proceedings, a party to produce documents in its possession which the other party has adduced as evidence.

### 3. Protection of business secrets?

The material scope of disclosure in the Slovenian CPA is relatively broad. It is important to note that the right to seek documents is not (as has traditionally been the case in civil law jurisdictions<sup>45</sup>) restricted to cases where an independent substantive right to possession exists. The disclosure duty extends to documents, the production of which is sought solely on the basis of their relevance to the pending case. It seems, however, that the legitimate interests of the possessor of the requested documents have not been adequately protected. It is especially noteworthy that the protection of trade and business secrets is not explicitly mentioned as a legitimate ground for a disclosure refusal (as it is not a reason for excusing a witness from the duty to testify)<sup>46</sup>. The protection of trade and business secrets is merely a ground

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<sup>43</sup> See e.g. judgment of the Ljubljana Court of Appeals No. I Cpg 1205/2001: '(...) the law refers to specific, individualized documents, invoked by the party, and not to any documents relating to the case or even some undefined and undefinable documentation'.

<sup>44</sup> N. Bucan Gutta, *supra* note 37, at p. 224.

<sup>45</sup> Compare N. Trocker, V. Varano, *supra* note 11, at p. 255.

<sup>46</sup> Compare M. Testen, 'Vloga odvetnika pri pridobivanju in (ne)razkritju dokazov za namen pravnega postopka' ['The Role of the Attorney in Obtaining and (Non)disclosure of Evidence for the Purpose of Civil Proceedings'] (2011) 6-7 *Podjetje in delo* 1506.

for exclusion of the public from all or part of the main hearing, as well as excluding the general public from access to the court file (Article 230 CPA). This however does not solve the problem where a party wishes to safeguard its business secrets *vis-à-vis* its opponent, which might in the same time be its competitor, and to prevent serious damage that could result from improper communication of business secrets to such a party<sup>47</sup>. Protection of professional secrets (relating to jobs where the confidentiality of the professional-client relationship is essential; such as the explicit examples given in the CPA: a lawyer, a doctor or a priest) makes it possible to withhold documents. However, professional secrets are only rarely identical to trade and business secrets<sup>48</sup>. Only if a very broad understanding of the term 'professional secrets' is adopted, it could also include business secrets<sup>49</sup>.

Certain authors have suggested therefore that protection of business secrets could be covered by the provision that documents can be withheld if by producing them the party would expose himself (*inter alia*) to a 'considerable financial loss' or for 'other compelling reasons' (Article 233 CPA)<sup>50</sup>. This seems like a plausible definition. A problem remains however in that – unlike with professional secrets and attorney-client privilege – the right to withhold documents due to a threat of considerable financial loss is unrestricted. No test of proportionality applies here and the court cannot rule that the benefit of producing the document outweighs the damage caused by disclosure of certain business secret. This is, again, not a proper solution. The protection of trade and business secrets should be a legitimate ground for a denial to disclose documents, but not on absolute terms. It is necessary to strike a proper balance between competing values – the right of effective access to the court and the right to be heard *versus* the protection of confidentiality and business secrets.

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<sup>47</sup> Cf. N. Bucan Gutta N., *supra* note 37, at p. 221.

<sup>48</sup> V. Bergant Rakočević, 'Varstvo uradne, vojaške in poslovne tajnosti v civilnem sodnem postopku' ['Protection of official, military and commercial confidentiality in civil proceedings'] (2011) 6-7 *Podjetje in delo* 1483; J. Zobec, *supra* note 33, at p. 445.

<sup>49</sup> One author suggests that 'professional secrets' referred to in Art. 232 CPA are something different from 'professional privileges' in Art. 232, and could thus cover also the notion of 'business secrets' (N. Bucan Gutta, *supra* note 37, at p. 221). But this author fails to see that Art. 232 CPA does not establish a new category of non-disclosable information, but merely adds additional requirements concerning one category of non-disclosable information as determined in Art. 231 CPA. In other words, Art. 231 CPA postulates that members of certain professional groups are entitled to refuse testimony, while Art. 232 CPA in relation to this rule adds that when the protection of professional secrets is invoked, the court must apply the proportionality test. It is thus beyond doubt that in the CPA the notion of a 'professional secret' is used as a synonym for a 'professional privilege'.

<sup>50</sup> Cf. *ibidem*.

The protection of trade and business secrets should thus not form an unconditional and absolute ground for withholding documents. The court should be authorized to weigh up the respective interests in order to establish a proper balance between the adversarial principle and the right to protect business secrets<sup>51</sup>. A solution that offers a compromise should be possible such as: restricted access to the documents or; the redaction of its sensitive parts provided it still provides the requesting party with sufficient information and; if there is a legitimate interest on the part of a party or 3<sup>rd</sup> party to do so. However, no such instruments exist in current Slovenian legislation and neither have they been developed by the courts.

#### 4. Sanctions for non-compliance

The question has to be considered also of the consequences of an opponent failing to produce the required document<sup>52</sup>. Before the 2008 CPA reform, the law provided that the court would assess, within its discretion and taking into account all circumstances of the case, the significance of the fact that the party possessing a document failed to comply with a court order to produce it, or if the company asserted, contrary to the court's belief, that it was not in possession of such document. When it came to the determination of the claim, this usually meant in practice that the court drew adverse conclusions from any refusal to produce readily available documents<sup>53</sup>. This solution was reasonable, adequate and at the same time flexible.

Nevertheless, the Slovenian legislature chose to change the old system in 2008 and introduced a sanctions model for non-compliance which is both harsher, as well as more rigid than its predecessor. Now, if a party does not

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<sup>51</sup> For the specific area of antitrust litigation (claims for damages for infringement of competition law) compare the proposal for the Directive 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 (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+AMD+A7-2014-0089+002-002+DOC+PDF+V0//EN>). Recital 17 of the proposal states that 'while relevant evidence containing business secrets or otherwise confidential information should in principle be available in actions for damages, such confidential information needs to be appropriately protected. National courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during the proceedings'.

<sup>52</sup> First it should be noted that the order that the opposing party must produce the documents is not enforceable. The court has no power to force the opponent to produce such documents even if the requesting party has a legal right to obtain it. The only remaining possibility is to bring a separate claim for handing over of the document in question (*actio ad exhibendum*); L. Ude, *Civilno procesno pravo* [Civil Procedure], ČZ UL, Ljubljana 2002, p. 267.

<sup>53</sup> M. Brkan, T. Bratina, *supra* note 36, at p. 87.

comply with an order to produce a document (which the court believes is in its possession), the court must regard the facts alleged by the requesting party, and supposedly supported by the document in question, as true. Presumably, the novelty was supposed to be in line with Paragraph 427 of the German *Zivilprozessordnung* (hereafter, ZPO)<sup>54</sup>. This, however, is not the case. In Germany, allegations made by the party tendering evidence regarding the nature and content of a document may be assumed to be proven in the case of a failure to comply with the order to produce that document. The differences between the German and the Slovenian rules are significant.

First of all, German judges retain their discretion not to draw adverse inferences from the failure to comply with a disclosure order ('*may*'), unlike the Slovenian solution which obliges them to do so ('*shall*'). Much more importantly, however, the German rule that the asserted content of a given document is considered proven (Paragraph 427 of the German ZPO) is much less far reaching than the Slovenian rule, whereby material facts, intended to be proven by the document in question, shall be considered proven (Article 227(5) of the Slovenian CPA). The German rule is much more appropriate. After all, in a system where evidence is freely evaluated (where judges must weigh all evidence), even if the document was submitted and its contents were indeed such as the requesting party had contended, this would not automatically mean that the party would inevitably succeed in proving the facts, which it intended to prove relying on this document. It is not clear why the Slovenian legislature opted to change the previous flexible sanction system for the party's non-compliance with the court's disclosure order. It might be just one further expression of the general animosity towards judicial discretion in Slovenia, and a persistent preference of the national legal community for a rigid procedural regime.

## 5. Documents in possession of 3<sup>rd</sup> parties and public authorities

Persons other than procedural parties may be ordered to submit documents only if such a duty is imposed upon them by substantive law or if, concerning the contents of a document to be submitted, it was created both for this 3<sup>rd</sup> person and the party adducing it as evidence. Unlike the order directed to the other procedural party, the order for the production of documents directed to a 3<sup>rd</sup> person is directly enforceable (Article 228 CPA). Nevertheless, the law is extremely unfavourable for the party relying on a document in the possession of a 3<sup>rd</sup> person. There is no right to produce the document if the

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<sup>54</sup> J. Zobec, *supra* note 33, at p. 177.

request is based solely on the document's relevance to the pending case, no matter whether the possessor has any legitimate interests to withhold it or not. The legislature entirely failed to strike a balance here between the legitimate interests of litigants (and their constitutional right of effective access to the courts) and the legitimate interests of 3<sup>rd</sup> parties which possess relevant documents.

The present Slovenian system has been criticized for being too restrictive and for its logical inconsistencies. It is unreasonable that a 3<sup>rd</sup> party may be obliged to testify about the content of a certain document in its possession, but is nevertheless not obliged to produce this document in a court<sup>55</sup>.

If a document (relied upon by a party) is held by a public body, and if the latter refuses to produce it, the court may demand its production *ex officio* (Article 226(3) CPA). In addition, the court also has a general power to request that public authorities or public officials communicate records or provide official information (Article 10 CPA).

## 6. Lack of specific rules for private antitrust enforcement litigation

There are no specific rules relating to evidence for antitrust damages actions in the CPA. Neither are such rules included in the Prevention of Restriction of Competition Act of 2008 (hereafter, PRCA-1<sup>56</sup>), which is, in general considered to be a modern piece of competition legislation<sup>57</sup>. Hence, the above presented general regime of the CPA is also fully applicable to private antitrust enforcement. The Public Information Access Act<sup>58</sup>, and its provisions on exceptions to grant access, are also applicable but they do not ensure the desired degree of predictability and legal certainty either; neither do they properly balance competing interests specific for private antitrust enforcement. This is a highly unsatisfactory situation as it jeopardizes the effectiveness of both private enforcement (Article 62 PRCA-1) as well as public enforcement of Slovenian competition law.

A particularly high degree of uncertainty concerns the issue of access to documents held in the file of the Slovenian NCA – the *Javna agencija Republike*

<sup>55</sup> M. Testen, *supra* note 43, at p. 1507; J. Zobec, *supra* note 33, at p. 433.

<sup>56</sup> In Slovenian *Zakon o preprečevanju omejevanja konkurence (ZPOMK-1)*, Official Gazette RS, No. 36/2008, as amended; entered into force on 26 April 2008; English version of the Act (without its latest amendments of 2014) is available at: [http://www.varstvo-konkurence.si/fileadmin/varstvo-konkurence.si/pageuploads/ZPOMK-1-EN\\_consolidated\\_2013.pdf](http://www.varstvo-konkurence.si/fileadmin/varstvo-konkurence.si/pageuploads/ZPOMK-1-EN_consolidated_2013.pdf)

<sup>57</sup> See: A. Fatur, K. Podobnik, 'SI/C Slovenia/Commentary' [in:] *Competition Law in Western Europe and the USA*, Wolters Kluwer, 2014, Chapter SIC-1.

<sup>58</sup> *Zakon o dostopu do informacij javnega značaja – ZDIJZ* (Official Gazette No. 24/03).

*Slovenije za varstvo konkurence* – with respect to its leniency programme<sup>59</sup>. The Decree on the procedure for granting immunity from fines and reduction of fines in cartel cases (hereafter, the Decree<sup>60</sup>) merely states that leniency applications are deemed to be business secrets<sup>61</sup>. However, the very question to what an extent do business secrets constitute a legitimate ground for a disclosure refusal, has not been adequately solved in Slovenian law. There are also no procedural tools which would enable disclosure of documents in such a way that would guarantee that business secrets are protected to the greatest possible extent<sup>62</sup>. The question whether such disclosure must also take place following a court request in an individual damages action is not answered by Article 6 of the Decree either. The latter states only that the NCA ‘may only disclose information and evidence from an application to a company under an infringement procedure after a statement of the objections has been issued in an administrative procedure and in accordance with paragraph 7 of Article 18 of the Act’. The PRCA-1 does include rules on access to the files of the NCA<sup>63</sup>. However, these provisions apply only to the NCA’s administrative proceedings (and are addressed to the parties of those proceedings). They do, not apply to private enforcement proceedings or to requests for disclosure which are made by courts<sup>64</sup>. Fatur, Vlahek and Podobnik therefore observe that ‘it is yet to be seen how this issue is tackled by Slovenian undertakings and authorities’ and that ‘it will also be particularly interesting to see how the new directive is implemented in Slovenia’<sup>65</sup>. For the time being though, leniency participants cannot be sure that their leniency statements will not be disclosed in follow-on actions if so requested by the claimants in these proceedings<sup>66</sup>.

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<sup>59</sup> The Slovenian leniency programme has been implemented by the PRCA-1 of 2008 in order to align the competition regime regarding fines with that of the EU. It was, however, not actually launched until January 2010. See A. Fatur, K. Podobnik, A. Vlahek, ‘Competition Law – Slovenia’ [in:] F. Denozza, A. Toffoletto (eds.), *International Encyclopaedia for Competition Law*, Kluwer Law International/Wolters Kluwer, forthcoming (expected date of publication 2015), Chapter 5, § 1, IV B.

<sup>60</sup> Official Gazette RS, No. 112/09.

<sup>61</sup> Article 6 of the Decree.

<sup>62</sup> For a partially different view see: N. Bucan Gutta, *supra* note 37, at p. 222–223.

<sup>63</sup> Art. 12b(4) of the PRCA: ‘Notwithstanding the provisions of the act regulating access to public information, the Office shall refuse a person requesting access to public information access to information relating to the secrecy of the source and to information constituting a business secrets of undertakings’.

<sup>64</sup> Judgment of the Ljubljana Court of Appeals No. I Cpg 708/2013 of 21 November 2013.

<sup>65</sup> See A. Fatur, K. Podobnik, A. Vlahek, *supra* note 56.

<sup>66</sup> A. Fatur, K. Podobnik, *supra* note 54, Chapter SI.C-35: ‘The leniency programme as regulated by Article 76 of the Competition Act provides for immunity from fines as well as for reduction of fines to potential whistle-blowers. Its characteristics are mainly aligned to the 2006 Commission notice on immunity from fines and reduction of fines in cartel cases, whereby the

Yet since the offender's voluntary submission of incriminating documents to the NCA is a key requirement of the Slovenian leniency programme<sup>67</sup>, it is not surprising that it has thus far been only very rarely applied in practice<sup>68</sup>.

On a more positive note, Slovenia is one of the few Member States that have already, prior to the transposition of the Damages Directive, ensured that claimants in antitrust damages actions are able to rely on a final decision of their NCA (as well as the European Commission) finding an antitrust infringement. In follow-on actions, such decisions automatically constitute proof before the court that the infringement occurred (Article 62(2) of the PRCA-1).

#### IV. Assessment and conclusions

The privilege against self-incrimination is a principle of criminal procedure and like with many other properties of the law of evidence, one should be cautious when applying such doctrines to civil cases. Undoubtedly, in the context of documents disclosure in civil procedures, the privilege against self-incrimination is legitimately applicable insofar as it relates to a party exposing itself to the risk of being prosecuted for a criminal offence<sup>69</sup>. It is, however, an entirely different question whether this privilege should also apply if a party would, by disclosing evidence unfavourable to itself, merely risk losing the civil case at hand. What is decisive is that the structure of a civil case differs from a criminal one, since it inevitably involves the need to strike a proper balance between the conflicting rights of two equal parties. When striving to protect the constitutional rights or legitimate expectations of one party in a civil case, the court should take into account equally important constitutional rights and legitimate interests of the other party. Hence, the traditional, absolute application of the *nemo tenetur edere contra se* principle in civil litigation must be rejected<sup>70</sup>. A proper balance between legitimate expectations and constitutional rights of both parties should be stricken. It

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regime contained in the Competition Act itself regulates solely the more fundamental issues, with the Decree on the procedure for granting immunity from fines and reduction of fines in cartel cases contains the rules on procedure'.

<sup>67</sup> In order to be granted relief from sanctions in a leniency programme the offender must, pursuant to the PRCA-1, *inter alia*, fully and completely disclose its participation in the alleged cartel and cooperate with the NPA throughout the procedure. For other conditions and for general assessment see: *supra* note 56.

<sup>68</sup> Ibidem.

<sup>69</sup> See N. Andrews, *supra* note 6, at p. 55.

<sup>70</sup> Accord: R. Stürner, *supra* note 14, at p. 169.

should be borne in mind that especially in litigations which are either complex or characterized by an unequal position of the parties concerning their ability to obtain evidence (like antitrust damages cases), effective access to justice is inherently linked to access to information.

Additional reasons might exist linked to the fate of civil justice in communist Yugoslavia that add to the general underdevelopment of this issue in Slovenia – not only in legislation and case law, but also in legal writing. The old procedural system highly valued the so-called principle of material truth. Yet it might seem surprising on first glance that in reality, it contained so few instruments which would enable parties to search for that truth. Nevertheless, the absence of such instruments in the hands of the parties used to be ‘compensated’ by broad inquisitorial powers of judges. It is not so surprising therefore that the parties’ lack of access to documents held by others (their opponent or a 3<sup>rd</sup> party) was not perceived as important. Judges used to be empowered to take evidence *ex officio*, alongside broad inquisitorial powers to require the production of any kind of documents, irrespective of who held them. Hence, it was simply expected that if a party fails to gain access to relevant evidence, the judge would take it *ex officio* and invoke the courts’ broad inquisitorial powers. Slovenian law still contains the rule that judges have broad powers to seek documents from any persons (Article 10 CPA). Nevertheless, this rule has lost much of its significance due to the fact that judges are no longer empowered to take evidence *ex officio*, except in regard to procedural pre-requisites (such as jurisdiction) or in exceptional circumstances and certain specific types of disputes (such as family cases).

A closer look at some principles and rules of civil procedure of communist Yugoslavia shows how unfavourable the creditor’s position used to be. For instance, the standard of proof in civil cases has always been very high, closely resembling, by law, the standard applied in criminal cases (‘the judge must be convinced...’)<sup>71</sup>. A strict and absolute (no exceptions) prohibition of so-called ‘exploratory’ or ‘informative evidence’ applied at least until very recently<sup>72</sup>.

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<sup>71</sup> The judge must be (practically) convinced (persuaded) about the existence of a certain fact, if not, the judge should rule against the party carrying the burden of proof for this fact. Hence, even if the court finds it more probable – but still not with a degree beyond a doubt of a reasonable person – that this fact actually exists (Judgment of the Supreme Court, II Ips 492/2002, 8.7.2004: ‘(...)convinced of the existence of material fact beyond doubt of any reasonable person’). The harshness of the high standard of proof is sometimes relaxed in doctrine as well as case law where a solution is applied that the standard of proof in a civil case should not, as Art. 216 CPA implies, be practically identical to the one in criminal cases (beyond reasonable doubt); therefore, a *clearly overwhelming degree of probability* should be sufficient in a civil case (see: *ibidem*). However, a mere decision on the preponderance of probabilities is definitely not sufficient.

<sup>72</sup> Eg judgment of the Supreme Court No. II Ips 106/2001 of 5 July 2002.

That prohibition was stricter than in Germany, for instance, where the doctrine and the case law have developed a balanced approach to the acceptability of *Ausforschungsbeweis*<sup>73</sup>. An absolute prohibition of such adducing of evidence is not justified in cases where the litigants must allege facts that lie outside their range of perception and hence do not have sufficient knowledge of the necessary facts<sup>74</sup>. In such cases, it is on the one hand necessary to alleviate the requirements of substantiated allegation of facts, and on the other hand, to allow informative evidence in order to ensure a fair trial<sup>75</sup>.

It should also be noted that in Slovenian civil procedure the claimant needs to – without exceptions – define a specific prayer of relief (a precise amount of money sought) already in the claim. The claimant cannot wait for the results of expert evidence, for instance, which makes it possible to determine damages effectively. Moreover, the strict principle of ‘the loser pays’ applies and costs of pre-action party-appointed experts are only exceptionally reimbursable. All of the aforementioned features, in addition to the lack of adequate possibilities of access to information, show that the claimant’s position in Slovenian civil procedure is rather difficult. This is so compared not only to the common law systems, but also to other civil law systems. Many of these national features were inherited from the procedural regime of the communist era, despite the fact that it was supposed to have been a system which attached great importance to the finding of ‘material truth’. The entirely inadequate rules on the protection of business secrets in the Slovenian CPA are also a heritage of the communist era<sup>76</sup>.

The present situation in Slovenia is unsatisfactory because a court disclosure order for evidence can only be issued at the trial stage of the civil proceedings, and even this is true to a rather limited extent only. Experience and recent developments abroad – also in other civil law systems<sup>77</sup> and on

<sup>73</sup> Cf. R. Stürner, *supra* note 14, at p. 172.

<sup>74</sup> M. Dolenc, ‘O vlogi informativnega dokaza v pravnem postopku’ [‘On the role of informative evidence in civil proceedings’] (2011) 6-7 *Podjetje in delo* 1467.

<sup>75</sup> The Slovenian Supreme Court adopted such view for the first time in its judgment No. II Ips 302/2011 of 26 April 2012.

<sup>76</sup> Although, unlike in the countries of the Soviet bloc, a system of a ‘centrally planned economy’ did not apply in Yugoslavia, the principles of free market and private initiative were not recognized either, hence also the lack of proper procedural protection of business secrets *vis-à-vis* their adversaries in litigation.

<sup>77</sup> In Germany, since the ZPO reform in 2002, the court is empowered to seek the production of documents – from the other party and from 3<sup>rd</sup> persons – based solely on their relevance to the pending case. 3<sup>rd</sup> parties are protected from having to submit evidence to the extent that this would be unreasonable or that the documents are protected by a statutory witness privilege. It is still debated how far reaching this new rule might be but the prevailing view is that it amounts to a paradigm shift and is a major step in the direction of a general duty to disclose and produce evidence (H. Prütting, ‘International Sources of German Civil Procedure’ [in:]

a level of academic attempts to harmonize civil procedure<sup>78</sup> – show that this restrictive approach to disclosure of documents needs to be re-examined. The creation of an EU-wide litigation disclosure mechanism in the Damages Directive will therefore inevitably have a general impact on civil procedure law in Slovenia. It is true that the EU-wide litigation disclosure mechanism, as established by the Directive, does not fit into existing Slovenian law (where disclosure merely follows rather precise fact pleading and is not a tool for gathering information<sup>79</sup>). It is equally true that the Directive's disclosure mechanism, if introduced, would amount to a radical change in procedural philosophy. It is however very doubtful that Slovenia's existing procedural system enables 'effective private enforcement of antitrust'<sup>80</sup>. The fact that there are practically no cases of successful and, in fact, even attempted private

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M. Deguchi, M. Storme, *The Reception and Transmission of Civil Procedural Law in the Global Society*, Maklu, Antwerpen 2008, p. 257). In France, pursuant to Art. 11 NCPC, when a party possesses relevant documents, the judge can, at the request of the other party, order the party to produce it. Unless legitimate grounds for withholding the document exist, the judge can fine the party for delay (and draw adverse inferences in cases of non-compliance). The judge can, upon the request of a party, also request a 3<sup>rd</sup> party to submit documents unless legitimate grounds for withholding them prevail (eg protection of professional secrecy; see F. Ferrand, 'The Respective Role of the Judge and the Parties in the Preparation of the Case in France' [in:] N. Trocker, V. Varano, *The reforms of civil procedure in comparative perspective*, Giappichelli Editore, Torino 2005, p. 27). Also the new Dutch Civil Procedure Act of 2002 extended the possibilities through which a litigation party can effectively seek the production of documents in possession of the opposing party (Art. 22). A document can be requested if it is relevant to the pending dispute and it may be withheld only for 'compelling reasons'. This is in line with the (also newly introduced) and 'decidedly revolutionary'; G.R. Rutgers, J.W. Rutgers, 'Reform of the Code of Civil Procedure in the Netherlands' [in:] N. Trocker, V. Varano, *The reforms of civil procedure in comparative perspective*, Giappichelli Editore, Torino 2005, p. 140) principle that parties must 'fully and truthfully supply facts that are relevant for the judge's decision under the threat of drawing adverse inferences in case of non-compliance' (Art. 21). The new Swiss Federal Civil Procedure Act (in force since 2011) provides for far reaching obligations of the parties and 3<sup>rd</sup> parties to disclose and produce documents (Art. 160 FCPA).

<sup>78</sup> An important indication of convergence between civil and common law approaches when it comes to evidence disclosure can be found in the ALI/UNIDROIT Principles of Transnational Civil Procedure of 2004. Article 16.2 provides for limited disclosure under the supervision of the court. It states that 'upon timely request of a party, the court should order disclosure of relevant, non-privileged, and reasonably identified evidence in the possession or control of another party or, if necessary and on just terms, of a non-party.' By stating that 'It is not a basis of objection to such disclosure that the evidence may be adverse to the party or person making the disclosure' the Principles explicitly eliminates the old-fashioned continental understanding of the privilege against self-incrimination in civil cases. Still, the explanatory memorandum also makes clear that 'fishing expeditions' should not be allowed.

<sup>79</sup> N. Bucan Gutta, *supra* note 37, at p. 224.

<sup>80</sup> For such view see: *ibidem*. For a more critical view see: M. Brkan, T. Bratina, *supra* note 36, at p. 105–106.

enforcement, speaks for itself. Moreover, the state of great uncertainty as to whether any confidential information and business secrets is exempt from disclosure obligations additionally jeopardizes the legitimate interests of potential defendants in such litigation.

The transposition of the Directive's litigation disclosure mechanism will require a fundamental change in Slovenia's key procedural principles<sup>81</sup>. It would be naïve to expect that such move could indeed be achieved if it was limited (isolated) to the very particular area of private antitrust enforcement – possibly by a mere minimalistic transposition of the Directive's requirements in a copy-paste manner (frequently the case in Slovenia). It is not realistic to expect that the new harmonized disclosure system can be properly and effectively applied by judges, who in all other cases perceive the scope and the purpose of disclosure in an entirely different manner and still adhere to the perception that a party cannot be required to disclose evidence which harms them<sup>82</sup>.

It should also be taken into account that the system promoted by the Directive relies heavily on the application of the principle of proportionality (for instance concerning the degree of protection of business secrets) and extends the use of open-ended terms in procedural legislation, all based on a presumption that judges can be trusted to apply them appropriately. Yet the majority of Slovenia's legal community – judges and attorneys alike – still prefers a rigid procedural regime with detailed rules. They frown upon any attempts to provide more room for judges to adapt the unfolding of proceedings to the characteristics of each particular case. This can also constitute a major impediment to the effectiveness of the litigation disclosure mechanism since the latter promotes, by contrast, the application of open-ended rules and general principles. Finally, the role of practicing attorneys should not be underestimated either. Preparing requests for evidence disclosure requires a great amount of diligent and time-consuming work. This, however, can hardly be expected from those lawyers who have difficulties to engage in a diligent and timely search for information and documents in possession of their own clients (see *supra*, section III subsection 1). Currently, there are merely a handful of law firms in Slovenia which are realistically capable of properly applying the disclosure mechanism foreseen in the Directive.

In conclusion, it is true that the transposition of the litigation disclosure mechanism of the Damages Directive will undermine the existing principles of Slovenian civil procedure. This, however, is due to the fact that Slovenian

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<sup>81</sup> Ibidem.

<sup>82</sup> Cf. (for Germany): W.-H. Roth, 'Private Enforcement of European Competition Law – Recommendations Flowing from the German Experience' [in:] J. Basedow (ed.), *Private Enforcement of EC Competition Law*, Kluwer Law International, 2007, p. 77.

law is outdated with regard to the issue of evidence disclosure and is partially based on erroneous premises. The required transposition of the Directive's requirements should therefore be perceived as a step in the right direction for Slovenia. This step will, however, be successful only if followed by a general reassessment of disclosure of evidence rules in Slovenian civil procedure law.

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# **Access to Documents in Antitrust Litigation – EU and Croatian Perspective**

by

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## **CONTENTS**

- I. Introduction
- II. Access to documents and information from the Commission in cartel-based damages claims
  - 1. Value of published decisions
    - 1.1. Timing
    - 1.2. Content
  - 2. Access under Regulation 1/2003
  - 3. Access under the Transparency Regulation
  - 4. Access under the Damages Directive
- III. Access to documents and information in antitrust litigation under Croatian law
  - 1. Access under the Competition Act
  - 2. Access under the Act on the right of access to information
  - 3. Possibilities and pitfalls of the pending implementation of the Damages Directive
- IV. Conclusions

## ***Abstract***

The paper analyses access to documents in cartel-based damages cases from the EU and Croatian perspective. It considers all relevant EU and Croatian legislation and case-law primarily focusing on the expected impact of the newly enacted Damages Directive. It is argued that the new rules on access to documents provided by the Directive will not necessarily have a significant impact on damages proceedings following cartel decisions issued by the Commission. This is due to

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the introduction of an absolute ban on the disclosure of leniency statements and settlement submissions via a 'maximum harmonization' rule. This conclusion is drawn from statistic figures showing that EU cartel enforcement rests solely on the leniency and settlement procedures. With that in mind, it is concluded that the Directive's general, permissive rules on access to documents (other than leniency and settlement procedures) will not be applicable in most damages cases following the cartel infringement decision issued by the Commission. However, it is also observed that the Damages Directive's new rules on access to documents may have the opposite impact on private enforcement in cases following infringement decisions issued by National Competition Authorities (NCAs) which do not rely as much on leniency in their fight against cartels as the Commission. The Directive's general rule on access to documents will apply in jurisdictions such as Croatia, where all of its cartel decisions so far have been reached within the regular procedure. It is argued that the general access rule, coupled with other rules strengthening the position of claimants in antitrust damages proceedings, might actually be beneficial for both public and private enforcement in such jurisdictions.

### *Résumé*

Cet article analyse, de la perspective européenne et croate, la question d'accès aux documents dans les affaires concernant les actions en dommages introduites par les victimes des cartels. Il examine toute la législation et la jurisprudence européenne et croate, en se focalisant principalement sur l'impact attendu de la Directive relative aux actions en dommages récemment adoptée. Nous affirmons que les nouvelles règles sur l'accès aux documents prévues par la Directive ne vont pas avoir un impact significatif sur les actions en dommages introduites postérieurement à une décision de la Commission constatant une infraction. Cela est dû à l'interdiction absolue par une règle de « harmonisation maximale » de la divulgation des déclarations effectuées en vue d'obtenir la clémence et des propositions de transaction. Cette conclusion est tirée des informations statistiques qui montrent que la lutte contre les ententes repose uniquement sur les programmes de clémence et les procédures de transaction. En tenant compte de cela, il est conclu que des règles générales et permissives de la Directive concernant l'accès aux documents (autres que les procédures de clémence et de transaction) ne seront pas applicables dans la plupart des actions en dommages introduites après la décision sur la violation du droit de la concurrence rendue par la Commission. Cependant, il est également observé que des nouvelles règles sur l'accès aux documents introduits par la Directive peuvent avoir l'effet inverse sur l'application privée du droit de la concurrence dans les actions introduites après les décisions constatant l'infraction rendues par les autorités nationales de concurrence (ANC), qui ne comptent pas autant sur les programmes de clémence dans leur lutte contre les cartels, que la Commission. La règle générale de la Directive sur l'accès aux documents sera applicable dans les pays comme la Croatie, où l'ensemble des décisions constatant l'infraction du droit de la concurrence par un cartel, ont été jusqu'à maintenant atteint dans la

procédure régulière. Nous affirmons que la règle générale sur l'accès aux documents, accompagnée d'autres règles renforçant la position des requérants dans les actions en dommages, pourrait être bénéfique à l'application publique et privée du droit de la concurrence dans telles juridictions.

**Key words:** EU Damages Directive; private enforcement; cartels; antitrust litigation; access to documents; access to file; evidence in antitrust litigation.

**JEL:** K23; K42.

## I. Introduction

It has long since been established<sup>1</sup> that efficient private enforcement of competition law is a vital complement to public enforcement<sup>2</sup>, both acting as prerogatives for the proper functioning of the EU internal market<sup>3</sup>. However, a study performed in 2004 found a 'total underdevelopment'<sup>4</sup> of private antitrust enforcement in individual Member States. This finding was the source of the idea of introducing a specific, EU-wide regime that would facilitate private damages actions<sup>5</sup>. General procedural and substantive tort rules of the Member States proved to be unsuitable for effective antitrust litigation. With

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<sup>1</sup> The European Parliament proposed the idea of introducing rules on antitrust damages already in 1961 during the consultations on the European Commission's (EC) proposal for the first regulation on the application of articles 85 and 86 of the EEC (later becoming Regulation No. 17), OJ 1409, 15.09.1961, point 11.

<sup>2</sup> There has been some academic debate over the desirability of private enforcement. See e.g. W.P.J. Wils, 'Should private antitrust enforcement be encouraged in Europe?' (2003) 26(3) *World Competition* 473. Wils argues that there isn't even a case for a supplementary role for private enforcement. For an opposite view see C.A. Jones, 'Private Antitrust Enforcement in Europe: A policy Analysis and Reality Check' (2004) 27(1) *World competition* 13–24.

<sup>3</sup> 'Both forms are part of a common enforcement system and serve the same aims: to deter anti-competitive practices forbidden by antitrust law and to protect firms and consumers from these practices and any damages caused by them. Private as well as public enforcement of antitrust law is an important tool to create and sustain a competitive economy'. Green Paper – Damages actions for breach of the EC antitrust rules {SEC(2005) 1732} COM/2005/0672 final, Section 1.1. (hereafter, Green paper). Along the same lines see e.g. speech delivered by the former EU Commissioner for Competition Policy Mario Monti entitled 'Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation' SPEECH/04/403.

<sup>4</sup> Green Paper, Section 1.2.

<sup>5</sup> For more see M. Bukovac Puvača, V. Butorac, 'Izvanugovorna odgovornost za štetu prouzročenu povredom pravila tržišnog natjecanja' (2008) 6 *Zbornik radova Pravnog fakulteta Sveučilišta u Mostaru* 249.

the aim of changing this situation, and after a decade of legislative efforts, the long awaited Damages Directive was finally adopted in December 2014<sup>6</sup>. The act covers substantive and procedural issues considered most important for the efficient functioning of the private enforcement regime. They include: access to evidence, limitation periods for bringing an action, standing, burden of proof, effect of decisions rendered by National Competition Authorities (hereafter, NCAs) and legal consequences of the passing-on of overcharges.

When the debate over the introduction of a specific private enforcement regime in the EU started, one important question arose. What is so specific about private antitrust enforcement that it requires specialized, tailor-made rules in order to enable injured parties to obtain damages suffered from competition law infringements? After all, each Member State had some form of its own tort legislation that worked quite efficiently for all other tort injuries. So what made competition-based claims so unusual? The most obvious, and maybe simplistic answer is the unpredictability of the outcome of high cost proceedings, caused by the complexity of antitrust litigation, coupled with inapt substantive and procedural rules for proving a claim. Both public and private antitrust proceedings require a very complex factual, legal and economic analysis. Economic evidence and sound reasoning are often needed to differentiate between pro-competitive and anti-competitive behaviour<sup>7</sup>. In order to reach its decision, a competition authority has to meet a high standard of proof based on a sophisticated analysis.

The same decision-making principles, methods and standards of proof should apply to courts in private antitrust litigation. Yet there are key differences between public and private enforcers when it comes to the availability of tools necessary to reach these analytical standards. Private claimants are generally much less likely to prove their case before a court<sup>8</sup>. This is due to a number of factors, some of which are purely procedural in nature.

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<sup>6</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 Text with EEA relevance, OJ L 349, 05.12.2014, p. 1.

<sup>7</sup> Gutierrez-Rodriguez, Juan David, 'Expert Economic Testimony In Antitrust Cases: A Comparative Law And Economic Study' (2009) 14 *International Law, Revista Colombiana De Derecho Internacional* 224.

<sup>8</sup> Particularly in stand-alone actions, as there is no prior administrative infringement decision on which the claimants' may rely in the civil proceedings. However, even in follow-on cases (cases brought after a competent competition authority has reached an infringement of EU competition rules decision), claimants are not in an envious position. Under most EU tort rules, claimants will still have to face great difficulties in proving causation, fault (where required) and quantifying damages.

This paper will focus on a particular procedural issue – access to evidence in cartel cases. It is undoubtedly one of the most important components of the new private enforcement regime, as it potentially affects a great number of possible claimants. In fact, cartel activities are seen as the most harmful of all anti-competitive practices that result in the greatest number of injured subjects.

In order to make a plausible case, a private claimant has to produce evidence that supports his claim<sup>9</sup> and collect data necessary for the provision of legal and economic proof in the courtroom<sup>10</sup>. However, antitrust litigation is characterized by an information asymmetry. While the infringer is in possession of all evidence pertaining to its illegal behaviour, the claimant often has nothing but the knowledge of the injury suffered. The evidence necessary to prove a damages claim is thus usually held by the infringer or by 3<sup>rd</sup> parties, most notably a competition authority<sup>11</sup>. Evidence is generally not easily accessible to a private claimant, which is also insufficiently aware of the existence of such evidence<sup>12</sup>. It is thus crucial to look into the rules regulating access to documents for private claimants.

Section I of this paper analyses the available routes for a private claimant to obtain relevant information and documents from the European Commission (hereafter, Commission or EC) in preparation of a damages claim. The paper first scrutinizes the value of published EC decisions and points out to the possible problems facing private claimants (II.1). Access to documents via Regulation 1/2003 is examined next (II.2), followed by the Transparency Regulation (II.3), with the view of demonstrating their inefficiency for the purposes of damages actions. Rules on access to documents envisaged by the Damages Directive are last to be considered (II.4). It is argued that rules on access to documents contained in the Directive will not exercise a significant impact on damages proceedings following EC cartel decisions. This is due to the Commission's extensive use of the EU leniency programme and the settlement procedure, coupled with the Directive's very restrictive rules on the

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<sup>9</sup> Some authors have questioned whether access to the file is really a prerequisite to assess damages. See C. Hummer, M. Cywinski, 'ECJ's Judgements In "Enbw" And "Donau Chemie" And The Unresolved Problems Of Access To File' (2014) 7(2) *Global Competition Litigation Review* 115–118.

<sup>10</sup> 'Access to information is critical to effective use of expert witnesses. Forensic economics depends upon access to firm-specific data. Often that data will relate to costs, markets, strategic planning and other matters that relate to the specific competition law offence at issue'; I.A. Gavil, 'The Challenges of economic proof in a decentralized and privatized European competition policy system: lessons from the American experience' (2008) 4(1) *Journal of Competition Law and Economics* 199.

<sup>11</sup> Recital 15 of the preamble of the Damages Directive.

<sup>12</sup> Recitals 14–15 of the preamble of the Damages Directive.

disclosure of documents obtained by the EC in such proceedings. Here, private enforcement will remain a subsidiary tool to public enforcement, rather than its complement. It is argued furthermore that differences between national rules on access to documents will continue to persist albeit to a minor degree.

Section III focuses its assessment on the case of Croatia, considering to what an extent private enforcement will become efficient following cartel decisions rendered by smaller NCAs (which do not rely as much on leniency in their fight against cartels as the Commission). To that end, rules on access to documents under existing Croatian legislation are analyzed, considering the normative set-up of the Civil Procedure Act (III), the application of the Competition Act (III.1), and followed by the Act on the right of access to information (III.2). Last but not least, possibilities and pitfalls of the pending implementation of the Damages Directive are considered (III.3). It is argued that because the Croatian Competition Agency does not relay as much on leniency as the Commission, the Directive's general, more permissive rule on access to documents will apply here. Hence, the implementation of the Directive might prove beneficial for both public and private enforcement in Croatia.

## **II. Access to documents and information from the Commission in cartel-based damages claims**

### **1. Value of published decisions**

A full-length decision of the Commission on an antitrust violation may prove to be a valuable source of information for private claimant. It may contain information directly pertinent to a damages claim, or may be used as guidance for identifying information and documents to be requested from the EC for the purpose of a damages procedure. Most useful are documents obtained during the preparation of a damages claim, when the claimants can evaluate the risks associated with initiating litigation, and 'take account of evidence and findings when drafting pleadings'<sup>13</sup>. Before commencing a civil damages procedure, a future claimant may want to wait until the EC publishes a full-length infringement decision because of its potential evidentiary value. However, a claimant will have to take into consideration several likely impediments.

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<sup>13</sup> A. Howard, 'Disclosure Of Infringement Decisions In Competition Damages Proceedings: How The UK Courts Are Leading The Way Ahead Of The Damages Directive' (2015) 6(4) *Journal Of European Competition Law And Practice* 257.

## 1.1. Timing

First, it may take years before a full-length decision is publicly available. It has become common practice for the Commission to publish in the Official Journal<sup>14</sup> summary decision only<sup>15</sup>. A full, non-confidential version of the decision is usually published on the Commission website with a delay<sup>16</sup>. The latter occurs due to disputes arising between the EC and the parties concerning the contents of the web publication<sup>17</sup>, particularly with respect to the question what information deserves confidential treatment.

When deciding on the disclosure of allegedly confidential information, the Commission must follow a rather complicated and lengthy procedure as described by the Court in the *AKZO I*<sup>18</sup> judgement<sup>19</sup>. The delay may be even more significant in cases where the EC refuses to grant confidentiality to particular pieces of information. This can result in the interested party applying, pursuant to Article 278 TFEU, for interim relief before the General Court (hereafter, GC) on the ground of confidentiality<sup>20</sup>. Cartel infringers may tactically take advantage of this right to prolong the ‘push-back exercise

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<sup>14</sup> According to Art. 30 Regulation 1/2003, the EC is obliged to publish in the Official Journal only the names of the parties and the main content, including any penalties imposed.

<sup>15</sup> P. Roth, V. Rose (eds.), *Bellamy & Child, European Community Law of Competition*, 6th ed., Oxford University Press 2008, para 13.112.

<sup>16</sup> Regulation 1/2003 does not specify publication time limits. While the EC does its best to publish simultaneously the summary decision in the Official Journal and the full non-confidential version on its website, the later is often delayed. This in turn may lead to a substantial publishing delay ‘due to disputes with the parties regarding the contents of the web publication’. European Commission, *Antitrust manual of procedure, Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU*, March 2012, available at [http://ec.europa.eu/competition/antitrust/antitrust\\_manproc\\_3\\_2012\\_en.pdf](http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf) (accessed 07.05.2015), Ch. 28 Publication of decisions, p. 3. (hereafter, Antitrust manual of procedure).

<sup>17</sup> Antitrust manual of procedure, Ch. 28 Publication of decisions, p. 3.

<sup>18</sup> *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission*, Case 53/85, EU:C:1986:256, para 29.

<sup>19</sup> ‘Akzo procedural rule says that where the Commission intends to disclose information which the company providing it wants to be treated as business secret or confidential, it shall inform that company in writing of its intention and the reasons for it. Where the company concerned objects to the disclosure of this information, but the Commission finds that the information is not protected and may therefore be disclosed, that finding shall be stated in a reasoned decision. This decision has to be notified to the company concerned, which has to be given the opportunity to bring an action before the European Court of First Instance with a view to having the Commission’s assessments reviewed. The information may not be disclosed before one week after the decision has been notified’. Glossary of competition terms, AKZO procedure, available at <http://www.concurrences.com/Droit-de-la-concurrence/Glossaire-des-termes-de/AKZO-Procedure?lang=en> (accessed 11.05.2015).

<sup>20</sup> See *Bank Austria Creditanstalt v Commission*; *Pergan Hilfsstoffe für industrielle Prozesse v Commission*; *Pilkington v Commission*; *Akzo v. Commission*

to restrain publication which may extend beyond the limitation periods and force claimants to issue half-baked claims which then face the risk of strike out or summary judgement'<sup>21</sup>. With this strategy in mind, battles concerning information disclosure (in the fuller non-confidential version of the Commission's decision) have recently moved into the courtroom arena, as demonstrated in *Pilkington*<sup>22</sup> and most recently *AKZO*<sup>23</sup> judgments. In both cases, the infringers were granted interim relief against the publication of an extended version of a Commission decision that potentially contained data valuable for private claimants.

According to Article 104(2) of the Rules of Procedure, an application for interim measures must state the subject-matter of the proceedings, the circumstances giving rise to urgency, and the pleas of fact and law establishing a prima facie case for the requested interim measures. Where appropriate, the judge hearing the application must also weigh up the interests involved<sup>24</sup>.

For parties resisting publication of a fuller version of an infringement decision, the recipe for obtaining interim relief seems to be rather simple. It is practically enough for an applicant to bring before the court an action for the annulment of the EC decision (that denies the request for confidential treatment) simultaneously with an application for interim measures.

In both *Pilkington* and *AKZO*, the argument essentially evolved around the conclusion that the applicants were likely to suffer serious and irreparable harm because, if the information was disclosed, they would be denied effective judicial protection before the resolution of the main action. If the interim measures were denied, the EC would be free to immediately publish the extended version of its infringement decision. This would, in turn, render any subsequent judgments ordering its annulment an illusion by depriving it of its effectiveness. By having access to such arguably confidential information, the general public would have the opportunity to use it as they please. The eventual subsequent annulment of the infringement decision would not be able to reverse these consequences.

As a result, when an application for interim measures is accompanied by an action for the annulment of a Commission decision denying a request for confidential treatment, the interim measure is likely to be granted, in order not to prejudice or render illusory the subsequent annulment procedure (unless, of course, the information is clearly non-confidential). This back and forth battle between the applicants and the Commission will almost always delay the publication of an EC infringement decision and this fact is to be

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<sup>21</sup> A. Howard, *supra* note 13 at 258.

<sup>22</sup> *Pilkington v Commission*, T-72/09, EU:T:2014:1094.

<sup>23</sup> *Akzo Nobel NV and Others v European Commission*, T-345/12, EU:T:2015:50.

<sup>24</sup> Order of the President in Case C-445/00 *R Austria v Council* [2001] ECR I-1461, para 73.

taken into account by private litigants. The Commission will thus generally have to limit the information contained in its summary decision to basic facts only, while a more complete publication will have to await the conclusion of the main proceedings before the GC<sup>25</sup>. Even if infringers may successfully avail themselves of the rules concerning interim relief to delay the publication of a full infringement decision, this by no means implies that they will be equally successful in the main proceedings for the annulment of the decision refusing to grant confidential treatment. As much as it is useful to have the complete decision at the pre-action stage, in order not to face limitation problems, it is much more efficient to initiate private claims and then request the stay of such proceedings awaiting the publication of a full EC decision.

## 1.2. Content

Private litigants should bear in mind that sometimes even the full versions of an EC decision might still lack the information and data necessary for the claimant to find evidence necessary to prove his claim. This is particularly true in cartel cases investigated and fined through settlement and leniency procedures. Generally, such decisions are very sparse when it comes to the facts of the case and the economic data pertaining to the cartel behaviour, this is true in particular for settlement procedures. Moreover, access to materials obtained by the EC in leniency and settlement proceedings has now been subjected to sever restrictions by the new disclosure rules contained in the Damages Directive.

However, in the *AKZO v. Commission*<sup>26</sup> judgment rendered in January 2015, the GC extended the possible publishable content of full non-confidential versions of cartel decisions taken in the ambit of a leniency procedure.

The dispute arose when the Commission, for reasons of transparency, decided to publish another, fuller version of its infringement decision concerning the hydrogen peroxide cartel<sup>27</sup>. The extended version was supposed to include extracts from leniency materials describing the way in which the cartel operated. This would include details on the collusive contracts and anti-competitive agreements, names of products concerned, figures concerning prices, allocation of market shares and objectives pursued by the cartel. Referring to the EC's duty to honour the legitimate interests of undertakings in protecting their business secrets, the parties opposed the publication of

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<sup>25</sup> M. Kellerbauer, 'The Recent Case Law On The Disclosure Of Information Regarding EU Competition Law Infringements To Private Damages Claimants' (2014) 35(2) *European Competition Law Review* 60.

<sup>26</sup> Judgement *AKZO v. Commission*, T-345/12, EU:T:2015:50.

<sup>27</sup> EC decision, *Hydrogen Peroxide and Perborat* (COMP/F/38.620) of 03.05.2006.

the extended version of the infringement decision. When the Hearing Officer rejected one of the undertaking's (AKZO) request for confidential treatment, AKZO sought the protection of the GC by initiating proceedings against the Commission. The court applied a test developed in settled case law whereby in order to be considered confidential, the information must be: (i) known only to a limited number of persons; (ii) if disclosed, it must be liable to cause serious harm to the person who has provided it or to 3<sup>rd</sup> parties and, finally, (iii) the interests liable to be harmed by the disclosure are, objectively, worthy of protection. In essence, the Court held that the EC is entitled to publish an extended version of its cartel decision containing a description of the constituent elements of the infringement. Such publication can take place even if it is likely to cause AKZO serious harm because it is able to facilitate damages claim against AZKO. The court ruled that being exposed to an increased risk of civil liability is not a cartel participant's legitimate interest that needs to be protected.

This judgment shines new light on the value of published leniency-based cartel decisions for private litigants in terms of the information they contain. The ruling may be seen as a compromise, or a balance between public and private enforcement. This is so particularly in light of the restrictive normative developments brought forward by the Damages Directive regarding access to leniency materials. If leniency corporate statements enjoy full protection, the rest of leniency materials do not necessarily fall into the category of confidential information. They are thus to be disclosed (though the publication of the decision) to as many persons as possible regardless of the harm that may cause to the infringers in terms of an increased risk of civil liability.

Although this judgement is more favourable to private litigants' interests, information contained in published decisions will hardly ever be sufficient to meet the standard of proof necessary to demonstrate a damages case. Access to documents is thus an inevitable step for a claimant. The latter may seek to obtain the confidential version of the EC decision, or may try to seek information and documents contained in the file of the Commission. The EC's file contains a 'plethora of useful information pertaining to sales volumes, prices, internal company documents (such as marketing strategies and e mail), commercial relationships with other parties and all important leniency documents and corporate statements'<sup>28</sup>. These documents will remain valuable even in follow-on cases where it is not necessary to prove the existence of the antitrust violation. Such information could be useful in proving the extent of the harm suffered and the causal link between the violation and the harm.

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<sup>28</sup> P. Bentley, D. Henry, 'Antitrust Damages Actions: Obtaining Probative Evidence In The Hands Of Another Party' (2014) 37(3) *World Competition* 274.

Prior to the enactment of the Damages Directive, parties had at their disposal two main routes for obtaining the necessary information and documents from the EC: 1) the route of Regulation 1/2003<sup>29</sup> and the route of 2) the Transparency Regulation<sup>30</sup>. These two instruments remain a valid legal ground for obtaining documents in the possession of the EC even after the enactment of the Damages Directive<sup>31</sup>. However, considering the development of EU case law on the application of these two instruments and, in particular, on the use of the Transparency Regulation<sup>32</sup>, they may not be as attractive a tool for these purposes as they used to be<sup>33</sup>.

## 2. Access under Regulation 1/2003

Pursuant to Article 15(1) of Regulation 1/2003, Member States' courts may request, in proceedings for the application of Article 101 and 102 TFEU, the EC to provide them with information or opinions on questions concerning the application of EU competition rules<sup>34</sup>. A detailed explanation of this duty is contained in the Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 101 and 102 TFEU (hereafter, Notice on cooperation)<sup>35</sup>. Accordingly, information held by the EC may refer to both documents in its possession and information of

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<sup>29</sup> There may be other routes to obtain access to documents such as seeking disclosure before non-EU courts through discovery rules applicable in that jurisdiction; applying to be interveners before EU courts in appeal proceedings; attempting to act as a complainant before the EC or NCAs. For more see G. De Stefano, 'Access of damage claimants to evidence arising out of EU cartel investigations; a fast evolving scenario' (2012) 5(3) *Global Competition Litigation Review* 95–110.

<sup>30</sup> Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.05.2001, p. 43.

<sup>31</sup> In fact, Article 6(2) of the Damages Directive explicitly states that rules on disclosure of evidence included in the file of a competition authority are without prejudice to rules and practices under the Transparency regulation. Furthermore, recital 15 of the preamble of the Damages Directive states that where a national court wishes to order disclosure of evidence by the EC, Article 15(1) of the Regulation 1/2003 applies.

<sup>32</sup> See *Commission v. EnBW*, C-365/12 P, EU:C:2014:112.

<sup>33</sup> Because the differences disfavour claimants litigating in one Member State as compared to claimants litigating in another member state. See e.g. P. Bentley, *supra* note 28 at 273; M. Kellerbauer, *supra* note 25 at 57.

<sup>34</sup> Information held by the EC may refer to both documents in its possession and information of a procedural nature.

<sup>35</sup> Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C 101, 27.04.2004, p. 54 (hereafter, Notice on co-operation).

a procedural nature<sup>36</sup>. However, the Commission's disclosure duty is limited. Since the EC is bound by professional secrecy, it may provide national courts with information only if the latter provide a guarantee that the confidential information and business secrets will remain protected while under their care<sup>37</sup>.

Furthermore, the Commission may refuse to grant access to the requested information in order to safeguard the interests of the EU, its functioning and independence<sup>38</sup>. On these grounds, the EC can reject a national court's request for the delivery of information submitted by leniency applicants. According to the Notice on the co-operation, such information may be granted only with the consent of the leniency applicants<sup>39</sup>. In practice, however, this solution works like an absolute ban on the disclosure of corporate statements, since no leniency applicant would grant access to documents that will be used against it in a civil procedure<sup>40</sup>. Considering the impossibility of access to documents held in the EC's files through Article 15 of Regulation 1/2003, 3<sup>rd</sup> parties may take advantage of the Transparency Regulation to obtain evidence from the Commission.

### 3. Access under the Transparency Regulation

Another way to access the files of the EC is through the application of general rules on access to documents of EU institutions provided by the Transparency Regulation. The purpose of this act is to facilitate access to documents of all EU institutions, including the Commission. The Transparency Regulation is a general tool not designed specifically for antitrust litigation. It is also a public tool – available to any individual or corporation residing or having their headquarters in a Member State. Furthermore, unlike Regulation 1/2003, the Transparency Regulation does not condition access upon a particular use

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<sup>36</sup> According to point 21 of the Notice on the co-operation, a national court may ask the EC for documents in its possession or for information of a procedural nature to enable it to discover whether a certain case is pending before the EC, whether the latter has initiated a procedure or whether it has already taken a position. A national court may also ask the EC when a decision is likely to be taken, so as to be able to determine the conditions for any decision to stay proceedings or whether interim measures need to be adopted.

<sup>37</sup> Recital 25 of the Notice on co-operation.

<sup>38</sup> Recital 26 of the Notice on co-operation.

<sup>39</sup> Recital 26 of the Notice on co-operation.

<sup>40</sup> This right of leniency applicants will not relate to pre-existing documents – 'documents not specifically drawn up for the leniency application but submitted as evidence to the Commission as a part of a leniency application'; S.V. Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective*, Maklu, Antwerpen-Apeldoorn 2013. p. 195.

of the accessed document. In other words, documents obtained through the Transparency Regulation may be used for any purpose.

Because of these distinct features, access to documents via the Transparency Regulation is subject to exceptions – some of which have been very successfully invoked by the Commission when resisting the disclosure of leniency statements and settlement submissions. According to Article 4(2) of the Transparency Regulation, the Commission may refuse, *inter alia*, access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, or the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure. The EC used to consistently invoke these exceptions through ‘blanket’ disclosure refusals covering entire categories of documents<sup>41</sup>. Its protective attitude towards leniency submissions is very explicitly stressed in the Leniency Notice<sup>42</sup> stating that the ‘Commission considers that normally public disclosure of documents and written or recorded statements received in the context of the leniency application would undermine certain public or private interests, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of Regulation (EC) No 1049/2001 even after the decision has been taken’<sup>43</sup>.

Initially, in cases where private parties tried to annul decisions of the EC refusing access to its file, EU courts interpreted the exceptions of Article 4(2) of the Transparency Regulation rather narrowly, taking a claimant-friendly approach. Already in 2005, in *Austrian Banks* case<sup>44</sup>, the GC ruled that the ‘blanket refusal’ approach taken by the EC is unlawful<sup>45</sup>. A similar conclusion was reached in the 2011 *CDC hydrogen peroxide* case<sup>46</sup>.

The *CDC hydrogen peroxide* case involved a party’s request to access a single document, the index of the case file held by the Commission. It was a valuable document as it listed all items collected in the file, and would enable the private litigant to identify specific pieces of evidence for which disclosure should be requested in already initiated damages proceedings. When the Commission ultimately decided to disclose only a non-confidential version of the ‘statement of contents’, the disclosure-seeking party initiated proceedings

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<sup>41</sup> Ibidem, 192.

<sup>42</sup> Commission notice on immunity from fines and reduction of fines in cartel cases, OJ C 298, 08.12.2006, p. 17. (hereafter, Leniency notice).

<sup>43</sup> Para 40 of the Leniency notice.

<sup>44</sup> *Verein für Konsumenteninformation v Commission of the European Communities*, T-2/03, EU:T:2005:125.

<sup>45</sup> For a more detailed comment see G. Mackenzie, ‘The public now enjoys partial access to the EC’s file in cartel cases’ (2005) 4(9) *Competition Law Insight* 8–9.

<sup>46</sup> *CDC Hydrogene Peroxide Cartel Damage Claims (CDC Hydrogene Peroxide) v European Commission* T-437/08, EU:T:2011:752.

before the GC. The latter ruled against the EC – it ordered the index to be disclosed, arguing that this would not undermine the protection of business secrets or the purpose of the investigation. The GC expressed the view that avoiding private damages actions cannot be regarded as a commercial interest of a cartel participant, and particularly not an interest deserving of public protection.

As to the protection of the purpose of the investigation, the GC ruled that this concept cannot be interpreted by the Commission as including all of its policy in regard to cartel punishment and prevention. As a result, the EC may not refuse disclosure of all documents related to its leniency programme on the basis of the argument that such disclosure may in the future discourage cartel infringers from co-operating with the Commission<sup>47</sup>. Such a broad interpretation of the concept of ‘investigation activities’ was deemed by the GC as incompatible with the principle of the fullest possible effect of the right of public access to documents entrenched in the Transparency Regulation<sup>48</sup>.

In February 2014, the Court of Justice ruled on the *EnBW* case<sup>49</sup> limiting access to documents as defined by the GC in *CDC* and adopted a strict attitude towards disclosure, as it previously did in *Netherlands v. Commission*<sup>50</sup>.

The *EnWB* case started when private litigants sought access to practically the entire EC’s file. The latter denied such access and the parties sought the annulment of this decision before the GC. The Court ruled that the EC has to inspect every single document requested before refusing access and thereby annulled its ‘blanked refusal’ approach. The Commission appealed the GC judgement and in February 2014, the Court of Justice set aside the 1<sup>st</sup> instance ruling. In essence, the Court of Justice stated that authorising generalised access to a leniency file on the basis of the Transparency Regulation would jeopardise the balance formulated in Regulation 1/2003 and 773/2004<sup>51</sup>. In other words, the balance between the undertakings’ obligation to submit sensitive commercial information to the EC and the EC’s duty to protect such information on the grounds of professional and business secrecy.

The Court concluded, *inter alia*, that in order to apply the exceptions of Article 4(2) of the Transparency Regulation, the EC is entitled to assume that disclosure of documents will, in principle, undermine a) the protection of the commercial interests of the undertakings involved, and b) the purpose

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<sup>47</sup> Ibidem, paras 68–69.

<sup>48</sup> Ibidem, para 71.

<sup>49</sup> *European Commission v EnBW Energie Baden-Württemberg AG*, C-365/12 P, EU:C:2014:112.

<sup>50</sup> *Kingdom of the Netherlands v European Commission*, T-380/08, EU:T:2013:480.

<sup>51</sup> According to these acts, cartel infringers are under the duty to submit sensitive commercial information, while the EC in turn guarantees their increased protection, by virtue of the requirement of professional secrecy and business secrecy (ibidem, para 93).

of the investigations relating to the proceeding. Such presumption may be reached without carrying out a specific, individual examination of each of the documents in the file<sup>52</sup>. The Court of Justice stated also that this general presumption is rebuttable by demonstrating that a specific document's disclosure is not covered by the presumption, or that there is an overriding public interest in disclosure<sup>53</sup>. According to the Court of Justice, there is no need for every document in the cartel file to be disclosed for the purposes of actions for damages. Accordingly, a private claimant should establish that access to the EC's cartel file is necessary for him, in order to enable the Commission to perform the weighing-up of the interests in favour of disclosure against those in favour of confidentiality. In this concrete case, the Court of Justice held that the EC was right in denying access as there was nothing in the given case that was capable of rebutting the described presumption. The fact that EnWB intended to seek compensation for the loss allegedly caused by the cartel did not suffice to obtain disclosure. According to the Court, the interest in obtaining compensation for the loss suffered cannot constitute an overriding public interest within the meaning of Article 4(2) of the Transparency Regulation<sup>54</sup>. Instead, the claimant has to show in what way access to documents is necessary, that is, demonstrate that disclosure would enable it to obtain the evidence needed to establish its claim for damages. The claimant would also have to demonstrate that there are no other ways of obtaining that evidence. According to the Court of Justice, EnWB failed to do so<sup>55</sup>.

The finding of the Court of Justice makes it much harder for the claimants to obtain documents contained in a cartel file via the Transparency Regulation<sup>56</sup>. They have to establish that a specific document is necessary for them to establish the damages claim and that there are no other ways to obtain that evidence<sup>57</sup>. By contrast, the Commission has a much easier task as it does not have to weigh up interests of access with the interest of

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<sup>52</sup> Ibidem, para 93. As to the latter, the Court concluded that, investigations relating to the proceeding may be regarded as completed only when the decision adopted by the EC in connection with that proceeding is final.

<sup>53</sup> Ibidem, para 100.

<sup>54</sup> Ibidem, paras 104–106.

<sup>55</sup> Ibidem, para 132.

<sup>56</sup> For a more detailed comment on the case see C. Lacchi, A. Östlund, 'General Presumptions of Non-disclosure of Leniency Documents: a New Approach to the Interaction between Public and Private Enforcement of Antitrust Law?' (2014) *European Law Reporter* 56–61; A. Blume Huttenlauch, 'Transparency (Un)limited?' (2014) *European Law Reporter* 107–109; B. Lebrun, L. Bersou, 'Commission v EnBW Energie: Non-Disclosure of Leniency Documents' (2014) 5(7) *Journal of European Competition Law & Practice* 462–463.

<sup>57</sup> *Kingdom of the Netherlands v European Commission*, T-380/08, EU:T:2013:480, para 132.

confidentiality for each document in the file. It may instead rely on the general presumption that disclosure may jeopardize interests protected by antitrust rules<sup>58</sup>. After this ruling, '[t]he door to having sight of Commission documents under Transparency Regulation may therefore have been effectively closed, or at least left only slightly ajar'<sup>59</sup>. In practice, all hopes to obtain evidence necessary to prove damages claim reside with the Damages Directive.

#### 4. Access under the Damages Directive

Until the enactment of the Damages Directive, there was no specific EU-wide regime on disclosure of evidence in antitrust litigation. In order to access the files of the Commission, private claimants relied on either Regulation 1/2003 or the Transparency Regulation, both with very limited success. When it comes to access to documents contained in the files held by NCAs, private litigants had to rely on varying national procedural rules. National laws on disclosure of evidence differ greatly among Member States. While the UK, with its common-law system, provides for a wide disclosure through general discovery rules, Member States belonging to the civil-law family do not have such standard procedures and consequently have a much more limited scope of evidence disclosure. These differences in national laws are 'conductive to forum shopping, which is an anathema of the principles underpinning the single market'<sup>60</sup>. This fact alone was inductive to the creation of an EU-wide disclosure regime in actions for damages resulting from breaches of EU competition rules. However, it is yet to be seen whether the Damages Directive will result in the desired level of harmonization of national rules on access to documents, completely eliminating forum shopping incentives.

The Damages Directive introduces a specific disclosure regime considered to be its 'most controversial initiative'<sup>61</sup>. According to the Damages Directive, parties are supposed to have easier access to evidence which they need for the purposes of proving their damages claim, while avoiding overly broad disclosure of evidence. Very much in line with the judgement in the *EnWB* case, the Damages Directive emphasises that it is implausible that all evidence contained in the EC's file will be needed for the action for damages. Accordingly, in order to safeguard the effective protection of the right to

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<sup>58</sup> <http://www.stibbe.com/en/news/2014/march/competition-law-newsletter---march-2014> (accessed 14.05.2015).

<sup>59</sup> P. Bentley, *supra* note 28 at 276.

<sup>60</sup> *Ibidem*, 272.

<sup>61</sup> A. Howard, *supra* note 13 at 256.

compensation, it is unnecessary for every single document concerning EC proceedings to be revealed to a claimant merely because he is planning an action for damages<sup>62</sup>. Thus, subject to the principles of effectiveness<sup>63</sup> and equivalence<sup>64</sup>, a party in need of documents held by the opposing party or a 3<sup>rd</sup> person, including the competition authority, might as a rule, obtain a court order for the disclosure of those documents<sup>65</sup>.

This general rule of disclosure prescribed by Article 5 of the Damages Directive is conditioned upon several factors. To begin with, disclosure is available only to a claimant who demonstrates that he has suffered harm as a result of the given antitrust infringement. A claimant may do so by presenting a reasoned justification based on reasonably available facts and evidence showing plausibility of his claim. Furthermore, disclosure may be granted only for specified items of evidence, or relevant categories of evidence, specified as precisely and narrowly as possible to avoid ‘fishing expedition’<sup>66</sup>. Although it is a legitimate objective to avoid overly broad disclosure, it will still be difficult for claimants to narrowly identify those documents which they believe to be in the possession or control of the defendant, a 3<sup>rd</sup> party or a competition authority<sup>67</sup>. In addition, national courts have wide discretion in deciding whether documents so specified are proportionate to the defendant’s legitimate interests. In fact, national courts may only order disclosure of evidence provided it is proportionate. In deciding which specific evidence, or group of evidence, is proportionate, national courts will consider the legitimate interests of all parties concerned and several additional factors: the extent to which the claim or defence is supported by available facts and evidence; the

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<sup>62</sup> Recital 22 of the preamble of the Damages Directive.

<sup>63</sup> In accordance with the principle of effectiveness, Member States must ensure that all national rules and procedures relating to the exercise of damages claims are designed and applied in such a way that they do not render practically impossible, or excessively difficult, the exercise of the EU right to full compensation for harm caused by an antitrust infringement (Art. 4(1) of the Damages Directive).

<sup>64</sup> In accordance with the principle of equivalence, national rules and procedures relating to damages actions resulting from Article 101 or 102 TFEU breaches must not be less favourable to the alleged injured parties than those governing similar damages actions resulting from infringements of national law (Art. 4(2) of the Damages Directive).

<sup>65</sup> Art. 5(1) of the Damages Directive.

<sup>66</sup> According to Recital 23 of the preamble of the Damages Directive, these are non-specific or overly broad searches for information unlikely to be of relevance for the parties to the proceedings. Accordingly, generic disclosure of documents in the file of a competition authority relating to a certain case, or the generic disclosure of documents submitted by a party in the context of a particular case, should not meet the proportionality criteria.

<sup>67</sup> A. Howard, ‘The Draft Directive On Competition Law Damages – What Does It Mean For Infringers And Victims?’ (2014) *European Competition Law Review* 53.

scope and cost of disclosure<sup>68</sup>; and the existence of confidential information<sup>69</sup>. These general principles and rules may be broadened up by Member States in favour of wider disclosure.

However, according to the Damages Directive, the general rule on disclosure has two important exceptions directly affecting claimants who suffered damages as a consequence of a cartel. Article 6 sets out a rule of absolute protection of leniency statements and settlement submissions and a temporary ban for certain categories of evidence – the ban is applicable until the end of the administrative procedure underway before a competition authority<sup>70</sup>. The latter relates to settlement submissions that have been withdrawn and information prepared specifically for the purpose of public competition law proceedings, such as statement of objections or parties' submissions to a competition authority<sup>71</sup>. The disclosure of evidence in the file of a competition authority that does not fall within the ban (absolute or temporary) – so-called pre-existing documents – may be disclosed at any time. Finally, according to the Damages Directive, evidence is to be obtained from a competition authority only when it cannot reasonably be obtained from another party or a 3<sup>rd</sup> party<sup>72</sup>. In order to be granted access, the party should first demonstrate that it is reasonably unable to obtain documents from other sources. This may prove to be an additional hurdle to be overcome before accessing the EC's file.

The general rule on access to documents contained in the Damages Directive is a 'minimum harmonisation' rule, as it sets only the minimum standard and permits Member States to implement a wider disclosure of evidence, provided the principle of proportionality is observed. Given this wide discretion given to Member States, and the interpretative discretion of national judges, the level of success of collecting evidence on the basis of this general rule will depend mostly on the implementation of this article into each national legal order and the use of court powers to order disclosure. For this reason, differences may persist across Member States even in the future and the envisaged harmonisation will not be sufficient to entirely annul forum shopping incentives on account of disclosure rules. By contrast, the aforementioned exception to the

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<sup>68</sup> Especially for any 3<sup>rd</sup> parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure (Art. 5(3)(b) of the Damages Directive).

<sup>69</sup> Especially concerning 3<sup>rd</sup> parties in the procedure and what arrangements are in place for protecting such confidential information (Art. 5(3)(c) of the Damages Directive).

<sup>70</sup> That exemption should also apply to verbatim quotations from leniency statements or settlement submissions included in other documents; Recital 26 of the preamble of the Damages Directive.

<sup>71</sup> Art. 6(5) of the Damages Directive.

<sup>72</sup> Recital 26 of the preamble of the Damages Directive.

general disclosure rule covering leniency statements and settlement procedures is a rule of ‘maximum harmonisation’. Member State may thus not deviate from this rule, that is, they are not allowed to implement a different solution domestically to that prescribed in the Directive. This means that all national laws implementing it will have to ban the disclosure of leniency statements and settlement submissions. With this in mind, the effect of the rules on access to documents envisaged by the new Damages Directive will depend largely on the extensiveness of the use of leniency and settlements by given competition authorities in their fight against cartels.

The described regulatory solution of the Damages Directive only appears to strike the right balance between private and public enforcement. It has to be argued here that the new rules will not have the expected beneficial impact on those damages proceedings that following EC cartel decisions, because the Commission relies almost exclusively on leniency procedures and settlement submissions in its cartel cases. When it came to the design of the Damages Directive, the interests of public enforcement prevailed over the interests of private enforcement with respect to cartels. Adopting a maximum harmonisation rule providing for an absolute ban of access to evidence obtained within leniency and settlement procedures is a clear indication thereof. This explicit policy choice is justified by the key importance of leniency and settlements for the fight against cartels. In fact, recital 26 of the Damages Directive expressly states that ‘leniency programmes and settlement procedures are important tools for the public enforcement of Union competition law as they contribute to the detection and efficient prosecution of, and the imposition of penalties for, the most serious infringements of competition law’. Furthermore, it essentially states that effective leniency and settlement procedures are beneficial to damages actions as most of those claims follow-on from leniency and settlement decisions. While this is true in terms of exposing illegal cartel behaviour, it is very difficult to see in what other way are these procedures beneficial to private claimants, particularly considering the very low evidentiary value of settlement decisions. Finally, the legislator argues that ‘undertakings might be deterred from cooperating with competition authorities under leniency programmes and settlement procedures if self-incriminating statements such as leniency statements and settlement submissions, which are produced for the sole purpose of cooperating with the competition authorities, were to be disclosed’. According to the Damages Directive, such disclosure would place cooperating undertakings in a worse position than non-cooperating undertakings in terms of an increased risk of exposing them to civil and/or criminal liability<sup>73</sup>. Even if this proposition is

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<sup>73</sup> Recital 26 of the preamble of the Damages Directive.

true, rules against disclosure should not have the impact of extending the ‘immunity from fines under an administrative leniency to civil (non-) liability before the judiciary’<sup>74</sup>.

The Damages Directive tries to compensate the absolute ban on the disclosure of leniency statements and settlement submissions by making ‘pre-existing information’ available. This category contains evidence that exists irrespective of the proceedings of a competition authority, whether or not such information is in the file of a competition authority<sup>75</sup>. In other words, even if a prohibition decision is rendered through the leniency procedure, only leniency statements are fully protected from disclosure<sup>76</sup>. Hence, all other materials gathered by a competition authority prior to the leniency application, or material existing independently from such an application, are available for disclosure (such as e-mails between cartel participants). By a verbatim of the Damages Directive, these should include even original documents and information quoted in leniency statements or attached to such statements. According to recital 28 of the Damages Directive, national courts should be able, at any time, to order the disclosure of such information.

In a press release following the enactment of the Damages Directive, the Commission stressed that evidence needed by claimants will typically be contained in such documents<sup>77</sup>. Nonetheless, it is doubtful whether such information will be sufficient to prove damages claims in all cases<sup>78</sup>. Even where such documents would provide sufficient proof for the claimant, the latter would face difficulties in exactly pinpointing such documents or information. This is so given the requirement of the Damages Directive that disclosure may be ordered only for specified items of evidence, or relevant categories of evidence, circumscribed as precisely and narrowly as possibly. If a claimant asked for a category of evidence named ‘pre-existing documents’, this would be considered too broad of a request and it would be regarded as a fishing

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<sup>74</sup> A. Chirita, ‘The disclosure of evidence under the Directive 2014/104/EU’, (not published yet) presented and prepared for the 4. Petar Šarčević International Scientific Conference: EU Competition And State Aid Rules: Interaction Between Public And Private Enforcement, Rovinj, 9–10 April 2015.

<sup>75</sup> Art. 2(17) Damages Directive.

<sup>76</sup> Art. 2(16) Damages Directive explicitly excluded pre-existing information from the definition of a leniency statement.

<sup>77</sup> EC Memo: Antitrust: Commission proposal for Directive to facilitate damages claims by victims of antitrust violations – frequently asked questions, Brussels, 17 April 2014, available at [http://europa.eu/rapid/press-release\\_MEMO-14-310\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-310_en.htm)

<sup>78</sup> C. Brömmelmeyer, ‘Directive damages: Does the commission overstep the marks again?’ (2015) 1 *Sorbonne Procedural Law Review Online*, available at <http://irjs.univ-paris1.fr/labo/departement-de-recherche-justice-et-proces/revueelectroniqueliensprocessu/directiveprivateenforcement/> (accessed 10.07.2015).

expedition on the side of that claimant. A disclosure motion for such a category of evidence would thus most likely be rejected by the court. Furthermore, it should be stressed that pre-existing documents are often encrypted and basically useless, unless explained by the defendants and placed in the overall context of the cartel. That context is provided in leniency statements but because these are written specifically for the purposes of the procedure before a competition authority, their disclosure can at no point in time be ordered. With this in mind, even in situations where a claimant is successful in specifying a concrete piece of pre-existing documents and information, its value will not necessarily be substantial for the claimant. Finally, it should not be forgotten that leniency programmes and settlement procedures were introduced to facilitate the detection and sanctioning of cartels, since they were very difficult to prove in the regular, unassisted procedure (given the lack of material evidence). The same difficulties will apply to private claimants with regard to acquiring pre-existing documents, unless they know exactly what to look for, which will rarely be the cases.

It has been repeatedly stressed that rules on the protection of leniency statements and settlement submissions sought to protect leniency programmes, threatened by *Pfleiderer*<sup>79</sup> and *Donau Chemie*<sup>80</sup>. An extensive academic discussion took place on the potential negative impact of the *Pfleiderer* balancing test<sup>81</sup> on the EU leniency programme<sup>82</sup>. Most of the opinions are based around the argument that leniency will be much less attractive for

<sup>79</sup> *Pfleiderer AG v Bundeskartellamt*, C-360/09, EU:C:2011:389.

<sup>80</sup> *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*, C-536/11, EU:C:2013:366.

<sup>81</sup> In fact, according to *Pfleiderer*, Member States' courts should, on the basis of national laws, determine 'conditions under which access must be permitted or refused by weighing the interests protected by the European Union law', *Pfleiderer AG v Bundeskartellamt*, C-360/09, EU:C:2011:389, para 33.

<sup>82</sup> P.J. Slot, 'Does the *Pfleiderer* judgment make the fight against international cartels more difficult?' (2013) *European Competition Law Review* 197–206; U. Müller, 'Access to the file of a national competition authority' (2011) 2 *European Law Reporter* 56–64; A. Geiger, 'The end of the EU cartel leniency programme' (2011) 3 *European Competition Law Review* 535–536; C. Hummer, M. Cywinski, 'ECJ's judgments in 'EnBW' and 'Donau Chemie' and the unresolved problems of access to the file' (2014) 7(2) *Global Competition Litigation Review* 115–118; S.B. Völcker, 'Case C-360/09, *Pfleiderer AG v. Bundeskartellamt*, Judgment of the Court of Justice (Grand Chamber) of 14 June 2011, nyr.', (2012) *Common Market Law Review* 695–720; G. Goddin, 'The *Pfleiderer* Judgment on Transparency: The National Sequel of the Access to Document Saga' (2012) 3(1) *Journal of European Competition Law & Practice* 40–42; A. Kumar Singh, 'Pfleiderer: Assessing its Impact on the Effectiveness of the European Leniency Programme' (2014) *European Competition Law Review* 110–123; M. Sanders, E. Jordan, et al., 'Disclosure of leniency materials in follow-on damages actions: striking 'the right balance' between the interests of leniency applicants and private claimants?' (2013) *European Competition Law Review* 174–182; M. Sánchez Rydelski, 'Antitrust Enforcement: Tensions between Leniency Programmes and Civil Damage Actions – How Immune is a Leniency Applicant? (*Pfleiderer*

cartelists given the legal uncertainty regarding the possibility of 3<sup>rd</sup> parties accessing leniency materials. Furthermore, according to the ruling in *Donau Chemie*, access to leniency documents may be refused only for overriding public interests reasons relating to the protection of leniency programmes. The Court of Justice stressed here that ‘it is only if there is a risk that a given document may actually undermine the public interest relating to the effectiveness of the leniency programme that non-disclosure may be justified’<sup>83</sup>. Therefore, in these cases, the Court of Justice decided that a plaintiff in a follow-on action for damages could access the leniency documents of a NCA under the discretion of a national judge in preforming the balancing exercise. When it comes to corporate statements and settlement submissions, the Damages Directive ‘corrected’ the above rulings and left national judges no room of discretion to perform such a balancing exercise. As a result, the Directive effectively renders these judgments obsolete with regard to these two categories of documents<sup>84</sup>.

While this is good news for leniency applicants and the Commission as far as protecting public enforcement of competition rules, and in particular the leniency programme, it is bad news for those who have suffered damages due to illegal cartel behaviour. According to the Damages Directive, the general ‘rules on the disclosure of documents *other* than leniency statements and settlement submissions ensure that injured parties retain sufficient alternative means by which to obtain access to the relevant evidence that they need in order to prepare their actions for damages’<sup>85</sup>. However, general rules on disclosure, as liberal and permissive as they may be, cannot sufficiently compensate for the lack of access to leniency documents in cartel cases. This is due to the fact that the EC’s sanctioning of cartels relays almost completely on the leniency programme. Coupled with the settlement procedures, there is not much hope for private litigants to obtain evidence to support their claims (following a EC cartel decision) within the framework of the new Damages Directive.

Statistic data shows that the use of settlement and leniency has become the norm in the EC’s cartel enforcement practice<sup>86</sup>. Over the past five years,

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AG/Bundeskartellamt, ECJ (Grand Chamber), Judgment of 14 June 2011, C-360/09’ (2011) 6 *European Law Reporter* 178–182.

<sup>83</sup> *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*, C-536/11, EU:C:2013:366, para 48.

<sup>84</sup> P. Bentley, *supra* note 28 at 281. The authors argue that judgements are still applicable to white-listed documents (pre-existing information) and grey-listed documents (those under the temporary disclosure ban).

<sup>85</sup> Recital 27 of the preamble of the Damages Directive.

<sup>86</sup> M. Barennnes, ‘The Role of the Settlement Procedure and of the Leniency Program in the European Commission’s Fight against Cartels: Some Considerations in Light of the Commission’s Practice during the Past Five Years (2010–2014)’, (not published yet) presented and prepared for the 4. Petar Šarčević International Scientific Conference: EU Competition

almost all EU cartel cases that led to an infringement decision started with an immunity application. ‘Two percentages are particularly telling in this regard. First, 90 per cent of all the prohibition decisions were adopted after an immunity application was lodged. Second, 100 per cent of the cases that ended in a non-settlement decision started with an immunity application. These figures clearly show the critical role the leniency program plays in the Commission’s capacity to trigger an investigation and to adopt a final prohibition decision’<sup>87</sup>. Likewise, from 2010 to 2015, the settlement procedure ‘was used in 60 per cent of the decisions the Commission adopted. Even more representatively, for the year 2014 alone, 80 per cent of the Commission’s decisions were “full settlement” or “hybrid” decisions’<sup>88</sup>.

This data is very telling. It means that the Commission no longer renders any cartel decisions within a regular procedure. Consequently, if this enforcement trend continues, there will be no cartel cases where the general, more permissive rules on the disclosure of evidence will be applicable. Furthermore, as already explained, there is not much value to published cartel decisions (in particular settlement decisions) as they contain a very small amount of information of use to a potential plaintiff. Given this fact, and the available statistical data, it may be concluded that the new rules on access to documents will leave private litigants who have suffered damages because of a cartel with a very limited possibility to prove their case before the court if it is the EC that has rendered the infringement decision. Therefore, despite the general preposition favouring access entrenched in the new Damages Directive, the system will almost certainly continue to favour public over private enforcement (leniency programmes and settlement procedures) regardless of any possible statements to the contrary<sup>89</sup>. However, the outcome may be different when Article 101 TFEU is applied against a cartel by a NCA in jurisdictions that do not have a functioning leniency programme, such as Croatia.

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And State Aid Rules: Interaction Between Public And Private Enforcement, Rovinj, 9–10 April 2015, 8.

<sup>87</sup> Statistic data available on the EC website and processed in *ibidem*.

<sup>88</sup> *Ibidem*.

<sup>89</sup> Some voiced the concern that not even this is enough to protect leniency programmes. According to Geradin and Grelier, the principles set by the EC leave sensitive materials largely unprotected in particular the leniency applicants’ responses that would be accessible to potential claimants after the investigation ends. Leniency applicants might thus become less forthcoming in their responses; more generally, this could deter prospective applicants. See D. Geradin, L.-A. Grelier, ‘Protection of leniency submissions: an insufficient ‘Pfleiderer fix’ Cartel Damages Claims in the European Union: Have we only Seen the Tip of the Iceberg?’ George Mason University School of Law; Tilburg University – Tilburg Law and Economics Centre (TILEC) 2013, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2362386&rec=1&srcab s=2292575&alg=1&pos=1](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2362386&rec=1&srcab s=2292575&alg=1&pos=1) (accessed 22.05.2015).

### III. Access to documents and information in antitrust litigation under Croatian law

There is only one provision in the Croatian Competition Act regulating private enforcement of competition rules. However, this provision does not grant any specific rights to victims to get access to documents held in the files of the Croatian Competition Agency (hereafter, CCA) with a view of bringing an antitrust damages claim<sup>90</sup>.

According to the general rules of the Civil Procedure Act, in proceedings before the court, each party is obliged to provide facts and present evidence on which his claim is based<sup>91</sup>. It is the court that subsequently decides which of the proposed evidence shall be presented to establish the decisive facts<sup>92</sup>. It is up to the party to furnish the documents representing proof of his statement. If such documents are in the possession of a state authority, or a 3<sup>rd</sup> person<sup>93</sup>, and the party him is not able to arrange for the document to be handed over or shown, the court shall obtain the document by itself upon a motion by the party<sup>94</sup>. However, the court will intervene only when the requesting party specifies concrete pieces of evidence. Under the Croatian normative

<sup>90</sup> Art. 69a defines commercial courts as competent to decide on damages claims based on the infringements of Croatian and EU competition rules. It further establishes the liability of undertakings concerned for the compensation for damages resulting from competition law infringements. Although the decisions of the CCA are not legally binding for commercial courts, according to Art. 69a, they must take into account the legally valid decision of the CCA on the basis of which an infringement of domestic or EU competition rules has been established. Likewise, competent commercial courts must take account of final decisions of the EC in cases where the EC established the infringement of Article 101 or 102 TFEU. The competent commercial court may assess whether it is necessary to stay or suspend its proceedings until a legally valid decision of the CCA or a final decision of the EC is rendered. Furthermore, the competent commercial court must inform the CCA of any claims filed regarding the right to seek compensation for antitrust damages based on EU or domestic competition rules. The limitation period for damages claims should be suspended from the day on which the proceeding was initiated by the CCA or by the EC until the day when the relevant proceedings have been closed.

<sup>91</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.

<sup>92</sup> Art. 220(2) of the Civil Procedure Act.

<sup>93</sup> [and] the party him/herself is not able to arrange for the document to be handed over or shown.

<sup>94</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.

set-up, the parties should know exactly what the documents are that have to be presented in support of their claim, and should try to obtain them by themselves before requesting a court order. Potential plaintiffs may opt for two routes to obtain such documents: via the Competition Act or via the Act on the right of access to public information, both routes being of very limited value for gathering evidence.

## 1. Access under the Competition Act

The Croatian Competition Act only contains a provision on access to documents for the purposes of proceedings held before the Croatian NCA – the CCA. In that sense, quite logically, the right to full access to the files of the CCA is granted only to the parties to such proceedings, and only after they received a Statement of Objections<sup>95</sup>. Although the scope of disclosure is rather wide, some categories of documents cannot be accessed even by the parties. They include: draft decision, official statements, protocols and typescripts from the sessions of the Council, internal instructions and notes on the case, correspondence and information exchanged between the CCA and the EC, between the CCA and other international competition authorities and their networks, and other documents which are covered by the obligation of business secrecy<sup>96</sup>. All other documents may be accessed during or after the procedure.

Substantially more limited access to the CCA's file is granted to two other categories of persons: those who filed the initiative for the commencement of public proceedings, and those who find that their rights or legal interests are decided upon by the CCA. According to Article 36(2) of the Croatia Competition Act, a person who filed the initiative for the commencement of public proceedings is not a party to the proceedings. He may, however, be granted certain procedural rights. Similarly, those whose rights or legal interests are decided upon by the CCA are not parties to the proceedings, but they may be granted the same procedural rights as the person who initiated the proceedings<sup>97</sup>. Both of these types of entities are likely plaintiffs in antitrust damages claim. Hence, these rules are of particular importance when it comes to access to documents for the purposes of antitrust damages claims. Pursuant to the Croatian Competition Act, during public enforcement proceedings, the above categories of entities may only be granted access to a non-confidential,

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<sup>95</sup> Art. 47(1) of the Croatian Competition Act, official gazette Narodne Novine 79/09, 80/13.

<sup>96</sup> Art. 47(4) of the Croatian Competition Act.

<sup>97</sup> Art. 36(3) of the Croatian Competition Act.

shortened version of the Statement of Objections<sup>98</sup>. Once the proceedings are over and the decision is rendered, the right of access is granted only if the CCA refuses to open proceedings or fails to find a violation of the Croatian Competition Act<sup>99</sup>. Very rightly, some authors have observed that this 'normative set-up presupposes that it is not necessary to grant the right to access to file for those harmed by an antitrust infringement in cases where the agency adopts a decision finding the infringement'<sup>100</sup>. At the same time, in terms of private antitrust damages claims, these are the most important rules. The legislator's intention was clearly limited only to regulating the public enforcement procedure conducted before the CCA and so 3<sup>rd</sup> parties have a very narrow scope for accessing potential evidence via the Croatian Competition Act<sup>101</sup>.

Analogue to EC infringement decisions, 3<sup>rd</sup> parties may actually try to rely on the information provided in published decisions. Yet the above discussion on the value of such decisions, and the time necessary for their publication in the EU context, is applicable domestically as well, albeit to a lesser degree. This refers to the publication of non-confidential versions of CCA decisions with a limited evidentiary value, the publication of which may be delayed by the interplay between the parties and the CCA on what constitutes business secrets (although such delay rarely happens). In principle, the CCA considers that the data and documentation on which its decision is based is normally not covered by its duty to protect business secrecy<sup>102</sup>. However, the Croatian Competition Act provides also that the notion of business secrets covers everything which is defined to be a business secret by the undertaking concerned, if accepted as such by the CCA<sup>103</sup>.

From all the decisions published on the CCA website since 2010, there has been only one regarding a request to access documents on the grounds of the Croatian Competition Act by the person who filed the initiative for the

<sup>98</sup> Art. 47(6) and 48(4) of the Croatian Competition Act.

<sup>99</sup> According to Art. 47(5) of the Croatian Competition Act, *'the person who filed the initiative and the persons who, based on the separate decision of the CCA, have been granted the same procedural rights which are enjoyed by the person who filed the initiative, shall enjoy the right of access to the documents which served as a basis for the decision of the CCA as follows: after the receipt of the decision referred to in Article 38 of this Act stating the reasons on the basis of which there was no public interest or no grounds for the initiation of the proceedings, after the receipt of the decision'*.

<sup>100</sup> J. Pecotić Kaufman, 'How to facilitate damages claims? Private enforcement of competition rules in Croatia- Domestic and EU Law perspective' (2012) 5(7) *Yearbook of Antitrust and Regulatory Studies* 14-54.

<sup>101</sup> This issue has not been decided by the courts yet, so it remains to be seen 'what position the courts will take in determining the interests of the complainant and whistle-blowers'; B. Vrcek, 'Developments in private enforcement of competition rules after the Croatian accession to the EU' (2014) 7(3) *Global Competition Litigation Review* 155.

<sup>102</sup> Art. 53(6) point 4 of the Croatian Competition Act.

<sup>103</sup> Art. 53(2) point 3 of the Croatian Competition Act.

commencement of the proceeding. The request aiming to access particular pieces of documentation was eventually denied by the CCA on the grounds of their confidentiality (business secrets<sup>104</sup>). There may be many more decisions of this kind – they are simply rarely published due to their relative unimportance for the wider public. For that reason, it is difficult to make an empiric analysis. However, judging from the rules themselves, it may easily be concluded that access by 3<sup>rd</sup> parties via the Croatian Competition Act is very restrictive.

## 2. Access under the Act on the right of access to information

Because of such a limited possibility of document access through the Croatian Competition Act, 3<sup>rd</sup> parties (potential plaintiffs who wish to access the CCA's file) would currently have to rely on the general rules of the Act on the right of access to information<sup>105</sup> (hereafter, Act on Access to Information). The latter is the national equivalent of the Transparency Regulation and is compliant with the latter<sup>106</sup>. The objective of the Act on Access to Information is to give natural persons and legal entities the possibility to exercise the right of access to information, as well as its re-use. However, similarly to the Transparency Regulation, the Act on Access to Information restricts the right of access under certain circumstances.

A temporary access ban applies to information relating to any procedures held by the competent bodies in their preliminary and investigation activities – this ban applies for the duration of the respective procedures<sup>107</sup>. In those cases, the relevant public body must deny access. All other restrictions are discretionary. According to Article 15(2) of the Act on Access to Information, public authorities may restrict access if, *inter alia*, the information represents a trade or professional secret under the law<sup>108</sup>, and if the information is generated by public authority bodies, and if disclosure prior to completion of its final version might seriously undermine the decision-making process<sup>109</sup>. Of course, the latter relates to situations where access is requested prior to the completion of the final version of the relevant document. Finally, public authorities *may* restrict access to information in the case of a reasonable doubt that such disclosure might prevent the conduct of efficient, independent and unbiased judicial,

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<sup>104</sup> UP/I 034-03/2014-01/016 from 30.07.2014.

<sup>105</sup> Act on the right of access to information, official gazette, Narodne Novine 25/13 (hereafter, Act on Access to Information).

<sup>106</sup> Art. 3 of the Act on Access to Information.

<sup>107</sup> Art. 15(1) of the Act on Access to Information.

<sup>108</sup> Art. 15(2) point 2 of the Act on Access to Information.

<sup>109</sup> Art. 15(2) point 5 of the Act on Access to Information.

administrative or other legally regulated proceedings<sup>110</sup>, and the execution of court orders or sentences, and prevent the work of bodies conducting administrative supervision, inspectional supervision (legal supervision)<sup>111</sup>.

In applying this discretionary right, the relevant authority is bound to conduct the proportionality test and the public interest test prior to reaching its decision. The two tests refer to the assessment of the proportionality between reasons for disclosure and reasons for imposing access restrictions, and granting access to information only if the public interest prevails<sup>112</sup>. More specifically, the test consists of whether granting access to the requested information in each individual case would seriously damage these interests, and whether the need to protect the right to confidentiality prevails over the public interest. If the public interest prevails over the damage caused to individual interests, the information shall be made available<sup>113</sup>. Under the normative intention of the legislator, public interest consists of disclosure, while the protection of documents reflects, in effect, the protection of the private interest of the person to whom the information relates. However, the debate over protecting leniency statements reverses the above notion of public and private interest. Protection of documents equates here to the protection of the public interest, while disclosure equates to the protection of the individual interest of the particular plaintiff in a civil action for damages. In that sense, it becomes rather difficult, if not impossible, to properly perform the proportionality and public interest tests while deciding whether to grant the disclosure request of documents contained in the CCA's file, as proscribed by the Act on the right of access to information. Even though this is a very important issue for actions for damages, it is not possible to make any empirical conclusions here, as there are no publicly available decisions that would demonstrate in what manner the CCA decides on such requests. This is not surprising considering that there are hardly any antitrust damages cases pending before commercial courts in Croatia, so no evidence is being gathered for that purposes.

### **3. Possibilities and pitfalls of the pending implementation of the Damages Directive**

The implementation of the Damages Directive into Croatian legislation, including rules on disclosure contained in its Articles 5 and 6, will inevitably affect the approach to access to documents by potential claimants. National

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<sup>110</sup> Art. 15(3) point 1 of the Act on Access to Information.

<sup>111</sup> Art. 15(3) point 2 of the Act on Access to Information.

<sup>112</sup> Art. 5(7) of the Act on Access to Information.

<sup>113</sup> Art. 16(2) of the Act on Access to Information.

rules will have to be adapted and it is suggested here that this should be done for competition cases only, and within the ambit of the Civil Procedure Act. Some of the rules of the Damages Directive are more relaxed for plaintiffs than current Croatian solutions. Such is the case with Article 5(2) of the Damages Directive whereby Member States must ensure that national courts are able to order the disclosure of specified items of evidence or 'relevant categories of evidence', circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification. The current text of the Croatian Civil Procedure Act contemplates however only court assistance in obtaining concrete documents. When transposed, the EU solution might greatly relax the position of plaintiffs in Croatian court proceedings. The position of plaintiffs might also become more favourable in Croatia following the implementation of the Directive's rule explicitly granting to national judges the power to order documents containing confidential information, against a guarantee of their safety. According to Croatia's current normative set-up, it is not clear whether a national judge would have such an explicit power, or it would be up to the CCA to decide on the deliverable content of a document.

On the other hand, by being much more specific regarding requirements placed on the national judiciary, Articles 5 and 6 of the Damages Directive might also have a narrowing down effect when it comes to the rights of private claimants. Under the current normative set-up, a Croatian judge is bound to evaluate only the relevance of the documents in terms of their value in establishing the facts of the case. Following the implementation of the Damages Directive, this situation will inevitably change placing the judge in a position of a protector of the effectiveness of public enforcement of competition law. Yet looking from a different perspective, the requirements of the proportionality test as defined by the Directive might give valuable guidance to Croatian judges (which are generally not overly keen to give lengthy explanations for their decisions). The rights of claimants in Croatia might also be narrowed down following the implementation of the Directive because of its rule whereby a national court may order the disclosure of evidence included in the file of a competition authority only where no party, or 3<sup>rd</sup> party, is reasonably able to provide that evidence. There is no such rule currently in operation in Croatia.

Certainly, the rule on the absolute protection of leniency applications contained in Article 6 of the Damages Directive is completely novel to the Croatian normative-set up (rules on settlement submissions are irrelevant in this context because no such procedure exists in Croatia). Although current legislation does not contain such rule in relation to a civil damages action, the CCA would most probably protect these documents against disclosure on the ground of Article 7 of the Regulation on immunity from fines and

reduction of fines<sup>114</sup>. On its basis, leniency statements may be disclosed only to parties to the proceedings before the CCA, and only after they have received their Statement of Objections. Disclosure may be granted exclusively for the purposes of the procedure before the CCA, or before the Administrative Court as a 2<sup>nd</sup> instance body. Being very explicit and restrictive, these rules would justify the CCA's decision against a 3<sup>rd</sup> party disclosure request.

What comes to mind is that these specific rules on private enforcement facilitating the position of the claimant, and in particular rules on access to documents, might actually prove to be very valuable in the Croatian context. Actually, the entire debate on the balance between public and private enforcement is likely to have a completely different dynamics in Member States with underdeveloped public enforcement. For instance, not a single leniency application has so far been lodged in Croatia, despite the fact that it has already been 5 years since Croatia's Leniency programme was introduced (2010) with the adoption of the Regulation on the method of setting fines<sup>115</sup> and the Regulation on immunity from fines and reduction of fines. It is very difficult to identify the reasons behind the failure of the domestic programme, considering EU cartel enforcement relies almost completely on its leniency. The most logical conclusion here would be the infringers' perception that the CCA is unable to detect and punish cartels on its own. Wills very rightfully observes that 'a leniency policy will [...] start working if the antitrust enforcement authority concerned has built up a sufficient level of credibility as to its capacity to detect and punish antitrust violations on its own'<sup>116</sup>.

If one is to look over Croatian cartel enforcement, a few facts stand up. Over the past five years, the CCA rendered two cartel decisions a year on average. Yet the imposed fines have rarely been serious enough to act as a deterrent against such behaviours in the future. In fact, most of the cartel decisions ended up with symbolic fines only, including the most recent 'marinas'<sup>117</sup> and 'orthodontists'<sup>118</sup> cartels<sup>119</sup>. With this in mind, there is hardly any incentive for cartelists to apply for immunity in Croatia. Hence, the CCA has set as one of its priorities the promotion and the presentation of the immunity programme in cartel cases<sup>120</sup>.

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<sup>114</sup> Regulation on immunity from fines and reduction of fines, official gazette Narodne novine 129/2010; 23/2015 (hereafter, Leniency regulation).

<sup>115</sup> Ibidem.

<sup>116</sup> Art. 7 of the Leniency regulation.

<sup>117</sup> Decision UP/I 034-03/2013-01/047, from 17.03.2015.

<sup>118</sup> Decision UP/I 034-03/13-01/034, from 12.06.2014.

<sup>119</sup> With the exception of the recent personal protection cartel where the CCA fined the seven undertakings with a total of 5 billion Kunas.

<sup>120</sup> The priorities of the work of the CCA in the forthcoming period are laid down in its strategy statement for 2014-2016. 'Promoting the benefits of effective competition produces

Secondly, the CCA has not been maximising the use of the powers that have been entrusted to it. For instance, CCA has been empowered to carry out dawn raids since the 2009 Competition Act and yet its first dawn raid has not occurred until 2013 and they have rarely been used since<sup>121</sup>. The efforts of the CCA, particularly dawn raids, were constrained by the lack of computer forensics equipment, which is indispensable for gathering evidence in cartel cases<sup>122</sup>. Without such equipment, potential infringers may easily hide and/or destroy evidence<sup>123</sup>. This situation has changed recently with the purchase of state of the art digital forensic equipment. This new technical support is expected to enhance the CCA's powers to directly collect evidence during dawn raids, which may now be performed simultaneously on different sites<sup>124</sup>. Since the above investment in forensic equipment is very recent, it is to be seen whether it will indeed live up to expectations, enhance the CCA's actual powers and, in turn, its credibility in the eyes of infringers.

Finally, it appears that a substantial number of undertakings in Croatia are still unaware of the illegality of cartel agreements. The 'personal protection security services' cartel<sup>125</sup> is one of very recent examples. The cartel was detected by the CCA while surfing the web page of a specialized domestic magazine *Zaštita* (in English: Protection). A press release was found therein about a meeting during which personal protection agencies agreed upon minimum prices for personal protection security services (amounting to 32.52 Kuna per hour, equivalent to EUR 4,34). This case shows that Croatia suffers from an insufficient competition culture and awareness of the positive national and European legal framework.

Like in any other jurisdictions, there are undertakings in Croatia that engage in cartels, and yet no one is yet interested in participating in the domestic leniency programme. It is certainly very important to continue building up the institutional capacity of the CCA and to show the public its credibility to deter

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for undertakings and consumers will stay in the focus of the CCA, concentrating on most harmful practices for both consumers and other competitors, that is, hard core restrictions of competition and particularly cartels' (Competition report 2013 available at [www.aztn.hr](http://www.aztn.hr), accessed 30.05.2015).

<sup>121</sup> However, on that particular occasion evidence on the existence of a cartel was not found. See Annual Report of the CCA for 2013. Available at [http://www.aztn.hr/uploads/documents/eng/documents/AR/Annual\\_Report\\_of\\_the\\_Croatian\\_Competition\\_Agency\\_for\\_2013.pdf](http://www.aztn.hr/uploads/documents/eng/documents/AR/Annual_Report_of_the_Croatian_Competition_Agency_for_2013.pdf) (accessed 10.06.2015).

<sup>122</sup> AZTN Info, 3 March 2015.

<sup>123</sup> [...] and limited budgetary resources for the purchase of such equipment (Competition report 2013 available at [www.aztn.hr](http://www.aztn.hr) accessed on 15.06.2015).

<sup>124</sup> Annual Report of the CCA for 2014, available at <http://www.aztn.hr/ea/wp-content/uploads/2015/05/GI-AZTN-2014.pdf> (accessed 31.08.2015), p. 38.

<sup>125</sup> Decision UP/I 034-03/14-01/002, from 17.03.2015.

and punish cartels. However, it will be very interesting to see whether private enforcement may actually boost public enforcement thanks to the use of the new rules on access to documents. In fact, the rules on access to documents entrenched in the Damages Directive might actually work in favour of private litigants in countries like Croatia, where all cartel decisions are rendered in regular procedures, as rules on access in regular procedures are wide, specific, and available for access to the entire spectrum of valuable documents. This availability of documents gathered through ordinary procedures might in turn motivate private claimants to bring civil suits. It can also incentivise potential infringers to apply for leniency in order to protect evidence from their potential use in civil lawsuits. However, it will take time to see the actual effects of the Damages Directive once implemented into national legislation.

#### IV. Conclusions

The purpose of this paper was to analyse the possible effects of the rules on access to evidence prescribed by the Damages Directive on future private enforcement. To that end, the existing EU legislative framework and case law has been scrutinised. It was argued that rules on access to documents might have a chilling effect on private litigants when it comes to cartel decisions rendered by the Commission. This is due to the introduction by the Directive of an absolute ban on the disclosure of leniency statements and settlement submissions though a ‘maximum harmonization’ rule. This conclusion is drawn from statistic figures showing that EU cartel enforcement entirely rests on those procedures. With that in mind, it may be stated that general rules on access to documents (other than leniency and settlement procedures) are not a sufficient means for private plaintiffs to obtain evidence necessary to prove their case.

However, the Directive’s new rules on access to documents may have an opposite impact on private enforcement in cases following an infringement decision issued by a NCA when the latter does not rely as much as the EU on leniency programmes. In jurisdictions such as Croatia where all cartel decisions so far have been rendered within the regular procedure, general access to documents will apply. It is argued that such rules, coupled with other rules facilitating the position of the claimant in antitrust damages proceedings, might actually be beneficial for both public and private enforcement.

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# **Collecting Evidence Through Access to Competition Authorities' Files – Interplay or Potential Conflicts Between Private and Public Enforcement Proceedings?**

by

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## **CONTENTS**

- I. Introduction
- II. Hitherto practice regarding access to competition authorities' files – the European Commission's perspective
- III. Hitherto practice regarding access to competition authorities' files – the case of Poland
- IV. The new approach adopted in the Damages Directive
- V. Is access to leniency materials at all possible?
- VI. Practical issues with respect to the implementation of the Damages Directive – the case of Poland
- VII. The European Commission's efforts to harmonize its own rules on access to its files
- VIII. Conclusions

## ***Abstract***

Information asymmetry between claimants seeking damages for competition law violations and the alleged infringing undertaking(s) is a key problem in the development of private antitrust enforcement because it often prevents successful actions for damages. The Damages Directive is a step forward in the facilitation of access to evidence relevant for private action claims. Its focus lies on, *inter alia*, 3<sup>rd</sup> party access to files in proceedings conducted by national competition authorities (NCAs). The harmonization was triggered by the inconsistencies in European

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case-law and yet the uniform rules on access to documents held in NCAs' files proposed in the Damages Directive seem to follow a very stringent approach in order to protect public competition law enforcement. The article summarizes the most relevant case-law and new provisions of the Damages Directive and presents practical issues with respect to its implementation from the Polish perspective.

### *Résumé*

L'asymétrie d'information entre les demandeurs, réclamant des dommages pour les violations du droit de la concurrence, et les entreprises, accusées d'une infraction, est un problème clé dans le développement d'application privée du droit de la concurrence, car elle empêche souvent les actions efficaces. La Directive relative aux actions en dommages est un pas en avant dans la simplification d'accès à la preuve par les demandeurs, réclamant des dommages pour les violations du droit de la concurrence. La Directive se focalise, entre autres, sur la question d'accès par des tiers aux documents figurant dans les dossiers des autorités nationales de concurrence (ANCs). L'harmonisation a été déclenchée par des incohérences dans la jurisprudence européenne, alors que les règles uniformes sur l'accès aux documents figurant dans les dossiers des ANCs proposées dans la Directive, semblent suivre une approche rigoureuse afin de protéger l'application publique du droit de la concurrence. L'article résume la jurisprudence la plus pertinente, ainsi que des nouvelles dispositions de la Directive relative aux actions en dommages et présente des problèmes pratiques concernant sa transposition dans la loi polonaise.

**Key words:** competition; cartels; private enforcement; damages actions; leniency; Damages Directive; access to file.

**JEL:** K23; K42.

## **I. Introduction**

The issue of information asymmetry between claimants seeking damages for competition law violations and the alleged infringing undertaking(s) is a key problem in the development of private antitrust enforcement because it often prevents successful actions for damages.

Evidence required to prove a claim in private antitrust enforcement actions (based on EU or national competition law infringements) is usually held exclusively by the opposing party or by 3<sup>rd</sup> parties – including the competition authority pursuing a public action – and is neither easily nor directly accessible to the claimant. In some cases, it may be overly difficult to formulate a case solely on the basis of publicly available information since the very nature

of a cartel's operation is in itself secretive. Even competition authorities themselves must often put a lot of time and effort into making their public enforcement cases stand.

The situation is even more difficult in private enforcement cases since in order to establish the 'damage', claimants have to build a counterfactual scenario – compare the anti-competitive situation resulting from an infringement to a situation which would have existed in the absence of the violation in a hypothetical competitive market<sup>1</sup>.

For this purpose, the claimant will often depend on information that lies in the sphere of the defendants, and possibly their partners in the infringement. Such information could include, for example: notes on the overcharges agreed secretly between the cartel members; details on how and when they influenced the price as well as other parameters of competition; or the infringer's internal documents showing its own analysis of market conditions and developments as well as its regular invoices<sup>2</sup>. Reconstructing a hypothetical competitive market, in order to quantify the damage caused by the infringer, usually also presupposes knowledge of facts on the commercial activities of the infringer and other players on the relevant market. The same or similar types of difficulties arise in the context of causation when, for example, claimants try to identify the precise elements of an infringer's anticompetitive behaviour that have caused the claimant's damage, or the extent to which several infringers had individually contributed to the damage caused<sup>3</sup>. The European Commission (hereafter, Commission or EC) describes this difficulty as "*the structural asymmetry in the distribution of information required by claimants*"<sup>4</sup>.

The above issue was recognized and addressed in Directive 2014/104/EU on antitrust damages actions (hereafter, the Damages Directive)<sup>5</sup>. It is noted already in its preamble that evidence is an important element for bringing actions for damages for an infringement of EU or national competition law.

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<sup>1</sup> See Commission Staff working document – Practical guide 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 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}, p. 10.

<sup>2</sup> Commission Staff working paper accompanying the White paper on damages actions for breach of the EC antitrust rules, p. 28.

<sup>3</sup> Ibidem, p. 29.

<sup>4</sup> Ibidem.

<sup>5</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 Text with EEA relevance (OJ L 349, 05.12.2014, p. 1). The Damages Directive needs to be implemented by Member States in their legal systems by 27 December 2016.

It is also said that it is appropriate to ensure that claimants are afforded the right to obtain disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence sought because private antitrust enforcement litigations are characterized by information asymmetry<sup>6</sup>.

## **II. Hitherto practice regarding access to competition authorities' files – the European Commission's perspective**

Claimants from common-law jurisdictions can currently benefit from the revealing material documents during discovery. By contrast, claimants from civil law jurisdictions – including Central and Eastern European countries – have to cope with this problem by other means such as, for example, through access to the files held by competition authorities.

Both Article 15 of the Treaty on the Functioning of the European Union (hereafter, TFEU) and Article 42 of the Charter of Fundamental Rights of the European Union (hereafter, the Charter) recognize the right to access documents held by EU institutions.

Until now, 3<sup>rd</sup> party access to the case files of the Commission was in most cases enforced either by the claimant referring to the Transparency Regulation<sup>7</sup> (an action admissible basically at any stage of a dispute, even before bringing an action to a civil court) or to Article 15 of Regulation 1/2003<sup>8</sup> (by a request from national courts filed in the course of private action proceedings). Neither of these routes is perfect and each allows the Commission some degree of flexibility in deciding on the scope of the disclosure, a fact well illustrated in vast case-law concerning the application of these provisions<sup>9</sup>.

Under Article 4 of the Transparency Regulation, an institution can refuse access to a document where disclosure would undermine the protection of:

- the public interest as well as the privacy and integrity of the individual; and,

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<sup>6</sup> See point 15 of the preamble.

<sup>7</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31.05.2001).

<sup>8</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 04.01.2003, p. 1).

<sup>9</sup> See e.g. the General Court's Judgment of 15 December 2011 in Case T-437/08 – *CDC Hydrogene Peroxide Cartel Damage Claims v European Commission*; the CJEU's Judgment of 27 February 2014 in Case C-365/12 P – *European Commission v EnBW Energie Baden-Württemberg AG*.

unless there is an overriding public interest in disclosure:

- commercial interests of a natural or legal person, including intellectual property;
- court proceedings and legal advice; or
- the purpose of inspections, investigations and audits.

A Commission decision refusing access to its file can of course be appealed. However, this makes it necessary for the injured parties to carry out a cost/time analysis bearing in mind the limitation periods applicable for private actions.

As regards orders coming directly from national courts via Article 15(1) of Regulation 1/2003, the practical application of requests to transmit information held by the Commission or its opinion on questions concerning the application of EU competition rules may be overly difficult in civil law jurisdictions. Firstly, Article 15 of Regulation 1/2003 does not provide claimants with a legal basis to obtain documents directly – it is in the court’s discretion to request specific documents – private litigants may only suggest this route to the court dealing with their claim and rely on its receptiveness to this request. Secondly, it is uncommon in civil law jurisdictions to approach a national court without the relevant evidence to sustain the claim, since evidence is normally gathered and analysed prior to rather than during the trial. Uncertainty regarding the content of the documents to be obtained represents another significant obstacle here. Moreover, further to the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC<sup>10</sup>, the EC may refuse to transmit the requested information or documents if the national judiciary cannot offer a guarantee that it will protect confidential information and business secrets contained in such file. The Commission may also refuse to transmit information to national courts for overriding reasons relating to the need to safeguard the interests of the EU or to avoid interference with its functioning and independence, in particular by jeopardizing the accomplishment of the tasks entrusted to the Commission.

Finally, rules on access to the file and the treatment of confidential information in competition proceedings are also set out in Articles 15 and 16 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (hereafter, Regulation 773/2004)<sup>11</sup>. Rights of access under Regulation 773/2004 are only available to the parties to an investigation and to those with the status of a ‘complainant’.

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<sup>10</sup> OJ C 101, 27.04.2004.

<sup>11</sup> OJ L123, 27.04.2004, p. 18.

### **III. Hitherto practice regarding access to competition authorities' files – the case of Poland**

The possibility of accessing documents held in Poland in the case files of the National Competition Authority (hereafter, NCA or the UOKiK President) is a matter of ongoing debate. The route generally recognized by the UOKiK President is governed by the laws on access to public information, in particular by the Act of 6 September 2001 on access to public information. As in the case of the EU Transparency Regulation, Polish laws provide for a certain amount of discretion as regards the categorization of a given document as 'public information', hence again any dispute can be resolved only by the relevant courts. This issue is interrelated with the necessity to protect business secrets. The latest novelization of the Act of 16 February 2007 on Competition and Consumer Protection (hereafter, Competition Act 2007) has already established and expressly confirmed that information on the initiation of public enforcement proceedings, on the issuance of a decision by the UOKiK President and on the conclusions of such decision are to be made available to the public. The NCA holds a publicly available on-line register of its decisions but other documents prepared by it can potentially be obtained via the 'access to public information' route. This may be the case, for example, with respect to a resolution on the initiation of antitrust proceedings where the NCA states the main points of its interests in the pending proceedings.

The question remains open as to other documents gathered by the NCA in its case file – particular doubts concern documents prepared and filed by the parties to the proceedings. Moreover, the right to access public information is subject to restrictions governing conduct with confidential information, business secrets and an individual's privacy.

The jurisprudence of Polish administrative courts regarding access to information gathered in the UOKiK President's case files clarifies the above issues to some extent.

The Polish judiciary expressed views that it is not sufficient for the UOKiK President to state that a document cannot be disclosed simply because it was prepared by an undertaking being a party to the proceedings. The courts noted that the very fact that a private entity (entrepreneur) generated given information does not prejudice that it is not public information. It is the content of the document that should be analysed here (see judgment of the Supreme Administrative Court in Warsaw of 17 June 2011 in case reference I OSK 490/11).

As regards documents prepared by the NCA, the administrative court in Warsaw stated in one of its cases that an internal memo cannot be accessed since it is not an 'official' document but merely a working draft. On the other

hand, the court noted that a letter sent by the UOKiK President to the EC within the information exchange procedure could constitute public information and that it is up to the NCA to prove and duly justify that such letter contains protected information (see judgement of the Regional Administrative Court in Warsaw of 5 February 2015 in case reference II SA/Wa 1536/14).

In another case, the NCA very thoroughly described the scope of protected business secrets and the court agreed with the refusal to access public information (see judgment of the Regional Administrative Court in Warsaw of 13 March 2014 in case reference II SA/Wa 2178/13).

#### **IV. The new approach adopted in the Damages Directive**

The Damages Directive puts forward measures designed to give parties easier access to evidence required in private actions for damages, so as to minimize the information asymmetry between the claimant and the alleged infringing undertaking. Under the Damages Directive, the parties will therefore have the possibility to seek disclosure of specified (relevant) evidence through a court order, subject to proportionality and legitimate interest criteria – judges will thus have to ensure that disclosure orders are proportionate and that confidential information is duly protected. The Damages Directive states that it is not necessary for every document relating to public enforcement proceedings to be disclosed to a claimant merely on the grounds of the latter's intended action for damages. It is highly unlikely that the action for damages will need to be based on all the evidence held in the case file relating to the respective public proceedings (see point 22 of the preamble). The Damages Directive further notes that the requirement of proportionality should be carefully assessed when disclosure risks unravelling a competition authority's investigative strategy by revealing which documents are part of its case file or risks having a negative effect on the way in which undertakings cooperate with the competition authorities. Particular attention should be paid to preventing 'fishing expeditions' – non-specific or overly broad searches for information that is unlikely to be of relevance for the parties to the private enforcement proceedings. In line with the Damages Directive, disclosure requests should therefore not be deemed to be proportionate where they refer to the generic disclosure of documents held in the relevant case file of a competition authority, or the generic disclosure of documents submitted by a party in the context of a particular case. Such wide disclosure requests would not be compatible with the requesting party's duty to specify the items of evidence or the categories of evidence as precisely and narrowly as possible (see point 23 of the preamble).

## V. Is access to leniency materials at all possible?

The main issue, however, is access to case files in proceedings conducted by the Commission and NCAs. The major concern raised by the authorities is to prevent the rules on access to documents collected in case files by damages claimants from compromising the effectiveness of public enforcement, with particular focus on protecting leniency programmes or settlement procedures.

The need to weigh up different interests protected by EU law – on the one hand, the right to obtain damages for loss caused by conduct which is liable to restrict or distort competition and, on the other hand, the effectiveness of leniency programmes – was stated by the Court of Justice of the European Union (hereafter, CJEU or the Court) in its *Pfleiderer*<sup>12</sup> judgment. The Court did not provide a conclusive answer to the question posed by a German court on whether access to a file containing a leniency application should be granted in civil proceedings. The CJEU stated only that damages claims and procedures related to damages claims are matters of national law. The Court held that neither TFEU rules on competition nor Regulation 1/2003 contained common provisions governing the right of access to documents voluntarily submitted to a NCA under a national leniency programme. In particular, the Commission's notices are not binding on Member States, NCAs or national courts. In the absence of binding EU rules governing this matter, the issue of access to leniency documents gathered in a NCA's case file for cartel damages claimants fell within the competence of individual Member States. The Court stressed, however, that national procedural rules must not render the implementation of EU law impossible or excessively difficult, and that they must serve the effective application of Article 101 and 102 TFEU. The CJEU concluded that national courts have to weigh the interests of protecting information submitted under leniency programmes against those of private damages claimants suing for breaches of EU law<sup>13</sup>. The Court did not pose an absolute ban on disclosing leniency materials. Instead, it noted that weighing the interests protected by EU law, national judges should determine the conditions under which access to documents submitted under a domestic leniency programme may be made available to a claimant seeking damages for a cartel injury. Importantly also, the CJEU noted that actions for damages before national courts can make a significant contribution to the maintenance

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<sup>12</sup> Judgment of the Court of 14 June 2011 in Case C-360/09 – *Pfleiderer AG v Bundeskartellamt*.

<sup>13</sup> See also P. Callol, 'The European Court of Justice acknowledges the need to weigh the different interests at stake when granting access to documents containing leniency applications in the context of civil claims for damages, in line with US courts (*Pfleiderer*)' (2011) June 14 *e-Competitions Bulletin* Article N° 36988.

of effective competition in the European Union as they serve as a deterrent mechanism for potential infringers. The conclusion of the Court was that it is for the national judiciary to determine the basis of domestic law and, on a case-by-case basis, the conditions under which access to documents relating to a national leniency procedure must be permitted or refused.

The *Pfleiderer* ruling was widely discussed by both EU and Polish doctrine. It was noted that the judgment does not give an answer to the question on the possibility (or even necessity) to limit access by civil claimants to the leniency case file and some of the doctrine postulated that access to the competition authority's case file by civil claimants should be a rule, bearing in mind procedural economy with the author's indication that leniency documents should be protected<sup>14</sup>. In general, the judgment was however appreciated as a step forward in the liberalization of access to leniency documents gathered in the European competition authorities' case files<sup>15</sup>. It was also noted that *Pfleiderer* was the trigger for the current harmonization initiative of private enforcement of competition law rules with its particular emphasis on access to leniency documents<sup>16</sup>.

The CJEU confirmed the principle adopted in *Pfleiderer* in its later *Donau Chemie*<sup>17</sup> judgment. It stressed therein the necessity of a case-by-case weighing up of competing interests, keeping the proportionality criterion in mind. It was however noted by commentators that the *Donau Chemie* judgment does not only fail to provide for clear criteria for weighing the public and private interests, but is also somewhat incoherent and hence may create confusion for national courts<sup>18</sup>. On the one hand, the CJEU noted that refusal to grant access to evidence cannot be justified by the general argument highlighting the risk that access to evidence (contained in a competition authority's

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<sup>14</sup> See A. Jurkowska-Gomułka, 'Między efektywnością walki z kartelami a efektywnością dochodzenia roszczeń z tytułu naruszenia Article 101 ust. 1 TFUE. Głosa do wyroku TS z dnia 14 czerwca 2011 r., C-360/09, *Pfleiderer AG v. Bundeskartellamt*' ['Between effectiveness of the fight against cartels and the effectiveness of claims for infringement of Article 101 Sec. 1 TFEU. Commentary to the judgment of the CJ of June 14, 2011, C-360/09, *Pfleiderer AG v. Bundeskartellamt*'] (2012) 7 *Europejski Przegląd Sądowy* 39.

<sup>15</sup> See H.M. Sifton, C.S. Davis, D. Levisohn, '*Pfleiderer AG v. Bundeskartellamt*: A Step Forward in Efforts to Obtain Discovery from European Commission Antitrust Proceedings' (2011) 19(6) *Westlaw Journal* 2.

<sup>16</sup> See A.E. Beumer, A. Karpetas, 'The disclosure of files and documents in EU cartel cases: fairytale or reality?' (2012) 8(1) *European Competition Journal* 123.

<sup>17</sup> Judgment of the Court of 3 June 2013 in Case C-536/11 – *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*.

<sup>18</sup> See K. Kohutek, 'Głosa do wyroku Trybunału z dnia 6 czerwca 2013 r. w sprawie C-536/11 Bundeswettbewerbsbehörde przeciwko Donau Chemie AG' ['Commentary to the judgment of the Court of June 6, 2013, in case C-536/11 *Bundeswettbewerbsbehörde vs Donau Chemie AG*'], LEX el. 2014.

case file), which is necessary as a basis for a private action, may undermine the effectiveness of a leniency programme in which those documents were disclosed. On the other hand, the court noted that if there is a specific risk that a given document may actually undermine the public interest relating to the effectiveness of the national leniency programme, the non-disclosure of that document may be justified<sup>19</sup>.

However, a presumption of general protection of leniency material was established in the CJEU's *European Commission v EnBW Energie Baden-Württemberg AG* judgment of 27 February 2014 (Case C-365/12P). The CJEU concluded therein that there is a general presumption that leniency materials could not be disclosed to 3<sup>rd</sup> parties since the Transparency Regulation cannot be read *in abstracto* – exceptions from Regulation 1/2003 and Regulation 773/2004 should be applied to the exceptions to the right of access provided for in Article 4 of the Transparency Regulation. The CJEU also noted that the administrative activity of the EC does not require access to documents as extensive as that required by an EU institution's legislative activity. As a result, the Commission could apply a general approach to a 3<sup>rd</sup> party's broad and unspecified request, thereby saving itself a case-by-case analysis of documents gathered in its cartel case files.

Very recently the General Court (hereafter, GC) ruled once again on the scope of protected leniency materials. In the *Axa Versicherung AG v European Commission* judgment of 7 July 2015 (Case T-677/13), the GC noted that the EC should not have deleted references to potentially sensitive leniency information contained in the index of its investigative case file relating to the car glass cartel, which was fined by the Commission in 2008. Access to its case files was sought by Axa, an insurance company, for the purposes of pursuing damages claims against car glass manufacturers. In addition to certain documents gathered in the file itself, Axa was also seeking an un-redacted version of the index of the relevant case file. While the GC agreed that leniency statements require protection, it also noted that the Commission should each time make a full analysis and appropriately justify any rejection decision. It should not rest on a general presumption that such information would always be covered by exceptions to disclosure rules. The GC generally agreed that leniency documents sought by Axa should not be disclosed and only annulled the Commission's decision in so far as it refused to grant Axa access to references to documents provided within the leniency programme, which were contained in the index of the Commission's case file.

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<sup>19</sup> See also E. Matei, 'The EU Court of Justice decides that the Austrian Consent Rule allows no possibility for the national courts of weighing up the interests involved and it was precluded by the effectiveness principle (*Donau Chemie*)' (2013) June 6 *e-Competitions Bulletin* Article N° 52707.

Another perspective was presented in the *AGC v European Commission* judgment of the General Court of 15 July 2015 (Case T-465/12). The GC took a stance here regarding the scope of information which may be treated as confidential in final Commission decisions, including a reference to information provided in leniency proceedings. The judiciary strongly opposed the views of the parties and noted that except for a fine reduction, the Leniency Notice does not provide for any other advantage which an undertaking can claim in exchange for its cooperation. The fact that a leniency applicant is granted immunity or a fine reduction cannot protect it from the civil law consequences of its participation in an infringement under Article 101 TFEU. The GC explained that the Commission should not be prevented from publishing in its decisions information relating to the description of the infringement, which was submitted to it as part of the leniency programme. On this basis, the GC made a distinction whereby rules on the protection of leniency material apply at a different (investigative) stage of the Commission procedure, and should not interfere with its right to publish its final decision<sup>20</sup>.

The Damages Directive's uniform rules on access to documents held in the files of NCAs seem to follow the strictest possible approach meant to maximise the protection of public enforcement. The harmonization provides that national courts will not be able to order disclosure (at any time) with respect to leniency statements and settlement submissions for the purposes of an action for damages. This approach raises serious doubts considering national variations in the design of leniency and settlement programmes, in particular considering the possible definitions adopted in domestic laws. The Damages Directive provides for express definitions of leniency statements and states that it is '*an oral or written presentation voluntarily provided by, or on behalf of, an undertaking or a natural person to a competition authority or a record thereof, describing the knowledge of that undertaking or natural person of a cartel and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, not including pre-existing information*'. It stems from this definition that only leniency statements concerning cartels should be protected under the Damages Directive. By the same token, the Directive introduces a definition of a cartel as an '*agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales*

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<sup>20</sup> See para 67–68 and 70–72 of the judgement.

*quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors*'. It needs to be emphasised however that national leniency programmes differ. Taking the example of Poland for instance, a leniency application is admissible domestically for all types of anticompetitive agreements, including vertical agreements – an option often used in resale price maintenance cases.

Similarly, the Damages Directive's definition of a settlement submission sees it as *'a voluntary presentation by, or on behalf of, an undertaking to a competition authority describing the undertaking's acknowledgement of, or its renunciation to dispute, its participation in an infringement of competition law and its responsibility for that infringement of competition law, which was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure'*. The case of Poland again shows its national particularities. The very recent introduction of a domestic procedure similar to EU settlement enables undertakings to benefit from a 10% fine reduction if they decide to voluntarily submit to a fine imposed by the UOKiK President. However, the prerequisites for benefitting from this procedure are different to those described in the Damages Directive's definition of the settlement procedure. It is therefore doubtful if Polish statements regarding a voluntary submission to a fine would be caught under the above EU definition.

Moreover, the Damages Directive notes that not only actual statements should be protected but also any quotes taken from leniency statements and settlement submissions that are included in other documents. It would however be reasonable to assume that this only refers to information prepared and provided by the leniency applicant for the purposes of filing a leniency/settlement application. It would not refer to information which was included in pre-existing documents and was only quoted by the applicant in the leniency statement or settlement submission.

The Damages Directive also introduces temporary restrictions applicable until a competition authority has closed its proceedings. During on-going public proceedings, the courts will not be able to order the disclosure of three categories of evidence:

- 1) information that was prepared by a natural or legal person specifically for the proceedings (this covers, *inter alia*, replies to questions from the authority);
- 2) information drawn up by a competition authority and sent to parties in the course of its proceedings (such as information requests and statements of objections); and
- 3) settlement submissions that had been withdrawn.

As a side note, the above point on information drawn up by a competition authority and sent to parties in the course of its proceedings seems to be more

stringent than the current Polish approach. The UOKiK President generally allows access to its resolutions on the initiation of proceedings to a 3<sup>rd</sup> party via the ‘access to public information’ route even during on-going proceedings.

Moreover, limiting access to certain documents during on-going public proceedings may basically force claimants to wait with the decision on lodging a potential private action until public proceedings are closed and a decision is issued. Paradoxically, access to the relevant case file may in such cases no longer be necessary because an infringement decision should generally contain all relevant information describing the violation.

The Damages Directive facilitates the disclosure of other evidence in the case file of a competition authority at any time, provided it does not fall into the above two categories – this basically amounts to the possibility of accessing pre-existing documents at any time. Still, the courts may request that a competition authority discloses evidence held in its case file only if none of the procedural parties, or 3<sup>rd</sup> parties, is reasonably able to provide that evidence.

The Damages Directive provides for additional safeguards for protected documents. When such documents are obtained in the context of public enforcement proceedings (for instance, through access to the file exercisable by one of the parties to the proceedings), they will not be admissible as evidence in an action for damages so as to comply with general disclosure limits provided for in the Damages Directive.

Only the person who obtained documents through access to the file (or their legal successor) will in general be able to use them as evidence in an action for damages. This safeguard was structured so as to avoid the trading of evidence.

Against this background, it should be stressed that a leniency application includes two kinds of documents that prove the existence of a cartel: corporate statements or their national equivalents and pre-existing documents. These documents could therefore be crucial for 3<sup>rd</sup> parties for bringing damages actions against cartelists, especially in order to prove the existence of damages and the causality link between them and the infringement. From the overall context it seems to be the goal of the Damages Directive to only protect corporate statements and its national equivalents. At the same time, pre-existing documents should be made available under normal rules (basically at any point in time) – see definition of leniency statements adopted in the Damages Directive.

It is worth stressing as a side note that limitations with respect to access to leniency applications are not the only measure adopted to facilitate the effectiveness of this public enforcement tool. Relevant here are also rules on the limitation of joint and several liability of a leniency applicant. According

to Joaquín Almunia's view expressed in a speech devoted to fighting against cartels delivered on 3 April 2014:

*Leniency programmes have produced a consistent stream of good applications; on average four per month, including immunity applications.*

*The figure will likely go up when the private-enforcement Directive takes effect because of the limits it puts on joint liability.*

*... the new rules will preserve leniency programmes. While they will make more evidence available to victims, they also make clear that crucial documents for public enforcement voluntarily submitted by the parties can never be disclosed – namely, leniency corporate statements and settlement submissions.<sup>21</sup>*

## **VI. Practical issues with respect to the implementation of the Damages Directive – the case of Poland**

As regards the Polish approach, leniency materials are already protected under Article 70 of the Competition Act 2007. This provision expressly states that information and evidence gathered through leniency applications and procedures relating to voluntary submission to a fine cannot be subject to disclosure – this is ensured by the express statement that the 'access to public information' procedure cannot be used with respect to such documents. The scope of the protection given in Poland to leniency applicants seems therefore wider than necessary under the Damages Directive – according to the new EU rule it should be possible to disclose pre-existing documents even if they were provided as annexes to a leniency application *sensu stricto*.

There is virtually no court practice of requesting documents held in the UOKiK President's case-files at the moment. Polish civil procedure does not provide for evidentiary motions with respect to case files in different proceedings and requests for such evidence should be rejected by the court<sup>22</sup>. However, the party may name as evidence specific documents attached to different case files with the indication of the pages of that case file where the requested documents are located. In any event however, the above possibilities are limited in private antitrust enforcement cases as regards access to the NCA's case files. This is because Article 73 of the Competition Act 2007 expressly refers to the principle that information gathered in the course of

<sup>21</sup> [http://europa.eu/rapid/press-release\\_SPEECH-14-281\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-14-281_en.htm?locale=en) (accessed on 24.09.2015).

<sup>22</sup> K. Pietrzykowski, *Metodyka pracy sędziego w sprawach cywilnych [Methodology of a judge in civil cases]*, Warsaw 2012, p. 472–473.

the UOKiK President's proceedings may not be used in any other proceedings based on separate legal provisions. This rule – similarly to the rule of limited access to files – serves as a guarantee for the non-disclosure to unauthorized persons of information protected under separate regulations. Only a few exemptions from this rule exist, enumerated as follows:

- penal proceedings following by a public-complaint procedure, or fiscal penal proceedings;
- other proceedings conducted by the UOKiK President;
- sharing information with the EC and other NCAs under Regulation 1/2003/EC;
- sharing information with the EC and competent authorities of EU Member States pursuant to Regulation 2006/2004/EC;
- providing competent authorities with information which may indicate that any separate provisions have been infringed;
- providing specific information to regulatory authorities.

As can be seen from the above list, none of the exemptions expressly refers to private enforcement actions.

Ongoing doctrinal debate surrounds the question whether the exemption making it possible to provide competent authorities with information which may indicate that any separate legal provisions have been infringed may serve as the basis for the disclosure of information gathered in the UOKiK President's case files for the purposes of private enforcement actions. One interpretation is that civil courts ruling on private enforcement cases could be caught by the definition of 'competent authorities', since the 'separate provisions' which could have been infringed may as well be civil law provisions on torts<sup>23</sup>. Another interpretation argues that this particular provision only gives the NCA the initiative to provide information to other authorities if it considers it relevant. It does not, however, constitute grounds for requesting any such information from the NCA by 3<sup>rd</sup> parties<sup>24</sup>. It was very recently confirmed that the UOKiK President's hitherto practice shows that all attempts to obtain information by civil courts have so far invariably ended with a refusal to provide such documents, with the author's simultaneous emphasis on the fact that none of such requests was connected with claims for damages<sup>25</sup>.

<sup>23</sup> A. Jurkowska-Gomułka, *Publiczne i prywatne egzekwowanie praktyk ograniczających konkurencję* [Public and private enforcement of practices restricting competition], Warsaw 2013, p. 222; K. Kohutek [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [Act on competition and consumer protection. Commentary], Warsaw 2014, p. 816.

<sup>24</sup> M. Bernatt [in:] T. Skoczny (ed.), *Komentarz do artykułu 73 ustawy o ochronie konkurencji i konsumentów* [Commentary to Article 73 of the Act on competition and consumer protection], Legalis 2015.

<sup>25</sup> M. Błachucki, 'Dostęp do informacji przekazywanych Komisji Europejskiej i Prezesowi UOKiK w trakcie procedury łagodzenia kar pieniężnych (*leniency*)' [Access to information

From the practical point of view, the implementation of the rules of the Damages Directive relating to access to case files will require changes to be made to the current wording of the Competition Act 2007. It will also require the formulation of a dedicated procedure for the disclosure of documents contained in the case files of the NCA for the purpose of private enforcement actions. Currently it seems that access to case files will not be granted directly to the claimant but rather that it should be a prerogative of the court to request disclosure of certain documents gathered in the case file by the UOKiK President (for instance, like in the Commission Notice on cooperation between the Commission and the national courts). However, this assumption does not seem to resolve the current issues surrounding information asymmetry at the pre-trial stage. The claimant will still have no way of knowing what was collected by the NCA before it actually decides to file a claim, unless a special disclosure procedure is established, which will enable claimants to secure specific documents before filing a reasoned claim. Polish civil procedure currently provides for ways of securing evidence by the court at a pre-trial stage yet none seem to be applicable without necessary modifications.

## **VII. The European Commission's efforts to harmonize its own rules on access to its files**

The Commission introduced in August 2015 widespread changes to its internal procedures concerning access to its own case files. The modifications were made in an effort to harmonize rules applicable to EC case files so as to accommodate the new provisions stemming from the Damages Directive which concern NCAs. Most importantly, the EC introduced a new Article into Regulation 773/2004 on the limitation of the use of information obtained in the course of Commission proceedings, which would reflect restrictions imposed upon NCAs by the Damages Directive, on the disclosure of leniency corporate statements and settlement submissions.

In particular, in order to ensure effective protection of leniency corporate statements and settlement submissions in EC investigations, the Commission proposed to amend relevant provisions of Regulation 773/2004 on EU antitrust procedure as well as modify the content of four related soft law documents: the notice on access to the Commission's file, the leniency notice, the settlements notice and the notice on cooperation with national courts.

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submitted by applicants to the European Commission and President of the Office of Competition and Consumer Protection under leniency programmes'] (2015) 5 *Europejski Przegląd Sądowy* 10.

The Commission noted also that in order to ensure that undertakings are not discouraged from voluntarily acknowledging their participation in EU competition law infringements in the framework of the EU leniency programme or settlement procedure, other parties will be granted access to such acknowledgement through access to the EC's files pursuant to Regulation 773/2004 only for the purposes of exercising their rights of defense in proceedings before the Commission itself. It will be possible to use this information only in the review proceedings before the EU judiciary or before national courts of its Member States in cases which are directly related to the case in which access had been granted and which either concern the allocation of a fine between cartel participants, or the review of an infringement decision adopted by a NCA.

While proposing amendments the Commission was of the view that the use of information obtained pursuant to Regulation 773/2004 in proceedings before national courts should not unduly interfere with a pending Commission investigation of an infringement of EU competition law. Where such information was prepared by the EC in the course of its EU competition law proceedings (such as a statement of objections) or by a party to those proceedings (such as replies to requests for information of the EC), a party should not be able to use such information in proceedings before national courts until after the Commission has closed its proceedings against all parties under investigation by adopting a decision under Article 7, 9 or 10 of Regulation 1/2003, or has otherwise terminated its administrative procedure. The Commission clarified at the same time that pre-existing information, that is evidence that exists irrespective of EC proceedings and that is submitted to the Commission by an undertaking in the context of its leniency application, is not part of a leniency corporate statement.

As regards changes to the procedure of transmission of information held by the EC to national courts, the Commission included a very general statement that disclosure of information to national courts should not unduly affect the effectiveness of competition law enforcement by the EC, in particular so as not to interfere with pending investigations nor with the functioning of leniency programmes and settlement procedures. The Commission also added new paragraphs into Notice on the cooperation between the Commission and national courts expressly stating that for that purpose, the EC will not at any time transmit the following information to national courts for use in actions for damages for breaches of Article 101 or 102 TFEU:

- leniency corporate statements, within the meaning of Article 4a(2) of Regulation 773/2004; and
- settlement submissions, within the meaning of Article 10a(2) of Regulation 773/2004.

The EC further included the proviso that, as regards other types of information, the Commission will not transmit the following to the national courts for use in actions for damages for breaches of Article 101 or 102 TFEU, before it has closed its proceedings against all investigated parties by adopting a decision referred to in Article 7, 9 or 10 of Regulation 1/2003, or before it has otherwise terminated its administrative procedure:

- information prepared by a natural or legal person specifically for the proceedings of the Commission; and
- information that the Commission had drawn up and sent to the parties in the course of its proceedings.

Furthermore, the Commission noted that when asked to transmit the said information to national courts for other purposes than the use in actions for damages for breaches of Article 101 or 102 TFEU, the EC will, in principle, apply the same time limitation as mentioned in the above provision, in order to protect its pending investigations.

Public consultation on the proposed modifications ended on 25 March 2015. While the proposed changes were generally in line with the Damages Directive, stakeholders pinpointed during the consultation process a few issues which required, in their opinion, further clarification. According to the stakeholders:

- as regards leniency and settlement materials protected from disclosure, the new provisions should note that evidence pertaining to the alleged infringement, and in particular pre-existing documents, should not be treated as part of corporate statements and should be made available upon request if they do not contain any additional notes/explanations prepared solely for the purposes of filing the application;
- for the second type of protected documents, that is time-protected materials, the Commission should clearly specify the point in time when it deems its investigation to be closed; it would seem reasonable to assume that EC proceedings are closed with the adoption of a decision, irrespective of the parties' potential court appeals; moreover, stakeholders were of the opinion that it seemed unnecessary to condition disclosure of documents on closing the proceedings against all investigated parties; it is not uncommon to issue a couple of decisions in one proceedings, in particular in cases with hybrid proceedings where one party may decide to settle hence closing the proceedings while they continue against remaining alleged infringers;
- it was worth clarifying in the new rules that an infringer may voluntarily disclose its leniency statements and settlement submissions after the Commission has closed its proceedings as this may facilitate civil settlements and avoid the burden of a court trial.

Following the consultation process, the Commission adopted a number of amendments to Regulation 773/2004 and the four related notices on 3 August 2015. The amendments were largely reflecting the ones proposed in the consultation process and only minor comments provided in the consultation process were addressed in the final documents.

## VIII. Conclusions

To close this intriguing topic it needs to be noted that the practical use of procedures relating to access to competition authorities' files may prove limited due to the proviso of Article 6 section 10 of the Damages Directive whereby it needs to be ensured that national courts request disclosure of evidence held in a competition authority's case file only where no party, or 3<sup>rd</sup> party, is reasonably able to provide that evidence. In practice, this may mean that any document prepared by a party to the proceedings before the competition authority should first be requested directly from that party. It seems that this procedure will thus act somewhat as a back-up plan and its practical application may be very limited. This is all the more so because the Damages Directive does not cover the disclosure of internal documents of, or correspondence between, competition authorities, which is a basic category of documents which can be obtained only from the competition authority and not from 3<sup>rd</sup> parties.

The implementation of the Damages Directive into national laws and the practical application of the resulting national rules will gradually show if the approach of wanting to avoid the interference of private damages claims with effective public enforcement will still allow successful private actions or whether a more lenient approach to access to case files would have been necessary.

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# **The Damages Directive and Consensual Approach to Antitrust Enforcement**

by

Raimundas Moisejevas<sup>\*</sup>

## **CONTENTS**

- I. Introduction
- II. The benefits of Alternative Dispute Resolution methods for actions for damages
- III. The Damages Directive and consensual dispute resolution
  - 1. Reasons for the introduction into the Damages Directive of a section on consensual dispute resolution
  - 2. Suspension of the limitation period and pending proceedings
  - 3. Benefits for the settling infringer
  - 4. Effect of decisions of National Competition Authorities and national courts
  - 5. Disclosure of evidence and quantification of harm
- IV. Some thoughts on the status of the use of Alternative Dispute Resolution in practice
- V. Conclusions

## ***Abstract***

The article focuses on the novelties introduced by the Damages Directive in the field of consensual settlements of disputes concerning private enforcement. The Damages Directive obliges Member States to ensure that the limitation period for bringing an action for damages is suspended for the duration of any consensual dispute resolution process. The Directive also establishes the main principles that govern the effect of consensual settlements on subsequent actions for damages.

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Since the EU framework for consensual dispute resolution of private enforcement disputes is quite new, many issues must still be solved in Member States' practice. While analysing consensual dispute resolution in private enforcement cases, particular interest should be paid to mediation and arbitration as a form of Alternative Dispute Resolution (ADR). Mediation is often used in competition law litigation. In a mediation process, parties are subject to fewer legal costs than in litigation and arbitration. It may thus be concluded that consensual dispute resolution is usually a faster way to receive compensation. However, voluntary arrangements and ADR in competition law still raise many problems concerning both procedural and substantial legal acts.

### *Résumé*

Cet article porte sur les nouveautés introduites par la Directive relative aux actions en dommages dans le domaine de règlement consensuelle des litiges concernant l'exécution privée du droit de la concurrence. La Directive oblige les États membres à assurer que le délai de prescription fixé pour intenter une action en dommages est suspendu pour la durée de tout procédure de règlement consensuel du litige. La Directive établit également les principes concernant l'effet des règlements consensuels sur les actions en dommages subséquentes. Etant donné que le cadre européen pour le règlement consensuelle des litiges concernant l'exécution privée du droit de la concurrence est relativement neuf, de nombreuses questions doivent être encore résolues dans la pratique des États membres. En analysant le règlement consensuelle des litiges concernant l'exécution privée du droit de la concurrence, un intérêt particulier devrait être accordée à la médiation et à l'arbitrage, comme des modes alternatifs de résolution des conflits (MARC). La médiation est souvent utilisée dans les litiges en droit de la concurrence. Dans un processus de médiation, les parties sont soumises aux frais juridiques moins élevés que dans le cas d'un procédure judiciaire ou d'arbitrage. Nous pouvons donc conclure que le règlement consensuelle des litiges est généralement le moyen plus rapide pour recevoir une compensation. Toutefois, des accords volontaires et le MARC posent encore de nombreux problèmes substantiels et procédurales en droit de la concurrence.

**Key words:** antitrust damage; consumers; arbitration; alternative dispute resolution; mediation; consensual dispute resolution; Lithuania; private enforcement of competition law; antitrust damage claims; Directive on antitrust damages actions; consensual settlements.

**JEL:** K23; K42.

## I. Introduction

For quite a long time, it was considered impossible to arbitrate competition law. The situation changed with the adoption of the *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.* decision by the US Supreme Court in 1985<sup>1</sup>. The US Supreme Court recognized therein that a US federal antitrust claim was arbitrable in international matters. In Europe, the Court of Justice accepted the arbitrability of EU competition law in 1999 in the *Eco Swiss* case<sup>2</sup>. The European Commission (hereafter, EC or Commission) recognized that arbitration tribunals could decide damages actions in its Directive 2014/104/EU on antitrust damages actions (hereafter, Damages Directive) and in the EC's Practical guide quantifying harm in actions for damages<sup>3</sup>.

It should be noted that the recognition of the arbitrability of competition law by the Court of Justice has not inspired a unanimous position in all EU Member States. For example, the Lithuanian Law on Commercial Arbitration prohibited the arbitration of all competition law issues even until 30 June 2012<sup>4</sup>. The Lithuanian Law on Commercial Arbitration provides that arbitrable commercial disputes include disputes related also to breaches of competition law only since the 2012 amendment<sup>5</sup>.

The EC claims that hard-core cartels with effects across the EU cause damages to consumers and other victims in the EU ranging yearly from approximately €13 billion (most conservative assumptions) to over €37 billion (least conservative estimation)<sup>6</sup>. Any rules that could help consumers recover such damages are thus welcomed. Alternative Dispute Resolution (hereafter, ADR) could help collective-redress since claims could be resolved cheaper and faster than through litigation. Injured parties are expected to have more

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<sup>1</sup> *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985) decision by the United States Supreme Court.

<sup>2</sup> Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECR, I-3055.

<sup>3</sup> Commission Staff Working Document 'Practical guide quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' (SWD (2013)) C (2013) 3440).

<sup>4</sup> Lietuvos Respublikos komercinio arbitražo įstatymas (1996 m. balandžio 2 d. įstatymo redakcija Nr. I-1274) // Valstybės žinios. 1996. Nr. 39-961 [The Republic of Lithuania Law on Commercial Arbitration].

<sup>5</sup> Lietuvos Respublikos komercinio arbitražo įstatymas (2012 m. birželio 30 d. įstatymo redakcija Nr. XI-2089) // Valstybės žinios. 2012. Nr. 76-3932 [The Republic of Lithuania Law on Commercial Arbitration].

<sup>6</sup> Commission Staff Working Document. Impact Assessment Report. 'Damages actions for breach of the EU antitrust rules' (SWD (2013)) 2013 final p. 22.

alternatives how to seek redress<sup>7</sup>. This should be especially beneficial for consumers which do not usually have so-called 'deep pockets'.

The Damages Directive was signed into law on 26 November 2014 and published in the Official Journal of the European Union on 5 December 2014<sup>8</sup>. This Directive has introduced a number of new measures intended to facilitate private enforcement claims in EU Member States. One of the novelties brought about by the Damages Directive lies in a number of rules for the voluntary settlement of private enforcement disputes. Importantly here, the Directive obliges Member States to ensure that the limitation period for bringing an action for damages is suspended for the duration of any consensual dispute resolution process. Moreover, it establishes the main principles that shall govern the effect of consensual settlements on subsequent actions for damages. The Damages Directive in fact encourages parties to resolve their disputes by negotiating and avoiding the need to go to court. Since the above EU framework for consensual dispute resolution of private enforcement disputes is quite new, many issues must still be solved in the practice of EU Member States.

The main objective of this article is to analyze the novelties that the Damages Directive has brought about in the field of consensual settlement of private enforcement cases. The author does not attempt to thoroughly analyse all aspects of mediation and arbitration, or to present a comprehensive comparative study of ADR in private enforcement. The main goal of this article is to provide the reader with an analysis of the main features of the Damages Directive as far as it deals with consensual dispute settlement. The above-defined objective is pursued by scrutinising: the provisions of the Directive itself; certain relevant documents of EU Member States; EU case law; as well as the decisions of the Lithuanian Competition Council and the jurisprudence of Lithuanian administrative courts. It must be said, however, that as it has not been long since the Damages Directive was actually signed into law (end of 2014), there is very little relevant literature on the subject matter of this article. Moreover, there is practically no relevant case law or literature in Lithuania, which could help provide a comprehensive analysis on consensual dispute settlement in competition law. This article is likely to be one of the first Lithuanian papers devoted to such topic. The subject matter of the research of this article was analysed with the help of a logical, systematic analysis and comparative and linguistic research methods.

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<sup>7</sup> C.H. Bovis, C.M. Clarke, 'Private Enforcement of EU Competition Law' (2015) 36 *Liverpool Law Review* 49–71.

<sup>8</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, 05.12.2014, p. 1.

## II. The benefits of Alternative Dispute Resolution methods for actions for damages

Alternative Dispute Resolution could be beneficial both for the infringers and for the injured parties. When the infringer recognizes its infringement and wishes to pay compensation, then ADR provides the perfect opportunity to do so. Moreover, ADR allows consumers or other injured parties to recover compensation without high legal costs. The European Parliament has stated that ADR mechanisms could help avoid a considerable amount of litigation. The setting-up of ADR schemes at European level should thus be encouraged since fast and cheap settlement of disputes is a more attractive option than court proceedings<sup>9</sup>. The EC claims that in relation to a mass harm situation the parties should be encouraged to reach a consensual dispute settlement concerning relevant compensation both at the pre-trial stage and during civil trials, taking into account Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters<sup>10</sup>. The policy of EU institutions is thus that litigation should be treated as the last resort only<sup>11</sup>.

Like the EC, some Member States express support for the use of ADR in competition disputes. For example, the British Government announced in 2012 a Consultation on private actions in competition law and ADR<sup>12</sup>. Support for the British Government's proposal on the use of ADR to solve competition disputes was expressed by lawyers, a number of academics, as well as consumer and business representatives<sup>13</sup>. The British Government claims in the 2012 consultation that 'cases being resolved through alternative means, avoiding court involvement, can be a more satisfactory outcome for all parties as well as reducing burdens on the state; ... an extension of private actions through the reforms above would be more effective and less expensive if matched by increased Alternative Dispute

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<sup>9</sup> European Parliament Resolution of 2 February 2012 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)).

<sup>10</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 (2013/396/EU).

<sup>11</sup> C. Hodges, 'Fast, Effective and Low Cost Redress: How Do Public and Private Enforcement and ADR Compare?' [in:] B. Rodger (ed.), *Competition Law. Comparative Private Enforcement and Collective Redress Across the EU*, Kluwer Law International 2014, 328 pp.

<sup>12</sup> Department of Business Innovation and Skills, *Private Actions in Competition Law: A Consultation on Options for Reform*, available at <http://bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation.pdf>.

<sup>13</sup> C. Hodges, *Delivering Competition Damages in UK*, available at <http://www.csls.ox.ac.uk/documents/1208Howwouldcompensationbedeliveredinfuture.pdf>.

Resolution (ADR)<sup>14</sup>. The British Government even proposed to make ADR the default first option in competition cases, although not mandatory<sup>15</sup>.

There are many proposals how to solve disputes between consumers and businesses in competition and other areas. The EC is considering the adoption of ADR systems for consumers<sup>16</sup> – it even believes that ADR means should be available in relation to every type of dispute between a consumer and a business<sup>17</sup>. The EC Work Programme for 2011 identified consumer ADR as one of the Commission's strategic proposals for that year<sup>18</sup>. It may be expected that ADR mechanisms will continue to grow with respect to competition disputes, as well as other areas. Undertakings that value their reputation might be particularly inclined to use ADR mechanisms to solve their disputes arising with consumers or other businesses.

In the above mentioned 2012 Consultation on private actions in competition law and ADR, the British Government summarised somewhat the benefits and potential risks of ADR<sup>19</sup>. It was stated that the primary benefits of ADR are: restoration of a positive working relationship between the parties; making it possible to quickly resolve the underlying problem; a defence for both parties from uncertainties and costs of litigation; and, reducing court costs for the State. Clearly, the importance of the above issues might differ in separate cases. For example, consultations with businesses disclosed that the removal of barriers for business relationships is often more important than receiving monetary compensation.

A number of issues were also identified as potential risks of ADR: the creation of additional arbitrary burdens on claimants and defendants; opportunity for lawyers to increase the costs of a case through a long pre-trial process; creating a system that largely promotes ADR and diminishes the possibility of cases reaching the courts, reducing the pressure to actually achieve a settlement; allowing the party with better access to information (the defendant in most cases) to exercise pressure on its counterparty. The last risk concerning access to information is especially important in competition law cases for a number of reasons such as: it might not be clear what evidence supports the case; the quantity of the redress and the number of the potential recipients of the redress might also not be easy to determine.

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<sup>14</sup> Department of Business Innovation and Skills, *supra* note 12.

<sup>15</sup> *Ibidem*.

<sup>16</sup> Communication from the European Commission 'Alternative dispute resolution for consumer disputes in the Single Market', COM (2011) 791 final.

<sup>17</sup> Commission (EC), 'Proposal for a Directive on alternative dispute resolution for consumer disputes', COM (2011) 793/2, final 29 November 2011 and Commission (EC), 'Proposal for a Regulation on online dispute resolution for consumer disputes', COM (2011) 794/2, final, 29 November 2011.

<sup>18</sup> Commission Legislative Work Programme for 2011, COM (2010) 623.

<sup>19</sup> Department of Business Innovation and Skills, *supra* note 12.

### III. The Damages Directive and consensual dispute resolution

#### 1. Reasons for the introduction into the Damages Directive of a section on consensual dispute resolution

The Damages Directive deals mainly with rules governing actions for damages. However, according to its Preamble, actions for damages are just one element of an effective system of private enforcement of competition law. Hence, they should be complemented by alternative tools of redress such as consensual dispute resolution that provides parties with an incentive to give compensation. The Preamble of the Damages Directive envisages also that infringers and injured parties should be encouraged to agree on compensating for the harm caused by a competition law violation through consensual dispute resolution mechanisms such as out-of-court settlements, arbitration, mediation or conciliation. The Directive does not mention *expressis verbis* expert determination as an ADR mechanism. However, it is justified to say that expert determination of competition issues could be used in certain private enforcement cases<sup>20</sup>. Expert determination is especially important bearing in mind all the difficulties related to private enforcement and frequent requests for expert opinion in such cases.

The provisions of the Damages Directive on consensual dispute resolution aim to facilitate the use of such mechanisms and increase their effectiveness<sup>21</sup>. It will be analyzed below what influence the provisions of the Damages Directive may have on the arbitration of competition law.

#### 2. Suspension of the limitation period and pending proceedings

Article 18(1) of the Damages Directive stipulates that the limitation period for bringing an action for damages shall be suspended for the duration of any consensual dispute resolution process. Of course, if the parties have an agreement with an arbitration clause, they will in any case be obliged to use arbitration instead of litigation for resolving a dispute. The arbitration procedure would thus produce a result in the same way as a litigation procedure. Agreeing with Miriam Driessen-Reilly, Article 18(1) of the Damages Directive deals, in essence, with situations when the parties attempt to resolve the case primarily through mediation or conciliation without referring to arbitration/

<sup>20</sup> T. Zuberbuler, C. Oetiker (eds.), *Practical Aspects of Arbitrating EC Competition Law*, Schulthess 2007, p. 103–112.

<sup>21</sup> Paragraphs 5, 48–52 of the Damages Directive.

litigation<sup>22</sup>. In case the parties do not resolve their dispute through mediation, arbitration/litigation will then follow afterwards.

Mediation is well established in competition law disputes. Through mediation, the parties may get all the benefits of litigation without substantial legal costs. According to one of the documents prepared by the OECD, two types of competition law disputes are mediated: follow-on claims for damages and disputes concerning ongoing relationships in an industry<sup>23</sup>. Mediation might be especially important if businesses aim to re-establish a normal relationship and continue generating profits.

Moreover, Article 18(2) of the Damages Directive stipulates that without prejudice to the provisions of national laws in matters of arbitration, Member States shall ensure that national courts dealing with a damages action may suspend their proceedings for up to two years if the parties are involved in consensual dispute resolution concerning the claim covered by that action for damages. Most probably, these cases will deal with situations when the parties had already started a litigation procedure before a court but have afterwards decided to choose mediation/conciliation. This provision does not refer to arbitration because if the parties have an arbitration clause, then the case is decided in an arbitral tribunal instead of a court. In any case, such clause is welcomed as it encourages out-of-court settlements<sup>24</sup>.

### 3. Benefits for the settling infringer

The Damages Directive aims to encourage consensual settlement and provides that an infringer who pays damages through consensual dispute resolution should not be placed in a worse position than its co-infringers. A settling infringer should, therefore, not be fully jointly and severally liable for the harm caused by the entire infringement. After the settlement, the injured party is entitled to recover compensation only from the other non-settling infringers. However, it is possible that non-settling infringers would prove unable to pay their own dues and then theoretically, the injured party could once again make a claim against an infringer that has already settled its own damages. This principle follows from Article 11 of the Damages Directive

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<sup>22</sup> M. Driessen-Reilly, 'Private damages in EU competition law and arbitration – a changing landscape' (2015) *Arbitration International* 6.5.2015, <http://dx.doi.org/10.1093/arbint/aiv007>.

<sup>23</sup> OECD, Hearings, *Arbitration and Competition*, DAF/COMP(2010)40, p. 10, available at <http://www.oecd.org/competition/abuse/49294392.pdf>.

<sup>24</sup> S. Peyer, 'The Antitrust Damages Directive – much ado about nothing' [in:] M. Marquis, R. Cisotta, *Litigation and Arbitration in EU Competition Law*, Edward Elgar Publishing 2015, pp. 33–46.

that establishes the maxim of joint and several liability. In view of the above, the settling infringer should aim to ensure that the consensual settlement includes a clause on the exclusion of its further liability for any damages that prove impossible to recovered by non-settling infringers. Indeed, Article 19 of the Damages Directive *expressis verbis* provides for the possibility to amend a consensual settlement by expressly excluding additional liability.

Article 18(4) of the Damages Directive provides that a competition authority may consider compensation paid on the basis of a consensual settlement prior to its infringement decision to be a mitigating factor when imposing a fine. It is not clear how this provision will be transposed into national competition laws and how National Competition Authorities (hereafter, NCAs) will use this provision in practice. Moreover, antitrust damages claims are usually submitted as follow-on actions in EU Member States. It can be presumed that most consensual settlements will follow a prior infringement decision issued by a NCA. The application of the principle established in Article 18(4) of the Damages Directive will thus likely be quite uncommon.

#### **4. Effect of decisions of National Competition Authorities and national courts**

Article 9(1) of the Damages Directive provides that an infringement of competition law found by a final decision of a NCA or by a reviewing court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 of TFEU or under the provisions of domestic competition law. At the same time, Article 9(2) of the Damages Directive provides that when the decision of a NCA is taken in another Member State, then such final decision could be presented before domestic courts only as *prima facie* evidence. It is unclear how an arbitral tribunal should act in the same circumstances. It is also questionable whether, under the basic principles of arbitration law, the decision of a domestic NCA should have more legitimacy than the decision of a foreign NCA<sup>25</sup>. This question remains to be answered in the national practice of EU Member States.

#### **5. Disclosure of evidence and quantification of harm**

Articles 5–8 of the Damages Directive consider the disclosure and use of evidence in damages action cases but the above-mentioned provisions do not refer to arbitral tribunals. Moreover, according to the practice of the Court

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<sup>25</sup> M. Driessen-Reilly, *supra* note 22.

of Justice, arbitral tribunals are not considered to be ‘courts’ according to the TFEU. On the other hand, the Damages Directive obliges Member States to transpose certain mandatory procedural rules that shall govern the disclosure of evidence in damages action cases. Since arbitral tribunals are obliged to respect mandatory provisions of national law, arbitral tribunals will probably have to follow the rules on the disclosure of evidence established in the Damages Directive. Arbitral tribunals might also have to amend their rules on the disclosure of evidence. Bearing in mind all of the above-mentioned circumstances, it is clear that the Damages Directive is likely to have quite a significant effect on arbitration proceedings.

The Damages Directive does not cover exhaustively the ‘quantification of harm’ issue but the Practical guide quantifying harm in actions for damages (hereafter, Practical guide) is helpful in this matter<sup>26</sup>. However the latter document might, in some cases, not offer sufficient guidance and consulting a NCA might also be necessary. Article 17 of the Damages Directive provides that national court may request a NCA to assist them with respect to the determination of the quantum of damages. Like in many matter mentioned above, a problem might arise here since the Damages Directive does not grant the same right to an arbitral tribunal (that is, to request assistance from a NCA). Therefore, the way in which NCAs interact with arbitral tribunals might be different than how they treat the judiciary. However, as far as is known from the practice in Lithuania, arbitral tribunals do sometimes receive assistance from the domestic NCA.

#### **IV. Some thoughts on the status of the use of Alternative Dispute Resolution in practice**

According to the EC, one of the main aims behind the adoption of the Damages Directive is the idea that private enforcement of competition law should be strongly encouraged, considering that this area is currently undeveloped. A couple of studies showed an increase in private enforcement cases in the UK and in Germany<sup>27</sup>. However, after analyzing existing private enforcement cases, a claim can be made that the existing jurisprudential evidence is merely the tip of the iceberg – most competition law disputes lead

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<sup>26</sup> Commission Staff Working Document ‘Practical guide quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union’ (SWD (2013)) C (2013) 3440).

<sup>27</sup> B. Rodger, ‘Competition Law Litigation in the UK Courts: A Study of All cases to 2004’ (2006) *ECLR* 241-8, Parts I-III; B. Rodger, ‘Competition Law Litigation in the UK Courts: A Study of all Cases 2005-2008’ (2009) *GCLR* 93-114 and 136-47, Parts I and II.

to unreported out-of-court settlements<sup>28</sup>. In the first study, Professor Rodger undertook the empirical research of 43 settlements reached in the UK between 2000 and 2005. The fact that he found that only one of these settlements was actually known to the public speaks for itself. Professor Rodger recently claimed that ‘uncertainty of litigation was the key settlement motivation, and the principal difficulties in pursuing a competition law case were the evidential issues, legal uncertainty and economic difficulties’<sup>29</sup>. There is hope that settling parties shall have more clarity as to their position after the implementation of the Damages Directive and the expected increase in certainty of national legal rules. At the same time, however, the clear establishment of the rules on damages actions may also increase the amount of judicial litigation.

It should be noted that publicly available judgments of Lithuanian courts do not reflect all of this nation’s antitrust damages claims either. The author has personally dealt with a couple of publicly unreported private enforcement cases submitted to arbitral tribunals in Lithuania. The public remain unaware of many more competition law based claims that have been submitted for arbitration<sup>30</sup>.

Consumers’ interests are currently not represented in private enforcement litigation or/and settlements. Consumer damage had been clearly established because of cartels in a number of cases in Europe yet there were no follow-on action by consumer associations, let alone by private consumers. In Lithuania, only undertakings have even submitted actions for antitrust damages – consumers have so far never acted as claimants<sup>31</sup>. One claim submitted in the UK can be mentioned which was brought forward by a consumer association in the case *United Kingdom against JJB Sports PLC*<sup>32</sup>. The UK Consumer Association represented 144 consumers – the case ultimately settled with an agreement to pay up to 20 pounds to each of the represented consumers.

After analysing private enforcement cases from Poland, Latvia, Estonia, Slovakia and Lithuania, as well as other countries from Central and Eastern Europe, it came as no surprise that most of them centre on an abuse of dominance case and took the form of follow-on actions<sup>33</sup>. The author has

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<sup>28</sup> B. Rodger, ‘Private Enforcement of Competition Law, The Hidden Story: Competition Litigation Settlements in the UK 2000–2005’ (2008) *ECLR* 96–116.

<sup>29</sup> B. Rodger, ‘Why not court? A study on follow-on actions in the UK’ (2013) 1(1) *Journal of Antitrust Enforcement* 104–131.

<sup>30</sup> R. Moisejevas, ‘Development of Private Enforcement of Competition Law in Lithuania’ (2015) 8(11) *YARS*.

<sup>31</sup> *Ibidem*.

<sup>32</sup> *The Consumers’ Association v. JJB Sports plc.* (CAT Case 1078/7/9/07).

<sup>33</sup> M. Brkan, T. Bratina, ‘Private Enforcement of Competition Law in Slovenia: A New Field to Be Developed by Slovenian Courts’ (2013) 6(8) *YARS* 75–106; A. Jurkowska-Gomułka, ‘Private Enforcement of Competition Law in Polish Courts: The Story of an (Almost) Lost

made this analysis in an earlier article<sup>34</sup>. The above conclusion may have a number of explanations. First, it might be simpler to determine and to prove an abuse of dominance case than an anti-competitive agreement. Second, a company that suffered from an abuse might be more inclined to present a claim to the court, or approach the Lithuanian Competition Council, than a company which was a counterpart in an anti-competitive agreement since the Lithuanian Competition Council could end up imposing a fine on both undertakings that have concluded the anti-competitive agreement. Third, for those not party to an anti-competitive agreement, it is difficult to collect evidence on its functioning. An undertaking may suffer damages because of an anti-competitive agreement, but it might have no information about the existence of such agreement.

In another study, Lande and Davis have researched 40 private settlement cases in the US decided between 1988 and 2005<sup>35</sup>. Almost half of them were standalone actions uncovered by private attorneys. The importance of follow-on actions has thus recently decreased in the US<sup>36</sup>. It is not clear whether the same tendency could appear in the EU considering that the US legal system is more developed in the private enforcement area. In the opinion of Professor Rodger, the main criterion for deciding whether to rely on follow-on or standalone action lies in the ‘type’ of the relevant anti-competitive practice<sup>37</sup>. Unsurprisingly, cartel cases mainly generate follow-on actions since any potential claimants (especially consumers) usually do not have access to information on the fact that a given anti-competitive agreement has infringed their interests. On the other hand, claimants harmed through an abuse of dominance often understand that an abusive action has been committed and frequently induce an investigation in such matters by competition authority. Due to the above-mentioned circumstances, and difficulties in uncovering evidence, most private enforcement cases in the EU take the form of follow-on actions and are submitted by undertakings (rather than consumers/consumer associations) – they follow after a decision of a NCA that recognizes that a certain company had engaged in the abuse of dominance.

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Hope for Development’ (2013) 6(8) *YARS* 107–128; A. Piszcz, ‘Still-unpopular Sanctions: Developments in Private Antitrust Enforcement in Poland After the 2008 White Paper’ (2012) 5(7) *YARS* 55–77; K. Sein, ‘Private Enforcement of Competition Law – the Case of Estonia’ (2013) 6(8) *YARS* 129–140.

<sup>34</sup> R. Moisejevas, *supra* note 30.

<sup>35</sup> R.H. Lande, J.P. Davis, ‘Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases’ (2008) 42 *USFL Review* 879–918.

<sup>36</sup> M.T. Vanikiotis, ‘Private Antitrust Enforcement and Tentative Steps Toward Collective Redress in Europe and the United Kingdom’ (2014) 37(5) *Fordham International Law Journal* 1639–1682; R.H. Lande, J.P. Davis, *supra* note 35.

<sup>37</sup> B. Rodger, *supra* note 29.

## V. Conclusions

Arbitral tribunals are handling a huge number of competition cases albeit cases handled by arbitrators or mediators are often kept confidential. It is difficult to foresee what real effect the Damages Directive shall have on substantial and procedural rules of arbitration and other forms of ADR. There is reason to believe that the Directive might encourage recourse to ADR in competition law disputes. The Directive clarified rules on how evidence should be evaluated by parties to a dispute and arbitral tribunals, provisions on the amount of damages and on joint and several liability of co-infringers, as well as the legal value of decisions issued by NCAs. The new rules give clear benefits to both infringers and injured parties to achieve a consensual settlement. A fully comprehensive analysis of the effects of the Damages Directive on ADR in private enforcement cases can only be performed after a number of years have passed since its transposition into the national competition laws of EU Member States.

So far, the vast majority of all private enforcement claims (all private enforcement claims in Lithuania) was brought forward by undertakings – there have been almost no antitrust damages claims ever submitted by consumers or their associations. It remains to be seen whether consumers will make use of the Damages Directive. Following a ADR mechanism could help collective redress since claims could be solved cheaper and faster than through litigation. Injured parties shall have more alternatives how to seek redress. This is especially beneficial for consumers because they usually do not have ‘deep pockets’. It is also possible that the establishment of group actions might create a legal platform for consumers to submit antitrust damages claims and/or to be more effective in achieving consensual settlements.

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# **Antitrust Damages Actions in Ukraine: Current Situation and Perspectives**

by

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## **CONTENTS**

- I. Introduction
- II. Legal rules on private enforcement of competition law in Ukraine
- III. Quantifying harm from antitrust infringements in Ukraine
- IV. New sources of damages caused by market power
- V. Conclusion

## ***Abstract***

The article gives an overview of Ukrainian legislation and experiences concerning antitrust damages actions. The analysis has led to a number of conclusions: private claims are rare in Ukraine due to difficulties in obtaining evidence, high legal costs, and lacking confidence in the Ukrainian court system. The paper gives examples of Ukrainian private antitrust enforcement practice and provides a statistical analysis of the dynamics of ‘compensated’ damages caused by antitrust infringements in Ukraine. The value of ‘compensated’ damages is compared to the value of the economic effect of stopping antitrust infringements, as well as to the value of the overall welfare loss deriving from market power in the national economy. Finally, some new sources of damages caused by market power are discussed considering the development perspectives of this branch of antitrust activity.

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## Résumé

Cet article donne un aperçu global de la législation et de l'expérience ukrainienne concernant l'application privée du droit de la concurrence. L'analyse conduit à plusieurs conclusions : les actions en dommages sont rares en Ukraine en raison de difficultés avec l'obtention des preuves, en raison des frais juridiques élevés, et à cause de manque de confiance dans le système judiciaire ukrainien. Cet article donne des exemples de l'application privée du droit de la concurrence en Ukraine et fournit une analyse statistique des préjudices indemnisés causés par les violations du droit de la concurrence. La valeur des préjudices indemnisés est comparée à la valeur de l'effet économique de la cessation des pratiques anticoncurrentielles, ainsi qu'à la valeur d'une perte globale de bien-être pour la société. Enfin, certaines nouvelles sources de préjudices causés par un pouvoir de marché sont examinées, en tenant compte des perspectives de développement futur de cette branche du droit de la concurrence.

**Key words:** antitrust damages actions; private antitrust enforcement; harm from antitrust infringement; non-infringement scenario; economic effect of cease of antitrust infringements; welfare loss from market power.

**JEL:** K23; K42.

## I. Introduction

Article 42 of the Constitution of Ukraine provides that 'the State shall ensure the protection of competition in the pursuit of entrepreneurial activity' and bans 'abuse of a monopolistic position in the market, the unlawful restriction of competition, and unfair competition'. It also states that 'the types and limits of monopolies shall be determined by law' and provides that 'the State protects the rights of the consumers'. At the same time, Article 3(1) of the Law on the Protection of Economic Competition (hereafter, LPEC) clarifies that Ukrainian competition law is based on the norms established in the Constitution and consists of: the LPEC, the Law on the Antimonopoly Committee of Ukraine (1993), and the Law on Protection against Unfair Competition (1996), as well as other normative and legislative acts adopted in accordance with these laws. Among other things, they contain provisions that regulate the sphere of damages actions.

Many experts assume that Ukrainian competition law is opaque and often arbitrary, that changes are needed to bring clarity and certainty to the regulatory environment. Some amendments are expected due to Ukraine's commitments to harmonise its laws with European legislation deriving from the Ukraine-EU

Association Agreement. These changes may lead to growth in the role of private antitrust enforcement which remains a very rare phenomenon next to the central role played still by public enforcement.

To make these changes effective, it is necessary to know what the actual state of damages actions in Ukraine is. It is also essential to understand the practice of damages compensation, which is sometimes more influential for the development of this enforcement sphere than the laws or other official papers on which it is based. This paper provides both the legal and the economic perspective on this issue. In its second section, it gives an overview of the deficiencies of current Ukrainian civil procedural law, which prevent the development of private antitrust enforcement in the country. It also proposes ways to amend existing legislation. The third section of this paper sets out the actual approaches used to quantifying harm caused by antitrust breaches in Ukraine – they are illustrated by specific national antitrust cases. Those cases are not private actions, nevertheless they describe the existing mechanisms of calculating harm by the AMCU, and AMCU decisions would serve as evidence in possible future private actions. Presented here is also a statistical analysis of existing compensation dynamics as an indicator of the popularity of antitrust damages actions in Ukraine. The fourth section shows the very limited efficiency of the existing antitrust damages compensation system and identifies new sources of such damages. The need to consider the latter is further on stressed both in the practice of antitrust damages actions and even in the wider context of competition protection. The paper ends in conclusions that finalize the analytical results presented.

## II. Legal rules on private enforcement of competition law in Ukraine

Violations of competition rules, especially infringements as serious as cartels or abuses of monopoly powers, cause considerable damages not only to competition as a whole, but also to specific market participants. In Ukraine, most of the work to restore market competition is conducted by the Antimonopoly Committee of Ukraine (hereafter, AMCU)<sup>1</sup>.

Article 12 LPEC defines the conditions under which an undertaking is deemed to hold a dominant market position. An undertaking is understood to be dominant if its market share exceeds 35%, unless it proves that it is in fact exposed to substantial competition. A market share equal to or less than 35%

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<sup>1</sup> Official website of the Antimonopoly Committee of Ukraine, [www.amc.gov.ua](http://www.amc.gov.ua) (accessed 16.03.2015).

may be considered dominant if its holder does not face substantial competition, particularly due to relatively small market shares of its competitors<sup>2</sup>.

The results of public enforcement proceedings conducted by the AMCU have little impact on injured market players and consumers. Still, the importance of victims' satisfaction deriving from the fact that justice has been served and the offender punished should not be underestimated. The termination of an infringement is a natural and expected result but its effect is directed to the future. A question arises here therefore: how can a party that suffered losses from the misconduct of a particular market player find compensation for the negative consequences of acts committed in the past?

Damages actions are most widely used in the US and in the UK, but private law actions are now brought before the courts of many other countries also. Hence, attempts are made across the board to introduce appropriate legal standards.

Compensation for damages caused by an antitrust violation can be facilitated both in special legislation on private antitrust lawsuits (as is the case in the US and Germany) and in general civil law tort rules.

In Ukraine, filing a private law claim for an antitrust breach is a rare phenomenon, despite the fact that such suits are allowed by existing legislation. The legal basis for the filing of private suits lies in the norms of Article 224 of the Commercial Code of Ukraine which states that 'A participant of economic relations that violated the business obligation or the established requirements on the economic activities shall compensate the losses to the person, which rights or legitimate interests have been violated'. According to Article 55 LPEC, '[p]ersons who have suffered damage as a result of violation of legislation on protection of economic competition, may apply to the commercial court for a compensation'.

According to Article 55(2) LPEC, double compensation can be claimed for losses caused by an abuse of monopoly powers and by the participation in a concerted practice.

Actions for damages are governed by the basic principles on civil liability established in Chapter 24 of the Civil Code of Ukraine (hereafter, CCU). In order to establish the civil responsibility of a given individual, all elements of civil responsibility have to be established: the infringement of competition law, fault, damages, and a causal link.

Yet when it comes to private enforcement of competition law, certain deficiencies of Ukrainian law come to the surface, which hinder this enforcement model.

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<sup>2</sup> The Law of Ukraine on the Protection of Economic Competition, <http://zakon2.rada.gov.ua/laws/show/2210-14> (accessed 16.03.2015).

First, the CCU does not limit the range of individuals who may submit a civil action. As a result, damages can be claimed by members of a broad group of individuals including: competitors, customers, suppliers, and so on.

Article 45 of the Civil Procedural Code of Ukraine (hereafter, CPCU) specifies the general prerequisite for the protection of the interests of certain groups (particularly unspecified individuals). Accordingly, in cases established *ex lege*, a number of entities (the Commissioner of the Verkhovna Rada of Ukraine on human rights, public authorities, local governments, individuals as well as legal entities) may apply to the court for the protection of rights, freedoms and interests of others, as well as of national or public interests, and to take part in these proceedings. However, this provision lacks required scientific substantiation. It also lacks specific procedural mechanisms to protect subjective rights not of individual entities, but of a collective<sup>3</sup>.

Second, the main difficulty on the path to damages compensation in Ukraine is the issue of the burden of proof. The burden of proving an antitrust violation rests with the plaintiff, who must provide its evidentiary basis, develop a legal strategy of proof, provide documentation that confirms the appearance of losses, as well as to carry out their exact calculation. A final decision of the AMCU will act as proof of the infringement. It is fair to say that a claim for damages compensation, after the AMCU (or its authorized territorial body) recognizes a specific person has committed an antitrust violation, strengthens the legal position of the plaintiff, as the decision of the antitrust body confirms an infringement.

Having said that, national legislation makes it possible to also file civil claims independently from an AMCU decision. Since appeal proceedings to AMCU decisions may last for several months, the plaintiff will be forced to wait for the decision of the last instance court to have definite proof of an antitrust violation (final AMCU decision). If a plaintiff brought an action without waiting for the results of the appeal, should the court once again assess the circumstances of the antitrust breach? It is likely that in such cases the defendant will ask the court to suspend the damages proceedings pending the appeal ruling. The fact cannot be excluded also that the plaintiff may be required to get an expert opinion on some issues related to the case.

In practice, some of the documents containing the information required for a civil damages claim may be held by the defendant or by 3<sup>rd</sup> parties. These might not be made available to the plaintiff upon its request. Ukrainian procedural law provides the court with the authority to call for evidence on the

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<sup>3</sup> A. Gubska, 'Group action and other representative actions: differentiating criteria' (2014) 3 *Judicial bulletin*, [http://irbis-nbuv.gov.ua/cgi-bin/irbis\\_nbuv/cgiirbis\\_64.exe?C21COM=2&I21DBN=UJRN&P21DBN=UJRN&IMAGE\\_FILE\\_DOWNLOAD=1&Image\\_file\\_name=PDF/Npnau\\_2014\\_4\\_17.pdf](http://irbis-nbuv.gov.ua/cgi-bin/irbis_nbuv/cgiirbis_64.exe?C21COM=2&I21DBN=UJRN&P21DBN=UJRN&IMAGE_FILE_DOWNLOAD=1&Image_file_name=PDF/Npnau_2014_4_17.pdf). (accessed 16.03.2015).

basis of an application of the plaintiff. In such cases, the applicant must indicate what circumstances (relevant for the proper consideration and resolution of the case) may be confirmed or disproven by the requested evidence. The plaintiff must also state the reasons preventing it from obtaining the evidence as well as specify its location. This is clearly difficult, especially when it comes to compensation of damages caused to an end-user who is not familiar with the activities of the defendant.

For example, if a monopolist overstates the price of goods, an injured party would need to tell the court the specific amount overpaid. If the injured entity is not a procedural party in the AMCU case, it will not have access to the full text of the decision. In such cases, the plaintiff may apply to the court to request the disclosure of the AMCU decision as evidence. But even having received the full text of the antitrust decision, the plaintiff will not find in it a specific damages amount. The civil claimant will only find an indication of the fact that over-pricing has actually occurred.

Other barriers to effective private enforcement of competition law in Ukraine include:

- high legal costs and substantial uncertainty about the final outcome of such claims<sup>4</sup>;
- unawareness of potential claimants of their right to claim compensation, or their unwillingness to spoil their relations with offenders; even if the plaintiff is successful in its civil litigation, it might afterwards prove difficult to continue doing business with the offender; after the AMCU issues its decision to stop the violation and the court decides on damages, a monopolist will still have sufficient influence on the market, which it can use against the plaintiff, without actually infringing the law; in such cases, its customers are forced to make a decision: either to maintain good relations with the counterparty, or win a civil case and remain without the main supplier.

If further business conduct does not depend on the quality of the relationship between the injured entity and the offender, damages compensation is quite a justified step to take. Hence, not only the chance of winning the civil court case but also the level of dependence of the claimant on the offender should be assessed in every case.

This is why few court rulings have actually been delivered in Ukraine in this context in recent years. In all these cases, injured parties received compensation from companies holding a monopoly in public utility services markets.

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<sup>4</sup> N. Hurzheeva, 'Vyvchennia mozhlyvostej rozbudovy instytutu hrupovoho pozovu v Ukraini' (2009) *Zakhyst nevyznachenoho kola spozhyvachiv u sviti ta v Ukraini*, <http://www.consumerinfo.org.ua/upload/iblock/b62/> (accessed 18.03.2015).

### III. Quantifying harm from antitrust infringements in Ukraine

The quantification of harm caused by antitrust infringements is a major element of the antitrust damages actions system. Ukraine does not have a clear procedure for the estimation of such harm. Although there are no special legislative or other regulatory acts concerning this matter, some national practice exists (and its analysis is vital because, as noted above, AMCU decisions would be used as evidence in private actions) which is worth analysing in comparison with European standards.

The approaches used to quantifying harm caused by antitrust infringements depend on the type of violation in question. Dividing the latter into price and non-price antitrust infringements – the former manifest in overcharges, the latter are set aside from overcharges and are commonly referred to as ‘exclusionary practices’. They include: predation, exclusive dealing, refusal to supply, tying, bundling and margin squeeze. This is a common classification used by researchers<sup>5</sup> and experts<sup>6</sup>.

In the cases of price violations, Ukrainian officials quantify harm as a multiplication of the overcharge by the volume of the product sold under the infringement. This gives them a sum of additional customer expenses:

$$H = \Delta P \times Q_t \quad (\text{formula 1})$$

where  $H$  – harm caused by a price rise;

$\Delta P$  – overcharge;

$Q_t$  – product volume sold during the infringement period<sup>7</sup>.

In the cases of non-price infringements, the value of harm is quantified as a value of sunk costs, a loss of profit and so forth. However, some cases exist of non-price infringements where an overcharge analysis was used such

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<sup>5</sup> M.A. Han, M.P. Schinkel, J. Tuinstra, ‘The Overcharge as a Measure for Antitrust Damages’, Amsterdam Centre for Law & Economics Working Paper No. 2008-08; <http://ec.europa.eu/competition/antitrust/actionsdamages/schinkel.pdf> (accessed 11.03.2015); S. Salop, ‘Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard’ (2006) (73) *Antitrust Law Journal* 312; P. Buccirossi, ‘Quantification of Damages in Exclusionary Practice Cases’ (2010) 1(3) *Journal of European Competition Law & Practice* 252–256.

<sup>6</sup> Practical Guide to Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, hereafter, the Practical Guide; paras. 15, 136 and 180.

<sup>7</sup> Formalized by the authors using an Instructive Letter on Quantifying of Economic Effect of Antitrust Violations Cease by Structural Bodies and Territorial Offices of Antimonopoly Committee of Ukraine No. 200-29/99-3379 (17.04.2014).

as *JCC Kyivguma vs JCC Kyivoblenergo*. Kyivoblenergo (monopolistic owner of electricity transmission infrastructure in the Kyiv region) precluded an independent electricity supplier – The Central Power Company – from using electricity transmission infrastructure. The monopolist wanted to prevent consumers (Kyivguma was one of them) from buying electricity from The Central Power Company in favour of Kyivoblenergo, who also operated on the electricity supply market. However, the price of electricity charged by the competitor (The Central Power Company) was lower than that of the monopolist (Kyivoblenergo). Hence the consumer, Kyivguma, claimed compensation for its additional costs caused by the price difference. Its value was quantified by the abovementioned *formula 1* – as a multiplication of the price difference by monthly volume of electricity consumption by Kyivguma (the infringement lasted only for once month and was stopped at the next monthly auction for electricity supply in the State Enterprise ‘Energy market’)<sup>8</sup>.

However, this case provided only partial compensation. Kyivguma (injured ‘consumer’) has gotten the compensation, but The Central Power Company (injured ‘competitor’) has not. The latter did not even try to get compensation through the courts, notwithstanding the significant value of its lost profit. The reason for such behaviour could be found in the complexity of quantifying and grounding as well as getting a court confirmation of the value of lost profit. There are not precedents of such type in Ukraine, while compensations in cases of antitrust price violation are common. They will be the focus of the following analysis.

The methodology of quantifying the value of an anticompetitive overcharge in Ukraine is similar to the European approach<sup>9</sup>. It involves comparing the actual performance of the company (especially prices) with performance which would have existed in the absence of the infringement (non-infringement scenario). So, the key challenge in assessing the value of harm from antitrust infringements is the formulation of a non-infringement scenario. Two groups of methods are used in this context: comparison-based methods and simulation methods (Figure 1).

All of these methods are used in Ukraine besides theoretical modelling.

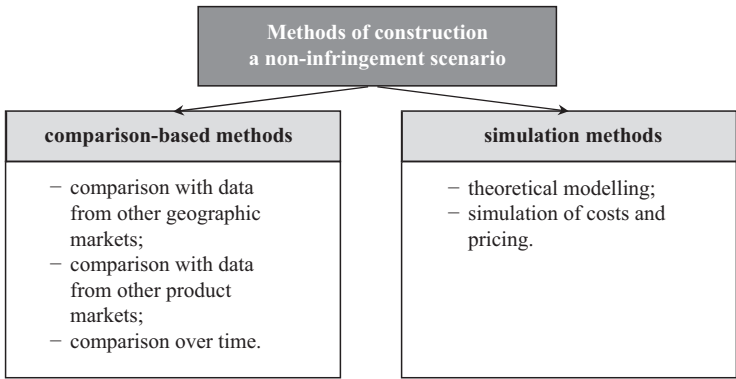
The method of ‘comparing data from other geographic market’ is used in Ukrainian antitrust practice when the infringement is committed on a regional market that is close or even identical to a number of adjacent geographic markets. An example here is provided by the cartel case that occurred on

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<sup>8</sup> Annual Report of Antimonopoly Committee of Ukraine 2008, p. 82–84.

<sup>9</sup> See 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, 05.12.2014, p. 1), hereafter, the Damages Directive, Art. 2(20).

**Figure 1.** Methods of constructing a non-infringement scenario



**Source:** created by the author using the content of the Practical Guide, paras 38-39 and 96.

the milk procurement market in some districts of the Ivano-Frankivsk region. The actual procurement prices were understated by a factor of 1.4–1.67 by four dairy plants (Kolomyisky syrzhavod, Snyatynsky syrzhavod, Gorodenkivsky syrzhavod and Maslozavod (Tlumach town)), which together occupy a dominant position on the relevant market. The Ivano-Frankivsk Territorial Office of AMCU compared these plants’ prices with the prices on the milk procurement markets in other districts of the Ivano-Frankivsk region. The authorities found that their prices were 25%–40% lower than comparable rates in other districts. The plants involved were obliged to compensate the incurred losses to injured households. The value of the losses was quantified as a difference between the average region price of milk procurement and the price paid to households under the infringement, multiplied by the volume of milk procured under the infringement<sup>10</sup>. So, this example also meets the requirements of the quantifying approach formalized in *formula 1*.

The method of ‘comparing data from other product market’ compares the price of the investigated good with prices of its substitutes. Among the examples of the use of this method in Ukrainian antitrust practice is the case of wireless engineering procurement by the Ukrainian state operator of rail transport – Ukrzaliznytsya. Suppliers of wireless engineering (Arcom and CTI) engaged in tender fixing. As a result of their anticompetitive practice, the price under the tender became higher than on the open market. Here, the comparison covered markets where the same product was sold to different groups of customers: state rail transport operator *versus* private customers. The difference between the tender price and the price of the same wireless engineering on the open market formed the first part of *formula 1*. The second part was determined

<sup>10</sup> Annual Report of Antimonopoly Committee of Ukraine 2002, p. 35.

as the volume of the tender procurement. The value of the damages granted to Ukrzaliznitsya amounted to UAH 400 000 (EUR 58 000)<sup>11</sup>.

The next method of constructing a non-infringement scenario is rather complex and focuses on a 'comparison over time'. It is rarely used in Ukraine since the national economy is dynamic, and it is difficult to compare prices set in different chronological periods. This method can be used for short-term infringements where it is possible to compare prices charged during the infringement period and those in an unaffected post-infringement period (comparison 'during and after'). This method was used in the wood cartel case<sup>12</sup>. However, such cases are sporadic and they rarely involve damages actions. The possibility of adequate price comparison over time is limited by long infringement periods and the dynamic nature of the Ukrainian business environment, which does not facilitate the detection of the anticompetitive component of the price change.

Unlike 'comparison-based' methods of constructing a non-infringement scenario, 'simulation methods' (simulation of costs and pricing) involve the analysis of the cost structure. Simulations are usually used in cases of antitrust violations on regulated markets, especially natural monopoly markets.

There are rich experiences of damages compensation with regard to consumers on such markets in Ukraine. Listed among the reasons for such compensation can be:

- providing poor quality services (for example, non-ambient temperature conditions during the heating season);
- providing services at pre-arranged (predictive) prices, irrespective of the real costs of energy consumption (for example, refusal to reevaluate the tariff<sup>13</sup> when the actual average winter temperature is higher than the predicted one);
- duplication of certain components' value in the cost and ultimately in the tariff (for example, the costs for meter calibration) etc.

These actions result in an overstating of the costs and price of the service. *Formula 1* can be used for its analysis but by replacing  $\Delta P$  for  $\Delta C$ .

$$H = \Delta C \times Q_t \quad (\text{formula 2})$$

where  $\Delta C$  – unjustified increase in costs that compound the regulated tariff.

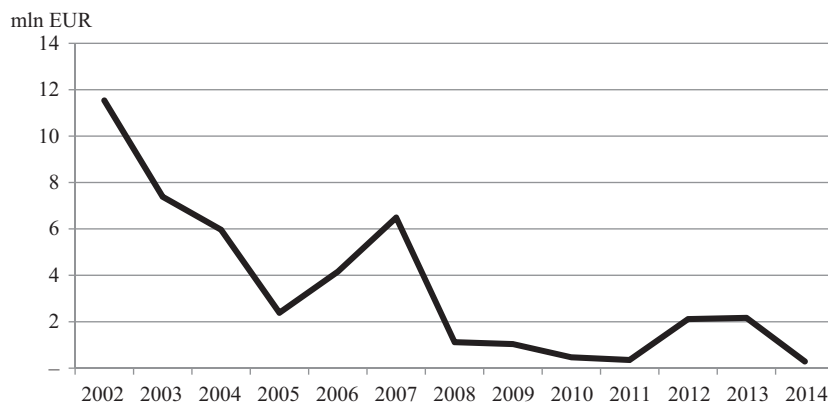
<sup>11</sup> Annual Report of Antimonopoly Committee of Ukraine 2009, p. 35.

<sup>12</sup> In this case, the Association 'Mebliderevprom' coordinated the anticompetitive concerted actions on the wood market which led to the overcharge. The infringement lasted for a year (2011) and was stopped by AMCO. After that the price of wood decreased almost to the pre-infringement level; Annual Report of AMCO 2012, available at: <http://www.amc.gov.ua/amku/doccatalog/document?id=95114&schema=main> (accessed 16.03.2015).

<sup>13</sup> Many Ukrainian consumers have no special gauges for the use of heating and use the tariff set for a square meter of living space.

In the first half of the 2000s, about one third of the overall value of compensations related to such infringements. This figure is now significantly lower, as well as the value of compensation that is kept count by AMCU (Figure 2). This shift is caused by a number of interrelated factors.

**Figure 2.** Dynamics of the value of private compensations of harm from antitrust infringements (data from AMCU)



**Source:** Annual Reports of AMCU 2002-2014.

The first reason for the shift lies in that the consumer circle of natural monopolists consists of thousands of households. The bargaining power of each individual household is far too weak to establish favourable terms of service consumption. Simultaneously, the value of the harm suffered by an individual household from the abuse by a natural monopolist is negligible in comparison to the cost of counteracting the monopolist. Moreover, the ability of individual households to unite to counter natural monopolists (also in cases of damages compensation) remains weak. According to the Stigler-Peltzman model, the market (with a court system acting as an instrument of guaranteeing its effectiveness) cannot cope with the problem of damages compensation to dispersed households<sup>14</sup>. This must be done by government agencies, primarily by the AMCU. So such compensation will only be adequate if the problem is kept in check by the AMCU. But this solution is not provided by Ukrainian Law, which brings this issue entirely into the sphere of civil law.

The second reason for the shift is the change in the mission of the AMCU. At the beginning of 2000s, independent regulators did not exist in most areas

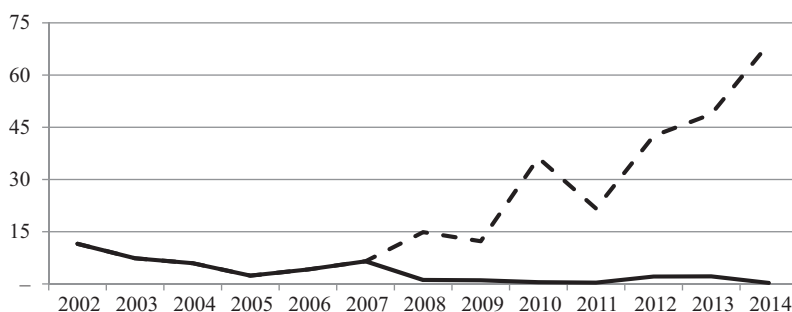
<sup>14</sup> S. Peltzman, 'Toward a More General Theory of Regulation' (1976) 19 *Journal of Law and Economics* 211-240.

of natural monopolies. The AMCU had to act in their regulatory capacity, which included price regulation in the sphere of utilities. Today such regulators exist and the activity of the AMCU centres on the development of competition and counteracting monopolization of potentially competitive markets. This area does not cover the above discussed class of infringements (as well as the relevant procedures of damages compensation). Today, such practices are out of the control of the AMCU.

The latter explains the rapid downward trend of private compensations value shown in Figure 2. But this dynamics does not show the overall trend in damages compensations in Ukraine – it is only a narrow AMCU statistics that ignores another sphere of damages compensations in the country.

Starting with the structure of total recovery<sup>15</sup> in 2002–2007<sup>16</sup> and the data on infringements committed and fines paid in 2002–2014, it is possible to estimate the change in value of private damages compensations in the following years of 2008–2014 (Figure 3).

**Figure 3.** Dynamics of estimated value of compensated harm in Ukraine (if the structure of total recovery stays fixed)



**Source:** Created by the author using data provided in Annual Reports of AMCU 2002–2014.

Figure 3 shows that the estimated value of ‘compensated’ harm (in other words, value of compensation actually paid) in antitrust cases can almost reach the point of 70 million EUR in 2014 – by contrast to the officially stated amount of 300 000 EUR.

It should be noted that the rapid increase in the estimated value of compensated harm in recent years should not be considered evidence of lack

<sup>15</sup> Total recovery is the total value of funds that was returned by the antitrust infringers to the society (State, competitors, suppliers, consumers). It consists of fines and compensated harm.

<sup>16</sup> The period of 2002–2007 was characterised by the strict control exercised by AMCU over the process of compensation of damages caused by antitrust violations. So AMCU data for that period is relatively complete.

of accuracy of the proposed assessment methodology. On the contrary, it correlates far better, than the official statistics, with the calculated value of the economic effect of stopping antitrust infringements (individuals' and entities' costs savings on goods, budget savings or prevention of an increase in such costs, which are the result of stopping antitrust infringements by AMCU<sup>17</sup>). It is close to the value of damages<sup>18</sup> and the relation between its doubled value and the value of compensated harm gives a rough measure of antitrust damages compensation in Ukraine (Table 1).

**Table 1. Dynamics of the index of antitrust damages compensation in Ukraine**

Year	Economic effect of stopping antitrust infringements, million euro	Corrected value of compensated harm, million euro	Index of compensation
[1]	[2]	[3]	$[4] = [3] / ([2] \times 2) \times 100\%$
2002	10.24	11.54	56.33
2003	10.29	7.38	35.87
2004	15.89	5.96	18.77
2005	38.37	2.38	3.11
2006	16.38	4.16	12.69
2007	6.09	6.49	53.29
2008	3.89	14.88	191.48
2009	13.70	12.26	44.79
2010	11.13	36.19	162.62
2011	44.11	21.66	24.55
2012	131.47	42.53	16.18
2013	292.12	48.78	8.35
2014	47.88	69.00	72.06
Total	641.54	283.21	22.07

**Source:** Created by the author using data from Annual Reports of AMCU 2002–2014.

<sup>17</sup> Instructive Letter on Quantifying of Economic Effect of Antitrust Violations Cease by Structural Bodies and Territorial Offices of Antimonopoly Committee of Ukraine No. 200-29/99-3379 (17.04.2014), p. 2.1.

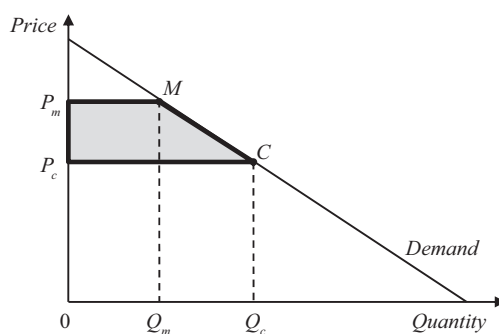
<sup>18</sup> The value of damages includes the value of the real harm experienced from the exploitation of market power, while the compensated damages can be doubled. Art. 55 LPECc N 2210-III at 11.01.2001, [in:] V. Tsusko, M. Barash, M. Fedosiyenko, T. Kulishova, V. Talakh, N. Arnaut (eds.), *Compendium of Legislation of Ukraine on Protection of Economic Competition In 2 Vol.*, vol. 1, p. 124; <http://www.amc.gov.ua/amku/doccatalog/document?id=94745&schema=main> (accessed 16.03.2015).

The Index of compensation is not a stable figure because an infringement can be stopped in the first period, while compensation might be paid in the second period. For the whole investigated period (2002–2014), this index is about 22%. This is evidence of powerful reserves for the development of antitrust damages actions in Ukraine.

#### IV. New sources of damages caused by market power

According to part 3 (para 128) of the Practical Guide, the value of harm caused by antitrust violations is represented by the area of the trapeze  $P_mMCP_c$  on Figure 4.

**Figure 4.** Harm caused by antitrust infringements



**Source:** Practical Guide, para 128.

According to the approach of R. Posner, which is considered to be fundamental in the measurement of the value of welfare loss in modern economics, the welfare loss from market power has the same schematic dimension<sup>19</sup>. Unlike harm caused by antitrust infringements, and the economic effect of stopping antitrust infringements, which are both calculated on the given market where the infringement occurred, welfare loss measures the harm suffered from market power by the entire economy, including implicit economic losses such as ineffective use of economic resources and exploitation of market power.

After investigating the value of welfare loss for the Ukrainian economy in 2008–2011, it emerges that its average yearly value (calculated with R. Posner's

<sup>19</sup> R. Posner, 'The Social Cost of Monopoly' (1974) 55 *NBER working papers*, p. 2–3.

methodology) amounts to UAH 373.2 billion (about Euro 33 billion)<sup>20</sup>. Comparing it with the value of compensated damages, it is evident how truly insignificant the latter is – compensated harm amounts to less than 0.1% of total welfare loss. Large value of welfare loss and the poor practice of damages compensation can be seen in other national economies also<sup>21</sup>.

The result of this comparison is the reason for looking for the causes and ways of overcoming the disjuncture between ‘compensated’ damages and welfare loss. It is not enough to merely improve the procedures for damages compensation in antitrust cases. It is necessary to realise the existence of implicit sources of welfare loss in day-to-day business, which are caused by:

- a) lack of effectiveness of antitrust regulation (each undetected/persisting abuse contributes to the gap, reducing the effectiveness of certain industry sectors as well as of the entire economy);
- b) existence of a range of legal business practices that help create, strengthen and protect the market power of private entities, and let them exploit it effectively.

Researchers and those engaged in the implementation of state competition policy are aware of the first group of the sources of welfare loss – they are a matter of continued legal improvement. For example, Ukrainian antitrust law can deal with some of them by adopting certain provisions of EU law. As for the second group, those factors remain implicit not only in Ukraine, but even in developed countries with deeply rooted traditions of competition protection. Focusing therefore on the second group of the sources of welfare loss, three questions should be answered. What business practices can cause welfare loss? How can they raise welfare loss? How to calculate the resulting damage?

Industrial economics and modern antitrust practice, the latter built on the achievements of the former, have investigated in detail the effects of market power onto market supply. They are the basis for national laws and other regulatory documents in the field of competition. At the same time, the effects of market power onto demand are only studied in theory, the latter explaining them as the result of some business practices that are able to distort a demand function of a consumer. These include:

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<sup>20</sup> A.G. Gerasymenko, *Market power: sources, scope, consequences*, Kyiv National University of Trade and Economics Press, Kyiv 2014, p. 317.

<sup>21</sup> F.M. Fisher, ‘Economic Analysis and Antitrust Damages’ (2006) 29(3) *World Competition* 383–394; A. Daskin, ‘Deadweight Loss in Oligopoly: A New Approach’ (1991) 58(1) *Southern Economic Journal* 171–185; S.B. Avdasheva, N.M. Rosanova, *The Theory of Industrial Markets Organization*, Magistr, Moscow 1998, p. 88.

excessive product differentiation (H. Hotelling<sup>22</sup>, S. Salop<sup>23</sup>, K. Lancaster<sup>24</sup>), asymmetric information (G. Akerlof<sup>25</sup>, J. Stiglitz<sup>26</sup>), persuasive advertising (R. Schmalensee<sup>27</sup>, P. Milgrom<sup>28</sup>) and other business practices, as well as a mix of the above. But the problem is that it is in practice quite difficult to separate such manifestations of the exploitation of market power from the normal course of business conduct.

Business conduct of forming a market power zone in a product space, and its strengthening by persuasive advertising, uses excessive product differentiation (also by way of persuasive advertising) to place the item in as far away the product space from others substitutes as possible. The Salop Model of Circular City grounds the potential of such a practice, which makes the consumer of a product pay more for the opportunity to enjoy its benefits<sup>29</sup>. This behaviour is not *a priori* harmful. It is not prohibited. It raises harm only (a) when the overcharge is not provided by real differences in product quality and, (b) when it brings a profit margin much higher than the normal rate.

Ordinary instruments of quantifying harm cannot be used here because such overcharge is not caused by a monopolistic decrease of output. A different method of damage estimation is needed based on the difference between the declared and actual utility of the good, rather than solely on the price difference.

The proliferation of trademarks and proactive product innovations are able to preserve market structures and facilitate individual and collective dominance, similar to any other barriers to potential competition. However, unlike predatory pricing or sunk costs, methods to distinguishing between fair and unfair practices do not exist when it comes to the updating of a product range. There are no clear indicators of the ability of demand manipulation practices to raise market power and the associated welfare loss.

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<sup>22</sup> H. Hotelling, 'Stability in Competition' (1929) 39 *The Economic Journal* 41–57.

<sup>23</sup> S. Salop, 'Monopolistic Competition with Outside Goods' (1979) 10 *Bell Journal of Economics* 141–156.

<sup>24</sup> K. Lancaster, 'The Economics of Product Variety: a Survey' (1990) 9(3) *Marketing Science* 189–206.

<sup>25</sup> G.A. Akerlof, 'The Market for 'Lemons': Qualitative Uncertainty and the Market Mechanism' (1970) 84(3) *The Quarterly Journal of Economics* 488–500.

<sup>26</sup> J.E. Stiglitz, 'Equilibrium in Product Market with Imperfect Information' (1979) 69(2) *The American Economic Review* 339–345 (Papers and Proceedings of the 91 Annual Meeting of the American Economic Association).

<sup>27</sup> R. Schmalensee, *Advertising and Market Structure*, Forgotten Books, Charleston 2012.

<sup>28</sup> P. Milgrom, 'What the Seller Won't Tell You: Persuasion and Disclosure in Markets' (2008) 2(2) *Journal of Economic Perspectives* 115–121.

<sup>29</sup> S. Salop, 'Monopolistic Competition with Outside Goods' (1979) 10 *Bell Journal of Economics* 141–156.

As for the approaches to the estimation of the harm suffered from such conduct of a market power holder, they can be similar to those that are used in the EU in foreclosure cases. They refer to three kinds of losses: actual loss suffered (*damnum emergens*), compensation for the profit a potential competitor had lost due to an infringement (*lucrum cessans*), and the payment of interest<sup>30</sup>. Actual losses must be calculated as a value of additional costs of overcoming the barrier notwithstanding the result (whether there was a potential competitor entering the market or not), reflecting the so-called Stigler approach to the definition of barriers<sup>31</sup>. The second and the third type of loss must be calculated as a value of lost profit of potential competitors, who refuse to enter the market.

It is clear that these two examples do not exhaust the entire range of anticompetitive practices of demand manipulation that can harm individuals (both persons and companies) and the society as a whole. However, they define a vector for further studies in the sphere of antitrust damages actions and the development of competition at large.

## V. Conclusion

Public enforcement of competition law still plays a dominant role in Ukraine. In order to ensure that private antitrust lawsuits successfully operate in Ukraine, without rights abuses from both sides, the following measures are proposed:

- to develop a mechanism for access to evidence held by the defendant;
- to adopt legislative norms defining who can initiate actions for damages caused by antitrust violations (direct or indirect customers);
- to provide the possibility for collective actions by groups of plaintiffs.

The approaches to quantifying the value of damages are similar in Ukraine and the EU. Most differences are sectorial. For example, the largest share of damages compensations in the Ukraine (mostly in early 2000s, but also today) concerns natural monopolies. Detecting abuses on such markets entails not only the punishment of the offender, but also compensation for damages incurred by its customers. This can be public or private in nature. The Decision of the AMCU, which established an abuse, can be used as evidence of a violation by the injured entity. The active role of AMCU in such cases removes one of the thorniest problems of the damages compensation procedure – quantifying the value of the harm caused by the antitrust infringement.

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<sup>30</sup> Damages Directive, Art. 3, para. 2; Practical Guide, para. 183.

<sup>31</sup> G.J. Stigler, *The Organization of Industry*, Richard D. Irwin, Homewood 1968.

The abovementioned involvement of the AMCU would thus be considered 'indirect' antitrust damages enforcement because the AMCU is a public body. Its active involvement in the process of damages compensation changes the classical disposition of the parties, being the driving force of the whole process's transformation from private enforcement into the public one. Direct private antitrust enforcement works in Ukraine only in cases of a 'big company vs. a monopolist (or cartel)' and only with respect to overcharging. This is so, first, because small companies are too weak to bear the burden of court actions in Ukraine's corrupted economy. The second cause lies in poor competitive education of average Ukrainians. Neither Ukrainian entrepreneurs, nor lawyers have enough skills to ground the actual value of profit loss as a result of monopoly abuse (or a cartel). Only AMCU staff can really do it.

There is an urgent need for competition advocacy in the sphere of antitrust damages actions. This would intensify the practice of antitrust damages actions as a 'yesterday step' and make Ukrainian society ready for the challenges of today or even tomorrow, such as the abovementioned practices of demand manipulation.

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# **Georgia's First Steps in Competition Law Enforcement: The Role and Perspectives of the Private Enforcement Mechanism**

by

Zurab Gvelesiani\*

## **CONTENTS**

- I. Introduction
- II. Evolution of Georgian competition law and its recent reforms
- III. Necessity for private enforcement of competition law in Georgia
- IV. Availability of private enforcement of competition law infringements and damages claims
- V. Challenges for the development of an effective private enforcement system
- VI. Conclusions

### ***Abstract***

The goal of this article is to assess the role and perspectives of the private enforcement of competition law mechanism in Georgia. The discussion starts with a brief review of a number of major events that have occurred in Georgia in the last two decades, which have shaped its competition law. The paper provides next an assessment of the current stage of the development of Georgian competition legislation, the necessity for a private enforcement model as well as the rules and legal tools offered by existing Georgian law in that regard. Outlined are also a number of challenges that must be overcome in order for Georgia to develop a successful and effective private enforcement system. The examination is based on a wide range of Georgian legislation; the interpretations provided are supported by existing enforcement practice, views of experts and scholars, research studies, reports and surveys from various national and international organizations.

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## Résumé

Le but de cet article est d'évaluer le rôle et les perspectives de l'application privée du droit de la concurrence en Géorgie. L'analyse commence par un bref examen d'un certain nombre de grands événements qui ont eu lieu en Géorgie dans les deux dernières décennies et qui ont façonné le droit de la concurrence géorgien. Ensuite, le document fournit une évaluation d'état actuelle du développement de la législation concernant le droit de la concurrence en Georgie, souligne la nécessité du développement d'un modèle d'application privée du droit de la concurrence, ainsi qu'entreprend une analyse des mécanismes d'application privée du droit de la concurrence disponibles actuellement dans la loi géorgienne. L'article indique aussi un certain nombre de défis qui doivent être surmontés afin que la Géorgie puisse développer un système efficace d'application privée du droit de la concurrence. L'analyse est basée sur une grande partie de la législation géorgienne. Les interprétations fournies sont soutenus par la pratique de l'application privée du droit de la concurrence en Georgie, par les opinions des experts et des chercheurs, ainsi que par les différentes études, rapports et enquêtes publiés par des diverses organisations nationales et internationales.

**Key words:** competition law; competition law infringement; damages; private enforcement; damage claims; Georgia; country specific challenges.

**JEL:** K23; K42.

## I. Introduction

Georgia has a new Law on Competition<sup>1</sup>. It has also not been long since its new competition authority – the Competition Agency – was formed and started functioning. So far, there is no national jurisprudence or developed case law, therefore no special tendencies have yet been shaped in practice. Georgia does have, however, a distorted market with supposedly numerous victims of various competition law infringements. Private actors are finally offered a possibility to take direct action and claim damages. The article will discuss how practical the existing model is, and what are the perspectives, opportunities and challenges facing it in the future. In order to better demonstrate Georgia's current developmental stage, the following section explores the unique evolutionary path taken by Georgian competition law, which has shaped its modern national market. The paper provides an analysis of the need for the development of private enforcement in Georgia, and reviews existing legal

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<sup>1</sup> Parliament of Georgia, Law of Georgia of 8 May 2012, No. 6148-Is on Competition.

tools that allow private entities to take action and claim damages. Finally, it assesses the main barriers and challenges on the road of building an effective national private enforcement system. Due to size limitations, the final section of the paper focuses on the specific problems experienced by Georgia, omitting common hardships of private enforcers, which is subject to an extensively rich literature<sup>2</sup>.

## II. Evolution of Georgian competition law and its recent reforms

Since 2003, Georgia has gone through a massive reformation process and attained a number of impressive achievements<sup>3</sup>. In certain fields, Georgia's success was so remarkable that it was used as a model to be 'exported' to other countries<sup>4</sup>. However, success has not been shared by the reforms of

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<sup>2</sup> See N. Bučan Gutta, *The Enforcement of EU Competition Rules by Civil Law*, Antwerpen-Apeldoorn-Portland 2014; A.P. Komninos, *EC Private Antitrust Enforcement, Decentralised Application of EC Competition Law by National Courts*, Oxford-Portland 2008; V. Milutinović, *The 'Right to Damages' under EU Competition Law: from Courage v. Crehan to the White Paper and Beyond*, Alphen aan den Rijn 2010; I. Van Bael, *Due Process in EU Competition Proceedings*, Alphen aan den Rijn 2011; J. Basedow, J.P. Terhechte, L. Tichý, *Private Enforcement of Competition Law*, Baden-Baden 2011; M. Berglund, *Cross-Border Enforcement of Claims in the EU: History, Present Time and Future*, Alphen aan den Rijn 2014; W.P.J. Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) 26(3) *World Competition: Law and Economics Review*; D.F. Engstrom, 'Private Enforcement's Pathways: Lessons from Qui Tam Litigation' (2014) 114(8) *Columbia Law Review* 1913–2006; T.M.J. Möllers, A. Heinemann, *The Enforcement of Competition Law in Europe*, Cambridge-New York 2007; M. Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement*, Oxford 2015; K.J. Cseres, J. Mendes, 'Consumers' access to EU competition law procedures: outer and inner limits' (2014) 51(2) *Common Market Law Review* 1–40; J. Basedow (ed.), *Private Enforcement of EC Competition Law*, Alphen aan den Rijn 2007; D.A. Crane, 'Optimizing Private Antitrust Enforcement' (2010) 63 *Vanderbilt Law Review*.

<sup>3</sup> In the last decade, Georgia implemented a number of bold and ambitious reforms and attained impressive achievements in many areas. Its position has been continuously improving in numerous international rankings and indexes including: the World Bank's Doing Business Index, the Heritage Foundation and the Wall Street Journal Index of Economic Freedom, the Transparency International Corruption Perception Index, and the Fraser Institute Economic Freedom of the World Index. See: M. Saakashvili, K. Bedukidze, 'Georgia, the Most Radical Catch-up Reforms' [in:] A. Aslund, S. Djankov, (eds.), *The Great Rebirth: Lessons from the Victory of Capitalism over Communism*, Washington, DC 2014, p. 149–164; N. Morari interview with K. Bedukidze, *There Is Only One Way – Building a Free Economy*, *Ekho Kavkaza*, 07.12.2009, p. 1; V. Papava, *Economic Reforms in Post-Communist Georgia: Twenty Years After*, New York 2012.

<sup>4</sup> 'Georgian politicians will share their experience of reforms with Ukrainians', *Kyivpost*, 08.12.2014; L. Rekhviashvili, 'Exporting Georgia's anti-corruption reforms to Ukraine: What

Georgian competition policy. Not much has been written in academia to analyse the chain of illogical, sporadic and controversial reforms in this field<sup>5</sup>. Hence, this section briefly reviews Georgia's unusual evolutionary process, in order to explain why it is only now that the country is taking its first steps in competition law enforcement, even though it has already a two decades-long history in this field. This historic analysis will make it possible to clarify the particularities of the Georgian system.

As a former Soviet member state, Georgia has not inherited any valuable legal heritage on competition and market regulation. Centrally-planned Soviet economy did not function according to free market rules, the State kept an absolute monopoly over the production and distribution process<sup>6</sup>, there was no private ownership and property was seen as robbery<sup>7</sup>. Market competition was considered to be evil and was artificially substituted by socialist emulation<sup>8</sup>.

After living under the Soviet regime for 70 years, Georgia entered the unknown world of market economy after gaining independence in 1991. It was one of the first countries among the former Soviet Union and Eastern Block members to introduce antimonopoly legislation already in 1992. Despite the challenges of the transitional period, military conflicts and the economic collapse of the country<sup>9</sup>, the initial phase of the development of Georgia's

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makes them worth replicating?', *LeftEast*, 03.04.2015; G. Lomsadze, E. Owen, 'Ukraine Wants to Pick Georgia's Brain on Reforms', *Eurazianet*, 27.05.2014; E. Livny, 'Lessons Learned From a Decade of Georgian Reforms. View From The Sky', *ISSET economist*, 17.04.2015.

<sup>5</sup> K. Lapachi, *Competition Policy and Sectorial Regulation in Georgia*, Tbilisi 2012.

<sup>6</sup> K.J. Cseres, *Competition Law and Consumer Protection*, the Hague 2005, p. 166–167; D.L. Prychitko, 'Marxism' [in:] *The Concise Encyclopaedia of Economics*, available at <http://www.econlib.org/library/Enc/Marxism.html> (accessed 06.11.2015).

<sup>7</sup> 'Private property is robbery; and a state based on private property is a state of robbers, who are fighting for a share of the spoils', V.I. Lenin, *Collected Works*, see 'Speech Delivered at a Conference Of Chairmen Of Uyezd, Volost And Village Executive Committees Of Moscow Gubernia October 15, 1920', available at <https://www.marxists.org/archive/lenin/works/1920/oct/15b.htm> (accessed 06.11.2015).

<sup>8</sup> Various artificial stimulators were engaged in the Soviet Union in order to ensure some level of quasi competition and increase labour productivity (all-union socialist competition race, introduction of the titles of shock workers, shock brigades, transferable red banners and so forth). See T. Maximova-Mentzon, *The Changing Russian University: From State to Market*, Abingdon, 2013, p. 173; A. Nove, *An Economic History of the U.S.S.R.*, Harmondsworth 1969, p. 208–209; K. Marx, *The Poverty of Philosophy*, Chapter Two: 'The Metaphysics of Political Economy' Section 3: 'Competition and Monopoly', first published in Paris and Brussels in 1847, available at <https://www.marxists.org/archive/marx/works/1847/poverty-philosophy/> (accessed 06.11.2015).

<sup>9</sup> Instead of a gradual transition, Georgia experienced a 'shock therapy' after the Soviet Union disintegrated. Due to military conflicts, rampant criminality, inefficient governance and losing traditional trade and economic ties, Georgia scored a world record in economic decline during 1991–1994; its GDP fell up to 77%, inflation reached 1500%, and unemployment

legal and institutional framework was relatively successful<sup>10</sup>. By 1996, Georgia already had the Law on Monopoly Activity and Competition<sup>11</sup> and a functioning Antimonopoly Service<sup>12</sup>. In 1999, the effectiveness of Georgian antimonopoly service was studied and assessed positively by the European Bank for Reconstruction and Development<sup>13</sup>. Yet since the beginning of the new millennia, the development process was reversed, only to pave the way for a fragmentation and limitation of the competences of the Antimonopoly Service<sup>14</sup>. This new trend was not only against positive experiences and tendencies predominant elsewhere in the world, but against Georgia's own obligations deriving from international agreements<sup>15</sup>, such as the Partnership and Cooperation Agreement (hereafter, PCA) signed with the EU in 1996<sup>16</sup>.

Significant political developments took place in Georgia in 2003 and with them a new political power was brought into the government<sup>17</sup>. The new leadership launched a massive reformation process<sup>18</sup> which included, most importantly here, market liberalization. The aim of the reform was to diminish corruption risks, attract direct foreign investments and strengthen the national economy<sup>19</sup>. From then on, a decade of transformation started

increased dramatically. See: M. Saakashvili, K. Bedukidze, *Georgia...*; W. Shoemaker, *Russia and The Commonwealth of Independent States*, Lanham 2014, p. 236; L. King, G. Khubua, *Georgia in Transition: Experiences and Perspectives*, Frankfurt am Main 2009; T. Burduli, *Economic Transition in Georgia: On the path from Shock Therapy toward DCFTA*, Natolin 2014.

<sup>10</sup> K. Lapachi, N. Kutivadze, *The Institutional Framework for Competition Regulation in Georgia*, EUGBC 2015, p. 18.

<sup>11</sup> Parliament of Georgia, Law of Georgia of 25 June 1996, No. 288 on Monopoly Activity and Competition.

<sup>12</sup> President of Georgia, Edict of 28 December 1996, No. 848 on the Antimonopoly Authority within the Structure of the Ministry of Economy of Georgia.

<sup>13</sup> European Bank for Reconstruction and Development, *Transition Report*, London, 1999, p. 132–145.

<sup>14</sup> S. Fetelava, *The Evolution of the Competition Theory and Antimonopoly Regulation in Georgia*, Tbilisi, 2008, p. 20–22.

<sup>15</sup> K. Lapachi, N. Kutivadze, *The Institutional...*, p. 18.

<sup>16</sup> Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Georgia, of the other part – Protocol on mutual assistance between authorities in customs matters, 1996.

<sup>17</sup> For more information see: <http://news.bbc.co.uk/2/hi/4532539.stm> (accessed 06.11.2015); L. Mitchell, *Uncertain Democracy: U.S. Foreign Policy and Georgia's Rose Revolution*, Philadelphia, 2011, p. 115; C. Sudetic, *The Philanthropy of George Soros: Building Open Societies*, New York 2011, p. 33–35; W. Shoemaker, *Russia...*, p. 238, 239; E. Svante, S. Cornell, F. Starr, *The Guns of August 2008*, Armonk-London 2009, p. 85–104.

<sup>18</sup> M. Saakashvili, K. Bedukidze, *Georgia...*, p. 150.

<sup>19</sup> The mastermind of the Georgian economic reform – Kakha Bendukidze (former Minister of Economy and the Minister for Reform Coordination between 2004 and 2008) saw market regulators as an unnecessary barrier and burden for doing business. For more information see: 'Godfather of Georgia's reforms dies at 58', *Associated Press*, 14.11.2014; N. Emerick,

concerning the Georgian market which took place under the *laissez-faire* slogan<sup>20</sup>.

In 2005, a new law was adopted repealing Georgia's earlier antimonopoly legislation and shutting down the Antimonopoly Service<sup>21</sup>. The act was nominal, not even defining basic competition law terms such as: the relevant market, dominant position, significant market share and so forth. A new State agency was created but its existence was merely formal (a mere 5–6 members of staff<sup>22</sup>) with competences limited to state aid issues only<sup>23</sup>.

The condition of the Georgian market worsened after 2005 which, in truth, has always been far from a healthy competitive environment. The country moved towards an economy dominated by monopolies<sup>24</sup> and oligopolies, which started to form on markets for the most commonly-used goods and services<sup>25</sup>. The share of small and medium sized enterprises in the Georgian market's total turnover decreased by more than 50% compared to 2000<sup>26</sup>. Georgia's positions fell in international rankings and indexes regarding market competition and antimonopoly regulation<sup>27</sup>. Unsurprisingly, a number of Georgian scholars expressed their criticism and concerns regarding these 'market liberalization' reforms<sup>28</sup>.

The Georgian government was forced to take steps against its own political will, when the EU mission highlighted in 2009 the need to improve Georgia's

G. Jandieri, 'Rose Revolution Shows the Results of Freeing Markets', 13.11.2013, <http://www.bdlive.co.za/opinion/2013/11/13/rose-revolution-shows-the-results-of-freeing-markets> (accessed 06.11.2015); 'A Different Sort of Oligarch', *The Economist*, 29.07.2014; N. Morari interview with K. Bendukidze, 'There Is...', p. 1.

<sup>20</sup> *Laissez-faire* theory strongly opposes any governmental intervention into business affairs. The economic concept of *Laissez-faire*, *laissez-passer* (translates as: let do, let pass) originated in the Physiocratic movement in France and is attributed to Vincent de Gournay. This doctrine laid the foundation for Adam Smith's Invisible Hand theory.

<sup>21</sup> Parliament of Georgia, Law of Georgia of 3 May 2005, No. 1550 on Free Trade and Competition.

<sup>22</sup> K. Lapachi, N. Kutivadze, *The Institutional...*, p. 30.

<sup>23</sup> Transparency International Georgia, *Competition Policy in Georgia*, Tbilisi 2012, p. 11.

<sup>24</sup> L. Papava, *Georgia's Socio-Economic Development: Prospects over the Medium Term*, 16.12.2012, available at <http://www.international-alert.org/blog/socio-economic-development-english> (accessed 06.11.2015).

<sup>25</sup> Transparency International Georgia, *Competition Policy in Georgia*, Tbilisi 2012.

<sup>26</sup> National Statistics Office of Georgia, *Statistics on the Operation of Undertakings*, 03.09.2014, available at [http://www.geostat.ge/cms/site\\_images/\\_files/georgian/business/Press%20Release%202014\\_II.pdf](http://www.geostat.ge/cms/site_images/_files/georgian/business/Press%20Release%202014_II.pdf), (accessed: 06.11.2015)

<sup>27</sup> K. Lapachi, N. Kutivadze, *The Institutional...*, p. 28.

<sup>28</sup> K. Lapachi, M. Tivishvili, 'Georgia' [in:] *Competition Regimes in the World – A Civil Society Report*, Jaipur, 2006, p. 384; S. Fetelava, *The Evolution...*, p. 22; K. Lapachi, N. Kutivadze, *The Institutional...*, p. 27.

competition policy system<sup>29</sup>. As a priority area for the successful completion of the Deep and Comprehensive Free Trade Agreement (hereafter, DCFTA), the government was obliged to follow EU recommendations. Eventually, a Comprehensive Strategy on Competition Policy was issued in 2010<sup>30</sup> and a new Law on Free Trade and Competition (hereafter, LFTC) adopted in May 2012. Although the steps taken at that time were significant, they were not a genuine reform but merely a formal reaction to the demands of the EU. The competences of the public enforcer were strictly limited by government-determined priorities, making it ineffective and putting its impartiality into question. Moreover, the level of the *de minimis* threshold was set too high and the law lacked, among other things, the most effective public enforcement instrument against cartels – a leniency programme<sup>31</sup>. Despite the nominal nature of the reform, the LFTC actually created the first legal possibilities for private actions<sup>32</sup>.

The LFTC of 2012 was further amended in March 2014. Not only was the act renamed as the Law on Competition (hereafter, LC)<sup>33</sup>, the changes were so massive that the parliament practically adopted a new statute. The amendments solved a number of problems associated with the earlier LFTC and brought Georgian competition law in line with EU standards<sup>34</sup>. Shortly after, a new and independent Competition Agency (hereafter, the Agency) was formed<sup>35</sup>. The Agency did not start to function until mid November 2014 and it mostly issued minor decisions in its first year of functioning. All this changed in July 2015 when the investigation of the car fuel commodity market was completed. The Agency imposed fines on five major economic

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<sup>29</sup> M. Maliszewska (ed.), *Economic Feasibility, General Economic Impact and Implications of a Free Trade Agreement between the European Union and Georgia*, Center for Social and Economic Research, 2008, p. 83–84.

<sup>30</sup> Government of Georgia, Decree of 3 December 2010, No. 1551 on the Approval of the Comprehensive Strategy in Competition Policy.

<sup>31</sup> K. Lapachi, N. Kutivadze, *The Institutional...*, p. 30–31; N. Kutivadze, E. Anderson, *TI Georgia recommendations for the Parliament on competition policy*, 22.01.2013, available at <http://www.transparency.ge/en/blog/recommendations-for-the-parliament-on-competition-policy> (accessed 06.11.2015).

<sup>32</sup> Alongside other grounds, this law was used by cargo companies to take action against the Ministry of Finance and Revenue Service for creating the monopoly of a state-owned company. For more information see: Transparency International Georgia, *New draft law on Postal Service: Establishing the Georgian Post monopoly?* 04.03.2014, available at <http://www.transparency.ge/en/node/3990> (accessed 06.11.2015).

<sup>33</sup> *Supra* note 1.

<sup>34</sup> K. Lapachi, N. Kutivadze, *The Institutional...*, p. 32–36.

<sup>35</sup> Government of Georgia, Ordinance of 14 April 2014, No. 288 on Adopting the Charter of LEPL Competition Agency.

agents<sup>36</sup> totalled 55 million GEL (equivalent to about 22 million EUR at that time) – an unprecedented amount for Georgia<sup>37</sup>. Unlike public enforcement, which has become quite active in the last year, not much has happened in the field of private enforcement. The following section will discuss how badly does the Georgian market need an effective and well-functioning private enforcement system as well as what legal tools are currently provided for this purpose by Georgian law.

### III. Necessity for private enforcement of competition law in Georgia

Since the early 1990s, Georgian antimonopoly, and later competition law, has always been developing toward its approximation with EU law<sup>38</sup> – both the current LC as well as the Agency are constructed according to the EU model<sup>39</sup>. It is a well-known fact that public enforcement has traditionally played the leading role in the EU competition law system. Yet an important additional trend developed, mostly over the last decade, of actively encouraging private enforcement of EU competition law. Despite its usual recourse to EU examples, Georgia does not follow the latter trend.

The question whether private enforcement should be actively used in Georgia also is related to the rationale and objectives of private enforcement itself. State institutions are generally granted ‘public’ enforcement powers, as competition distortions are against public interests, and effective enforcement by a competition authority is meant to protect this very interest<sup>40</sup>. However, public interests do not exist in isolation – they are not completely separate from private interests. Competition violations, in addition to distorting the market, cause harm to private rights of consumers and interests of other

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<sup>36</sup> Georgian law uses the term ‘economic agent’ in an analogue manner to the term ‘undertaking’ in EU Law. See Article 3(a) LC.

<sup>37</sup> For detailed information see: <http://competition.ge/images/upload/Annotation%20in%20English.pdf> (accessed 06.11.2015).

<sup>38</sup> Approximation with EU *acquis* has been a declared goal of all EU-Georgian agreements including: Georgia & EU Partnership and Cooperation Agreement, 1996, Article 44; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, Chapter 10. However, in practice, Georgian law has not always been on the track of EU harmonization.

<sup>39</sup> Dechert LLP, *Georgia’s Competition Agency is a reality*, 01.12.2014, available at <http://www.lexology.com/library/detail.aspx?g=6fab2551-b797-4936-b7c5-536ec166b7dd> (accessed 06.11.2015).

<sup>40</sup> N. Bučan Gutta, *The Enforcement...*, p. 24; C. Harding, J. Joshua, *Regulating Cartels in Europe. A Study of Legal Control of Economic Delinquency*, Oxford 2003, p. 239.

economic agents<sup>41</sup>. Even successful public enforcement (fining the infringers) does not heal the harm and damage experienced by the actual victims of the violation. It is therefore wrong to grant exclusive enforcement rights to a single (public) body. A healthy system is far more likely to develop if private parties are allowed to take actions as well<sup>42</sup>.

Private enforcement serves public interests because of its deterrence effects<sup>43</sup>. Taking into consideration that Georgian legislation sets a lower antitrust fine level than that applicable in the EU<sup>44</sup>, developing an effective private enforcement system is thus desirable in order to ensure a higher deterrence level. The need for an effective private enforcement model is increased by the fact that Georgia lags significantly behind when it comes to consumer protection. In fact, Georgia does not currently have an effective consumer protection system<sup>45</sup>. Although it is not the principal role of competition law to substitute for consumer protection, consumers are the ultimate beneficiaries of competition law. The development of an effective private enforcement system can thus empower Georgian consumers to intensify their role on the market.

In order to delineate the potential of private enforcement, the fact should be taken into account that the Georgian market has operated for a decade without any effective State regulation, and there are numerous signs of anti-competitive practices<sup>46</sup>. It can be presumed that there is a multitude of economic agents, the interests of which have been violated, which deserve to be granted legal tools to defend themselves. It might seem paradoxical that there are currently few claims for damages in Georgia. Yet this can be explained by the fact that the new legislation is still fresh and, in the absence of developed public enforcement practice (case law), stand-alone private enforcement cases are less likely. Among the few decisions issued by the Agency so far, no

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<sup>41</sup> L.A. Velasco San Pedro *et al* (eds.), *Private Enforcement of Competition Law*, Valladolid 2011, p. 51.

<sup>42</sup> J. Basedow, *supra* note 2 at p. 8.

<sup>43</sup> N. Bučan Gutta, *The Enforcement...*, p. 26; B. Rodger, A. MacCulloch, *Competition Law and Policy in the EU and UK*, London-New York 2014, Chapter 2 'Administrative Enforcement in UK', subsection 'Settlement'.

<sup>44</sup> Georgian law allows fining the infringer with an amount of no more than 5% of its annual turnover.

<sup>45</sup> The market deregulation wave also neutralized consumer protection in Georgia. When the EU spoke against poor food safety regulations, the Georgian government used this recommendation to reform this field, only in order to adopt a new law regarding food safety, eventually abolishing existing consumer rights' protection law in 2012. L. Todua, *Who is protected by the Georgian government – entrepreneur or the consumer?* 15.12.2011, available at <http://dfwatch.net/who-is-protected-by-the-georgian-government-%E2%80%93-entrepreneur-or-the-consumer-16054-2575> (accessed 06.11.2015).

<sup>46</sup> Z. Gvelesiani, *Need for Competition Law – Discussing the Case of Georgia*, Yearbook of Antitrust and regulatory Studies 8(11), 2015, pp. 25–29.

infringement by an economic agent has been detected yet, except on the car fuel commodity market. The latter decision is currently pending its judicial review and if the court upholds it, the victims of the infringement might feel more confident to submit private actions. In fact, cases of such high public interest increase consumer awareness – they attract the attention of consumers and businesses alike, and educate the society about the possibilities offered by this new legal field.

Practice and time will test the question if Georgia will follow the EU trend, or whether the future of its competition law enforcement will be exclusively shaped by the Agency. An analysis of Georgian competition legislation (the LC and other secondary acts<sup>47</sup>), leads to the conclusion that private enforcement is permitted. Yet a specific strategy does not exist for encouraging private enforcement, nor in fact for actually avoiding it in the initial phase in order to let the Agency assume the role of the ‘enforcement driver’. This situation can be partially explained by the fact that the Agency is still very young and weighted down with numerous tasks – formulating a private enforcement strategy might not be one of its main priorities. However, after reviewing its action plan for 2014-2017<sup>48</sup>, there is still no sign that the Agency is actually planning to take any steps in this context. This might give the impression that there is no clear understanding of the potential of private enforcement, and that its development is left to its own devices.

The only openly expressed position of the Agency regarding taking competition cases to courts is that judges might not be sufficiently prepared to effectively deal with cases based on the novel, for Georgia, field of competition law. As stated by the Agency, unqualified judges might become a burden for the effective performance of competition law<sup>49</sup>. Although the Agency stresses the need for the intensive competition law training of judges, it is yet unknown what actual activities are envisaged in this context. It is also unclear when Georgian judges are expected to be properly qualified to rule on competition law cases<sup>50</sup>.

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<sup>47</sup> Available at <http://competition.ge/ge/page.php?p=4> (accessed 06.11.2015).

<sup>48</sup> See <http://competition.ge/ge/page2.php?p=1&m=14> (accessed 06.11.2015).

<sup>49</sup> Speech of A. Gugushvili – the First Category Adviser of the Competition Department (International Relations) of the Georgian Competition Agency, at the International Competition Network conference, held in Sidney from 28.04.2015 to 01.05.2015. For more information, see <http://competition.ge/ge/page4.php?b=270> (accessed 06.11.2015).

<sup>50</sup> The High School of Justice (HSoJ) is an educational institution, which works to institutionalize training for the judges and other court staff. According to the HSoJ website, 2 day training was held for 17 judges from the Tbilisi City Court and the Tbilisi Appellate Court regarding competition law in October 2014. There is no other information available regarding the continuous education of judges in this field. See: [http://www.hsoj.ge/eng/media\\_center/news/2014-12-11-treningi-temaze-konkurenciis](http://www.hsoj.ge/eng/media_center/news/2014-12-11-treningi-temaze-konkurenciis) (accessed 30.09.2015).

Without developed jurisprudence, or the ability to identify specific enforcement trends in the Agency's case law, the only methodology possible to evaluate private enforcement perspectives in Georgia is to examine its existing legal rules and the availability of private actions. Knowing what the offered legal options are, and how easily accessible they seem, makes it possible to analyse what the key challenges might be for potential private enforcers. The next sections are dedicated to these issues.

#### **IV. Availability of private enforcement of competition law infringements and damages claims**

According to Article 4 LC, the Agency is an independent legal entity of public law, responsible for the enforcement and protection of that Law. However, the Agency does not own the exclusive rights to enforce the LC – there are various other possibilities of taking action without its involvement. Article 28(2) LC determines that in the case of a competition law violation, any person (natural or legal) is entitled to go directly to a court, without applying to the Agency first. Article 28(2) LC indicates that private claims must be lodged before the Tbilisi City Court giving the latter the exclusive jurisdiction to hear such cases.

The Georgian judicial system is divided into civil, administrative and criminal proceedings<sup>51</sup>. Civil cases include disputes between private parties, while administrative cases deal with disputes against State institutions. Article 28(3) LC makes it clear, albeit it does not state it explicitly, that Article 28(1) LC is applicable to civil disputes – it states that the court will declare the claim as inadmissible, or close an already admitted claim, if insolvency proceedings are opened against the respondent economic agent. From this it can be adduced that such disputes have a civil nature because insolvency proceedings can only relate to private entities, and not to State bodies (the latter are subjects of administrative law).

On the other hand, administrative proceedings might be necessary when private interests are violated by the State itself, mostly by granting unjustified aid to competitors and distorting the natural balance of the market. For such cases, Article 15 LC allows persons, whose interests have been violated, to appeal the state aid. Although Article 33 LC<sup>2</sup> is entitled '*The rule of appealing*

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<sup>51</sup> Parliament of Georgia, Organic Law of Georgia of 8 December 2009, No. 2257 on Common Courts, Article 1(2); the term 'Organic Law' is a type of legal act within Georgian legal system that has a higher hierarchy than (ordinary) law and regulates the issues as provided by the Constitution of Georgia. See: Law of Georgia on Normative Acts Articles: 7(2), 7(3), 8).

*the decision of the agency*', it contains rules of a broader nature. It states that in the case of a violation of competition related legislation (exceeding the scope of just the LC), any interested party can directly apply to the State body, or to the relevant official, or take an action to courts and claim damages.

After adopting the LC and recognizing certain anti-competitive actions as illegal, it is now possible to also use tort law in order to claim damages suffered due to competition law infringements. Tort law provisions are contained in chapter III of the Georgian Civil Code (hereafter, GCC). According to Article 992 GCC, a person who unlawfully causes damage to another shall compensate that damage. The GCC also establishes joint and several liability, which can be used against infringing parties of anti-competitive agreements and concerted practices. Liability is shared in full, which means that each defendant is deemed liable for the entire damage, regardless of the percentage of its own fault. Liability is shared among the instigators and accessories, as well as those consciously benefiting from the damage caused to another person<sup>52</sup>. It is clear that joint and several liability based on tort would apply to cartel members. However, this does not mean that each cartel participant will always be fined with an equal amount within the framework of public competition law enforcement. The Agency has the discretion to individually define fines imposed on each economic agent, taking into account the gravity and duration of the infringement and the damages caused<sup>53</sup>. Moreover, participation in the leniency programme can also lead to full or partial immunity.

According to the GCC, the limitation period on damages claims caused by tort is set to three years starting from the moment when the victim became aware of the damage or of the identity of the person liable<sup>54</sup>. However, the GCC also says that in the case of collision between norms of the same rank, the 'special' and/or 'newer' law applies<sup>55</sup>. The LC is 'newer' than the GCC as well as a 'special' act for competition regulation, hence its rules apply. In this context, it contains a stricter rule than the general provision of the GCC – the LC restricts the limitation period to three years from the moment of the infringement<sup>56</sup>.

Decisions of the 1<sup>st</sup> instance court can be appealed to the Appellate court<sup>57</sup>. The ruling of the latter can be taken before the Supreme Court

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<sup>52</sup> Parliament of Georgia, Law of Georgia of 26 June 1997, No. 786, Civil Code of Georgia, Article 998.

<sup>53</sup> Article 33(3) LC.

<sup>54</sup> Article 1008 GCC.

<sup>55</sup> Ibidem, Article 2(2).

<sup>56</sup> Article 27 LC.

<sup>57</sup> Parliament of Georgia, Law of Georgia of 14 November 1997, No. 1106, The Georgian Civil Procedural Code, 1997, Article 364

(court of the highest and final instance in Georgia). However, the Supreme Court admits cases in exceptional cases only – that is – if assessing them is important for developing a uniform judicial practice, if the decision of the appellate court differs from precedents of the Supreme Court on analogous or essentially similar facts, or in case of a significant breach of procedural law that substantially affected the outcome of the case. As a rule, most complaints to the Supreme Court are dismissed as inadmissible.

With regard to collective actions, they are an unknown legal institution for Georgian law. The closest provision lays in the possibility of joint actions, determined by Article 86 of the Georgian Civil Procedural Code (hereafter, GCPC). A joint action may be lodged by a number of persons together, when the object of the lawsuit is their joint rights, or their claim is based on the same grounds. A joint action is also allowed when claims are similar, even if the previous two conditions are not fully met. However, it lays in the discretion of the judge to allow a joint lawsuit or divide it into several individual ones<sup>58</sup>. Each claimant of the joint lawsuit participates independently in the proceedings<sup>59</sup>. Hence, their claims can vary and eventually, the resulting judgements might differ depending on the claimant. However, claimants of a joint lawsuit are allowed to grant the power of attorney to one of them, or let the same lawyer represent them all<sup>60</sup>. Moreover, if the court discusses several cases similar to one another, the judge can join them *ex officio* or upon a petition of the parties<sup>61</sup>.

In addition to ordinary courts, Georgian legislation allows one more possibility for private enforcement, which is limited to administrative cases only and does not directly award any damages compensation. It can, however, be used as an effective tool against competition distorting actions from administrative bodies, making it possible to claim damages as a result. Article 30(2) of the Constitution of Georgia determines that the State is bound to promote competition and prohibits monopolistic activity. The judicial body ensuring the supremacy of the Constitution is the Constitutional Court of Georgia<sup>62</sup> (hereafter, CCG). Any normative legal act issued by a State body can be appealed to the CCG in order to ascertain its compliance with the Constitution. This presents an effective legal tool to any person who believes that the rights and freedoms recognised under chapter II of the Constitution

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<sup>58</sup> Ibidem. Article 182, 203(c).

<sup>59</sup> Ibidem, Article 86(d).

<sup>60</sup> Ibidem, Article 87(b).

<sup>61</sup> Ibidem, Article 182(4).

<sup>62</sup> Parliament of Georgia, Organic Law of Georgia of 31 January 1996, No. 95 on the Constitutional Court of Georgia, Article 1.

of Georgia<sup>63</sup> have been violated or might be directly violated. Although the CCG does not grant compensation, its decision can be used in follow-on cases taken before ordinary courts in order to claim damages. The ruling of the CCG can be used as proof of competition restriction and illegal aid by a State body. This legal tool has already been used by cargo companies. Although the case was ultimately closed, because the disputed act was repelled by the issuing body itself<sup>64</sup>, it established a good example of how the CCG might serve the interests of private enforcement.

## V. Challenges for the development of an effective private enforcement system

Reviewed in the previous section were the possibilities of private enforcement in existing Georgian legislation. As demonstrated, any interested person has the right to take an action to the courts and claim damages. However, there are various challenges and barriers that discourage individuals from taking private actions. For Georgia to have an effective private enforcement system, certain developments are necessary. The current system has to be made more accessible in order to turn damages claims into common practice (instead of exceptions). This would give them a proper deterrence effect and enable them to support competition policy in achieving its overall goals.

This section examines barriers to the development of private actions. Due to size constraints however, the analysis will focus on problems specific to Georgia. A number of traditional challenges related to private enforcement will thus be omitted, which are common for all jurisdictions. These include: issues of legal standing and indirect enforcement, burden of proof, calculating damages, access to materials, litigation costs and so forth<sup>65</sup>.

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<sup>63</sup> Chapter Two, *Citizenship of Georgia; Fundamental Human Rights and Freedoms* (covers social economic rights, including Article 30 which guarantees that the State should promote competition).

<sup>64</sup> From January 2013, the market of cargo services became a subject of State interference, attempting to let the State-owned Georgian Post monopolize the market. The victimized companies applied to the court, demanding the abolition of the disputed acts. After losing the case, the government adopted a new resolution, this time attempting to monopolize entire postal services market. The resolution was appealed to the CCG. The Court admitted the case, but before hearing it, the government cancelled the appealed resolution. Eventually, the company filed a civil lawsuit, asking for damages in the amount of 1 500 000 GEL (equivalent to 632 191 EUR) from the State. For more information see: Transparency International Georgia *New draft law...*

<sup>65</sup> *Supra* note 2.

One of the biggest barriers for bringing a private action in a competition case in Georgia is the specific limitation period established in Article 27 LC, which provides for a statute of limitation of three years from the date of the infringement. As mentioned, this rule departs from the general rule applicable to damages claims set out in the GCC, where the three year period runs from the moment when the victim becomes aware of the damage or of the identity of the perpetrator. This means that for competition law infringements, the victim might miss the deadline even without knowing that the time limit is running. While anti-competitive conducts are often secret in nature, private parties do not have any special powers<sup>66</sup> (unlike public enforcement agencies) and might find it hard to detect them on their own. As Bučan Gutta rightfully indicates, antitrust victims are often not even aware of the existence of an infringement, or might learn about it only long after it took place. Starting to count the limitation period as early as the date of the infringement means that the actual time for taking action is much shorter, or does not even exist, at least in some cases<sup>67</sup>. The time limit established by the LC goes against modern practice and is based on a model rejected 30 years ago by the European Court of Justice<sup>68</sup>. Private competition law enforcers would thus benefit from the application of the general rule set out by the GCC – not only would they have more time to act, but it would also help them fulfil their burden of proof<sup>69</sup>. Overall, the motivation behind setting in the LC of a special, shorter time limit for competition law cases is neither clear nor justifiable. In practice, this provision might become a significant barrier to the development of private enforcement in Georgia – in certain cases, it might deprive an injured person from the right to bring a claim and get compensation<sup>70</sup>.

Article 28(2) LC states that claims regarding the LC are to be lodged exclusively with the Tbilisi City Court. This provision is clearly restrictive and limits the ‘*right to apply to the court for protection of [...]rights and freedoms*’ guaranteed by Article 42(1) of the Constitution of Georgia. The official motivation behind this rule is given in the relevant Governmental Strategy prepared in 2010. The document states that ‘*the main reason for this decision ... is to safeguard the building up of relevant competence as well as a uniform application and case law in the field of competition law*’<sup>71</sup>. The justification and

<sup>66</sup> K. Hüschelrath, S. Peyer, *Public and Private Enforcement of Competition Law a Differentiated Approach*, ZEW Discussion Paper No. 13-029, Mannheim 2013, p. 6.

<sup>67</sup> N. Bučan Gutta, *The Enforcement...*, p. 270.

<sup>68</sup> Cases 145/83 and 53/84 *Stanley George Adams v. Commission* [1985] ECR 03595.

<sup>69</sup> If the moment when the victim became aware of the damage is disputable, the burden of proof lies on the defendant, as ruled by the Supreme Court of Georgia. See decision of the Supreme Court of Georgia of 28 May 2014, No. AS-260-244-2014.

<sup>70</sup> N. Bučan Gutta, *The Enforcement...*, p. 270.

<sup>71</sup> *Supra* note 30, p. 31.

proportionality of such an approach are controversial. Even if it is assumed that the number of competition cases will be limited in Georgia, without the practical need to let all 1<sup>st</sup> instance courts deal with them, it does not seem proportional to restricting an individual's right to file a claim to a single court only. Providing exclusive jurisdiction over competition law cases to a single court, effectively monopolizing its competences, is not in line with the decentralization trend followed by EU law since 2003<sup>72</sup>. With regard to the justification for using this particular measure in order to develop a uniform enforcement practice and jurisprudence in this field, it is hardly the role of a single 1<sup>st</sup> instance court to develop such uniformity, especially by way of technically restricting all other courts from reviewing such cases. As clearly determined by Article 391 of the Civil Procedural Code of Georgia, the Supreme Court is responsible for developing uniform jurisprudence and there is no need to assign this function to lower instance courts for specific legal branches.

The abovementioned Governmental Strategy indicated also that there was a need for judges to be trained in order to enhance their knowledge and qualification in this field<sup>73</sup>. The same view has later been repeated by representatives of the Agency<sup>74</sup>. It is clearly easier and faster to train the judges of a single court than the entire national judiciary. However, this justification would have been valid if the restrictions were only temporary. It is clear that neither the government nor the Agency distrusts judges in general, yet they both indicated the need for certain preparatory works to take place in the initial enforcement phase. It is fair to say therefore that this is a temporary problem which should be duly resolved. Unfortunately, the legal provision that gives exclusive jurisdiction to the Tbilisi City Court is not transitional in nature, and it is not expected to expire, unless the LC is amended.

When it comes to competition law cases, the necessity to have specialized judges is not disputable<sup>75</sup>. However, even if the goal of this restriction was to avoid training the entire national judiciary, it is not a proportional measure. It would have been fairer to keep a geographical balance and, along with the Tbilisi City Court, assign competition cases to at least one court in west

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<sup>72</sup> Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p. 1.

<sup>73</sup> *Supra* note 30, p. 31.

<sup>74</sup> For more information, see: <http://competition.ge/ge/page4.php?b=270> (accessed 06.11.2015).

<sup>75</sup> In 1<sup>st</sup> instance courts, judges specialize in narrow fields in order to ensure their qualification and reduce the duration of proceedings. See: <http://www.supremecourt.ge/court-system/about-system/> (accessed 06.11.2015); Parliament of Georgia, Organic Law of Georgia of 8 December 2009, No. 2257 on Common Courts, Article 30.

Georgia, analogue to the appellate court system<sup>76</sup>. Moreover, the assigned court is not in fact a special court (as it is in certain EU Member States<sup>77</sup>) but an ordinary 1<sup>st</sup> instance court merely situated in the country's capital.

Georgia has in fact 26 separate 1<sup>st</sup> instance district or city courts, distributed across the entire country. It is clear that having several courts in each region serves the goal of making the judicial system easily accessible for every person. Tbilisi is without a doubt the biggest city in Georgia – it has the largest population and almost 50% of businesses are registered here<sup>78</sup>. However, a huge number of consumers live outside Tbilisi and a number of businesses are active in its various geographic regions<sup>79</sup>. Considering that Georgia is a relatively small size country, limiting jurisdiction to a single court only might not be an insuperable obstacle. Yet it can still be a major barrier, especially for consumers living outside Tbilisi, as using a centralized court would require additional financial and logistical expenditures. The chosen solution is also questionable considering the issue of discrimination according to the geographical location of the claimant. Not only is eliminating discrimination a goal of the LC, non-discrimination is an explicitly declared principle to be complied with by the Agency when performing its duties.

A further problem must be identified related to granting exclusive jurisdiction over competition cases to the Tbilisi City Court – the latter is already one of the most overloaded courts in Georgia. As stated in an interview by its Chair, the Tbilisi City Court is already working at its maximum capacity, and yet it cannot deal with its current caseload. It neither has enough judges, nor court rooms<sup>80</sup>. According to statistical data quoted by the Chair, each of its judges hears between 40-70 cases a month, while some have more than 300 cases

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<sup>76</sup> Georgia is geographically divided into its west and east parts by a mountain range. Tbilisi is situated in the central part of east Georgia and therefore is less accessible for the resident of west Georgia. Georgia has two appellate courts, one situated in Tbilisi and another in Kutaisi, the second largest city, located in central west Georgia. The same model could have been used for competition law cases, which would have been a better solution from the point of view of fairness and equal accessibility to courts.

<sup>77</sup> For instance, the Polish Court of Competition and Consumer Protection (SOKiK) is a special court working exclusively on the issues of competition and consumer laws.

<sup>78</sup> According to the data of the Population Census of Georgia 2014, 3 729 635 person lives in Georgia – 1 118 035 out of them reside in Tbilisi; For more information, see the preliminary results of the Population Census of Georgia 2014: [http://geostat.ge/cms/site\\_images/\\_files/georgian/population/agceris%20cinascari%20shedegebi\\_30.04.2015.pdf](http://geostat.ge/cms/site_images/_files/georgian/population/agceris%20cinascari%20shedegebi_30.04.2015.pdf) (accessed 06.11.2015). Furthermore, in Georgia, 43.4% of all businesses are registered in Tbilisi see: [http://geostat.ge/?action=page&p\\_id=241&lang=geo](http://geostat.ge/?action=page&p_id=241&lang=geo) (accessed 06.11.2015).

<sup>79</sup> When the competition agency was launched, all of the early applications were filed by companies operating in regions other than Tbilisi.

<sup>80</sup> See: <http://www.kvirispalitra.ge/justice/23403-ratom-tcianurdeba-saqmeebis-gankhilvasasamarthloshi.html> (accessed 06.11.2015).

assigned to them. At this point in time, the court is hearing cases that have been lodged two years ago. In such an environment, it is hard for the judges to even only deal with regular cases. The specific and innovative nature of competition law cases would make this matter far worse, especially considering that the Tbilisi City Court is expected to develop uniform jurisprudence in this new legal branch. In order to do so, its judges would have to ensure a higher than usual quality of their (competition-related) decisions. This expectation is in stark opposition to the recently criticised ‘conveyer-belt’ type of system, which the Tbilisi City Court is said to be currently employing. According to Transparency International Georgia, when rendering their decisions, judges have sometimes failed to be well acquainted with their own cases; they were also said to be more interested in closing a case as fast as possible, than in delivering justice<sup>81</sup>.

Another challenge concerns Georgia’s litigation culture and traditions. As Paulis states<sup>82</sup>, radical differences exist between Europeans and Americans in their attitude to courts. In the US, the court is a place where individual go to solve their problems; there is a belief that the judge will help defend recognized rights. In Europe, courts are viewed as the last resort – a place, most want to avoid. It is fair to say that courts have never been popular in Georgia, nor were they ever seen as a trustworthy ally. The Georgian judicial system has always been weak. It suffered from corruption in its earlier years and from strong political pressures in the last decade<sup>83</sup>. Trust towards courts has never been high<sup>84</sup> – surveys repeatedly demonstrated that the majority of the Georgian society did not see the courts as independent, and had only limited trust in the judicial system<sup>85</sup>. The newest survey proves that there is still a strong negative attitude toward the judicial system in Georgia, and

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<sup>81</sup> Transparency International Georgia, *Court Monitoring Report of Administrative Cases*, Tbilisi 2012, p. 29.

<sup>82</sup> The speech delivered at the Max Planck Institute for Comparative and Private International Law on 7 April 2006, for transcript see: J. Basedow, *Private...*, p. 7–16.

<sup>83</sup> S. Jones, *War and Revolution in the Caucasus*, Abingdon 2010, p. 152; S. Jones, *Georgia: A Political History Since Independence*, London 2015, p. 132; Freedom House, *Nations in Transit 2010: Democratization from Central Europe to Eurasia*, Lanham 2010, p. 214. Also see: <https://freedomhouse.org/report/countries-crossroads/2006/georgia#.VVpofmqkqo> (accessed 06.11.2015).

<sup>84</sup> Personal experience, from the time working at the Transparency International Georgia’s Advocacy and Legal Advice Centre (ALAC), makes it possible to recall numerous cases when victims of various legal violations were hesitant to take formal legal actions and instead insisted on sending a letter to totally unrelated officials (such as the President, Prime Minister, Chair of the Parliament) and State bodies, hoping for their assistance.

<sup>85</sup> Caucasus Research Resource Centres, *Attitudes to the Judiciary in Georgia: Assessment of Legal Professionals and Business Leaders*, June 2012, p. 6, [http://www.crrc.ge/uploads/files/research\\_projects/JILEP\\_Report\\_12\\_July\\_2012\\_ENG.pdf](http://www.crrc.ge/uploads/files/research_projects/JILEP_Report_12_July_2012_ENG.pdf) (accessed 06.11.2015).

that reforms in this area are among the least successful ones. The majority of the population has a negative or no opinion about the performance of the courts<sup>86</sup>. Private enforcement is a judicial remedy, unlike self-help where a victim acts independently without the intervention of a court<sup>87</sup>. The quality and effectiveness of private enforcement depends therefore on the strength and independence of the judiciary and other enforcement institutions<sup>88</sup>. Hence, trust toward judicial institutions plays a significant role in the context of private competition law enforcement – its lack can become a major barrier for private parties who might have suffered harm from an anti-competitive practice, but remain nevertheless reluctant to approach the courts for help.

It is not a secret that Georgia has a long road ahead to create an impartial and efficient judicial system. It is also necessary to raise awareness and educate the society about the basic legal procedures and principles, since knowledge is noticeably lacking<sup>89</sup>. The Governmental Strategy spoke of working with the private sector in order to raise awareness, as part of the operational programme for competition policy<sup>90</sup>. The need to educate businesses is even more prominent, considering that the government spend most of the last decade trying to persuade them that leaving the market without state intervention (without competition law) was in fact in their interest<sup>91</sup>. Eventually, when market regulation was reintroduced, there was some scepticism among the businesses toward the reform<sup>92</sup>.

The issue of the burden of proof remains a typical challenge for private enforcers in every jurisdiction. It might prove particularly difficult in Georgia, however, considering its lack of jurisprudence or developed case law (which claimants could use to support their arguments), making it necessary for private parties to interpret the LC themselves. The problem could be remedied by partial reliance on the rich EU jurisprudence. However, not only does the latter not apply to Georgia directly, it might often not be relevant either. Still, it can be a helpful guide for at least some cases. According to Article 7(5) of the

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<sup>86</sup> International Republican Institute, *Public Opinion Survey Residents of Georgia*, February 3–28, 2015, [http://www.iri.org/sites/default/files/wysiwyg/iri\\_georgia\\_public\\_2015\\_final\\_0.pdf](http://www.iri.org/sites/default/files/wysiwyg/iri_georgia_public_2015_final_0.pdf) (accessed 06.11.2015).

<sup>87</sup> E.M. Kieninger (ed.), *Security Rights in Movable Property in European Private Law*, Cambridge 2004, p. 79.

<sup>88</sup> G. Kochendörfer-Lucius, B. Pleskovic (eds.), *Investment Climate, Growth, and Poverty*, Washington, DC 2005, p. 36.

<sup>89</sup> *Supra* note 84, p. 14–16.

<sup>90</sup> *Supra* note 30, p. 40.

<sup>91</sup> N. Morari interview to K. Bendukidze, 'There Is...', p. 1, *supra* note 3. See also: <http://www.tabula.ge/en/story/89804-famous-reformist-kakha-bendukidze-dies-at-58> (accessed 06.11.2015).

<sup>92</sup> I. Lekvianidze, 'What an effective competition policy should be like?', *Forbes Georgia*, 13.02.2014.

Law of Georgia on Normative Acts, every international agreement of Georgia that entered into force, takes precedence over domestic normative acts, unless it contradicts the Constitution of Georgia. All of the agreements that Georgia signed with the EU, including the PCA and the Association Agreement, stress that Georgia will approximate its laws with EU *acquis*<sup>93</sup>. The latter term has a wide interpretation including EU jurisprudence<sup>94</sup>. Moreover, even if EU jurisprudence is not directly binding in Georgia, it is very relevant for the Georgian model, which was constructed according to the EU one. Maus refers to this phenomenon as a ‘dialogue of judges’, which concerns the confirmation, elaboration or rejection of the jurisprudence of foreign countries or supra-national courts<sup>95</sup>. In the absence of national jurisprudence, reliance on foreign best practices, and the interpretations given by famous judges, should not be harmful. Therefore, while training Georgian judges, it is important to educate them on EU jurisprudence, in order to make them more open for sharing argumentations based on EU rulings and let them understand and interpret the referred cases correctly.

## VI. Conclusions

The re-introduction of competition law in Georgia was one of the most important legal developments of recent years. Since its adoption in 2012, Georgia’s Law on Competition has been subject to major amendments and has progressed significantly. Despite several remaining criticisms, the positive impact of the recent reform cannot be denied. After years of an unregulated market, Georgia has now a modern competition law act and a functioning competition authority. Private parties are granted certain legal guarantees and mechanism to defend themselves and to claim damages.

Still, there are a number of challenges which need to be overcome in order to ensure that the recent legal changes will have a noteworthy impact in practice. The paper indicated some of the problems, which can be solved either by legal amendments or, in certain cases, by a more comprehensive and systematic change. It is necessary to generate a clear strategy about private enforcement and take further measures (beyond legal changes) to practically

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<sup>93</sup> *Supra* note 38.

<sup>94</sup> See: [http://europa.eu/legislation\\_summaries/glossary/community\\_acquis\\_en.htm](http://europa.eu/legislation_summaries/glossary/community_acquis_en.htm) (accessed 06.11.2015).

<sup>95</sup> D. Maus, *Application of the case law of Foreign Courts and Dialogue between Constitutional Courts*, 2010, p. 8, available at [http://ec.europa.eu/enlargement/policy/glossary/terms/acquis\\_en.htm](http://ec.europa.eu/enlargement/policy/glossary/terms/acquis_en.htm) (accessed 06.11.2015).

encourage victims to take actions, be more confident and less reluctant to act. The future will show how private enforcement will develop in Georgia, and what other problems will appear in practice. So far, Georgia has a promising starting point and with strong political will, developing an effective private as well as public enforcement system is possible, as well as extremely necessary.

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# **The Interaction of Public and Private Enforcement of Competition Law in Lithuania**

by

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## **CONTENTS**

- I. Introduction
- II. Modernisation of private antitrust enforcement by the Damages Directive
- III. Rules and case law applicable to private antitrust enforcement in Lithuania
- IV. Challenges concerning the quantification of harm and the establishment of causality
- V. Private enforcement and the leniency programme
- VI. Conclusions

## ***Abstract***

This paper provides a study of the interaction between public and private enforcement of Lithuanian antitrust law. The study refers to the Damages Directive. It has been found that private enforcement depends greatly on public enforcement of competition law. Therefore, their compatibility and balance are of great importance to antitrust policy. The Lithuanian NCA prioritises cases where an economic effect on competition does not have to be proven. This creates uncertainty about the outcome of private enforcement cases. Private enforcement in Lithuania is also in need of detailed rules on the identification of harm and causality. The analysis reveals how challenging it can be to estimate and prove harm or a causal link in private enforcement cases. Support from the NCA is therefore exceedingly needed. Moreover, even though the use of the leniency programme helps, it remains insufficient to solve the problem of under-deterrence. However, measures introduced by the Damages Directive do not make the leniency programme safe.

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## Résumé

Cet article fournit une étude concernant l'interaction entre l'application publique et privée du droit de la concurrence en Lituanie. L'étude se réfère à la Directive relative aux actions en dommages. Il constate que l'application privée du droit de la concurrence dépend largement de son application publique. En conséquence, leur compatibilité et l'équilibre sont de grande importance pour la politique de la concurrence. L'autorité de la concurrence lituanienne donne la priorité aux affaires dans lesquels un effet économique sur la concurrence ne doit pas être prouvé. Cela crée une incertitude concernant le résultat des actions en dommages. L'application privée du droit de la concurrence en Lituanie a également besoin de règles détaillées sur l'identification du préjudice et la causalité. Comme l'analyse effectuée révèle, il peut être très difficile d'estimer un préjudice ou de prouver un lien de causalité dans les affaires concernant l'application privée du droit de la concurrence. C'est pourquoi, le soutien de la part de l'autorité de la concurrence lituanienne est extrêmement nécessaire. En outre, même si l'utilisation du programme de clémence peut être évalué positivement, elle reste insuffisante pour résoudre le problème de la sous-dissuasion. Toutefois, les mesures introduites par la Directive n'assurent pas la sécurité du programme de clémence.

**Key words:** antitrust damages actions; private enforcement of antitrust rules; competition law; leniency programme.

**JEL:** K23; K42.

## I. Introduction

The recently adopted EU Directive on Antitrust Damages Actions<sup>1</sup> (hereafter, Damages Directive) is aimed at facilitating and boosting private antitrust enforcement. The Directive incorporates different measures that aim to remove the main obstacles that plaintiffs face when bringing private actions. It also tries to strike a balance between public and private enforcement. The Directive contains measures that pretend to protect efficient public antitrust enforcement through leniency programmes. Therefore, this analysis starts with a short review of the Directive.

In the EU, private litigation normally follows a decision of a National Competition Authority (hereafter, NCA). Private enforcement heavily depends

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<sup>1</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, 05.12.2014, p. 1.

therefore on public enforcement of competition law. Their compatibility and balance are thus of great importance to antitrust policy.

Lithuania's Competition Law<sup>2</sup> (hereafter, LCL) and the TFEU comprise the core of the legislation regulating antitrust policy in Lithuania. The purpose of the LCL is to protect and secure the freedom of fair competition in the country, and to harmonise Lithuanian and European law on competition relations. The Lithuanian NCA – the Competition Council of Lithuania – is responsible for the execution of national competition policy. The application of the LCL is reviewed by administrative courts. In Lithuania, private antitrust cases are resolved before civil courts (courts of general competence).

The basic principle behind such liability in Lithuanian law is that every person has the duty to act in such a way as not to cause damage to another person and, accordingly, that any harm caused as a result of a illegal action must be compensated by the person responsible for the claim being made by the injured party (a general law doctrine). Broadly, the conditions for tort liability are similar to those found in most European legal systems.

This paper reviews Lithuanian legislation related to private antitrust enforcement and contains a survey of the few national cases that have appeared in this area so far. Both reflect the current lack of detailed regulation on the quantification of harm and the establishment of causality in Lithuania. Uncertainty about the outcome of private enforcement cases does not facilitate private damages actions.

The following section shows how the Lithuanian NCA can play the role of *Amicus Curiae* (a friend of the court). It is revealed how challenging it can be to provide an estimation of the harm, as well as to actually prove the harm and the existence of a causal link in private enforcement cases. The role of the NCA role in helping with these issues could thus be far greater.

The leniency programme helps, but remains insufficient to solve the problem of under-deterrence. The Damages Directive introduced therefore some measures that facilitate antitrust damages actions. However, these measures undermine the leniency programme placing greater liability on leniency applicants.

The paper contains an introduction followed by five individual sections. The second section outlines the main features of the Damages Directive, including a short description of its aims and key improvements concerning private antitrust enforcement. The third section presents a brief description of Lithuanian private antitrust enforcement rules and case law. The fourth section investigates the challenges that surround the issue of quantifying harm and establishing a causal link in private enforcement cases. It is shown here

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<sup>2</sup> Competition Law of Republic of Lithuania, VZ No. VIII-1099, 23.03.1999. Available at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=1040736](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=1040736) (accessed 21.10.2015).

how a NCA's infringement decision can be helpful with those issues. The fifth section considers how the new rules affect the leniency programme. The last part contains conclusions.

## II. Modernisation of private antitrust enforcement by the Damages Directive

Private enforcement refers to the decentralised application of competition rules by individuals through private litigation before national courts of EU Member States, typically seeking damages. It provides an alternative to public enforcement, which involves the top-down application of competition law by the European Commission (hereafter, EC or Commission) or NCAs against infringing parties<sup>3</sup>.

Articles 101 and 102 TFEU impose freestanding prohibitions on certain forms of anticompetitive behaviour that are enforceable by the public hand of the Commission or NCAs, as well as privately by individuals that have suffered losses. The orthodoxy within EU law is to view public and private enforcement as 'complementary' and, mostly, mutually reinforcing<sup>4</sup>.

Pursuant to the case law of the Court of Justice (hereafter, CJ), citizens have the right to seek damages for cartel behaviours that caused them a loss, by virtue of the direct effect of Article 101 TFEU. While follow-on damages actions enable citizens to enforce their Treaties-based rights, these actions are purely about compensation – they do not serve public enforcement. On the other hand, in considering the need to encourage private enforcement of Article 102 TFEU, the importance of facilitating swift injunctive relief (to the greatest extent possible) cannot be overstated. Damages actions for exclusionary practices are extremely difficult to bring to fruition in a reasonable time frame, and they raise complex questions based in an economic analysis<sup>5</sup>.

The rationale for private antitrust enforcement is to empower individual consumers that have suffered distinct and quantifiable harm,

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<sup>3</sup> N. Dunne, 'The Role of Private Enforcement within EU Competition Law' (2014) 36 *University of Cambridge Faculty of Law Research Paper*.

<sup>4</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 (OJ C 167, 13.06.2013, p. 19).

<sup>5</sup> F. Louis, 'Promoting private antitrust enforcement: remember article 102' [in:] Ph. Lowe, M. Marquis (eds.), *European Competition Law Annual 2011: Integrating Public and Private Enforcement of Competition Law-Implications for Courts and Agencies*, Bloomsbury Publishing, Oxford 2014, p. 85–94.

attributable directly to an antitrust breach, to obtain compensation for their losses.

As soon as both enforcement systems are implemented in a given jurisdiction, Rubinfeld argues that the key question is how to harmonise both systems in order to minimise costs and avoid problems of under- or over deterrence<sup>6</sup>.

To date, private antitrust enforcement remains underdeveloped within the EU. It is this 'absence' that the Commission sought to address by formulating the Damages Directive. According to the EC, the objective of public enforcement, premised upon the use of administrative fines, is deterrence. This encompasses both specific deterrence by sanctioning the undertaking concerned, and general deterrence by scaring other undertakings away from breaching competition rules. At the same time, the Commission maintains that compensation is the primary objective of private enforcement – to 'repair the harm' caused by the breach. Nonetheless, benefits of deterrence and greater antitrust compliance are also envisaged as a result of private enforcement<sup>7</sup>.

According to the Commission<sup>8</sup>, the Damages Directive will help citizens and companies claim damages if they are victims of antitrust infringements based on Article 101 & 102 TFEU, such as cartels or abuses of dominance. The primary goals of the Directive are identified as follows:

(i) the Directive should facilitate access to evidence by antitrust victims, which they need to prove the damage they had suffered, and give them more time to make their claims; the right for victims of antitrust infringements to be compensated for the harm suffered has been acknowledged by the CJ; however, due to national procedural obstacles, only a few victims are currently being compensated; the Directive is also to reduce the wide divergence in national rules concerning antitrust damages currently present in the EU;

(ii) the Directive should facilitate a more efficient enforcement of EU antitrust rules overall: (a) it will fine-tune the interplay between private and public enforcement; (b) at the same time it will preserve the attractiveness of tools used by NCAs, in particular, leniency programmes and settlement procedures.

Pursuing such goals, the Commission introduced a set of improvements that have to be implemented into all Member States' legal regimes. They include: (i) national courts can order companies to disclose evidence when victims claim compensation, courts will ensure, however, that such disclosure orders are

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<sup>6</sup> D. Rubinfeld, 'An Empirical Perspective on Legal Process: Should Europe Introduce Private Antitrust Enforcement?' [in:] P. Nobel, M. Gets (eds.), *New Frontiers of Law and Economics*, Schulthess Juristische Medien, Zurich 2006, p. 141–148.

<sup>7</sup> N. Dunne, *op. cit.*

<sup>8</sup> EC, 'Antitrust: Commission welcomes Council adoption of Directive on antitrust damages actions' (2014), [http://europa.eu/rapid/press-release\\_IP-14-1580\\_en.htm](http://europa.eu/rapid/press-release_IP-14-1580_en.htm) (accessed 04.09.2015).

proportionate, and that confidential information is duly protected; (ii) a final decision of a NCA finding an infringement will automatically constitute proof of that breach before courts of the same Member State where the infringement occurred; (iii) victims will have at least one year to claim damages once an infringement decision by a competition authority has become final; (iv) if an infringement has caused price increases, and these have been 'passed on' along the distribution chain, those who ultimately suffered harm will be entitled to claim compensation; (v) consensual settlements between victims and infringing companies will be made easier by clarifying their interplay with court actions – this will allow a faster and less costly resolution of disputes.

The Commission seeks therefore to facilitate the restoration of justice making it easier to recover damages suffered by clients and customers of antitrust infringers. However, it is also ultimately supposed to deter infringers by encouraging private litigation as well as to relieve the heavy bureaucratic burden that rested on the European system since its inception<sup>9</sup>.

K. Hüschelrath and H. Schweitzer noticed that despite the EC's good intentions, both to facilitate private damages actions and remove obstacles for victims of anticompetitive conduct, the Damages Directive still leaves many important issues unanswered.

First of all, on the private enforcement side, it is still unclear:

- (i) how should the harm caused by antitrust infringements be quantified? How to assess what would have happened in the absence of the infringement? Which methods are legally acceptable, which methods are feasible?
- (ii) how should the disclosure of evidence within private antitrust enforcement be organised?
- (iii) how should the passing-on defence be treated in private enforcement suits?

Secondly, concerning the interaction of public and private enforcement, several critical questions remain unanswered including:

- (i) is it still justified to calculate fines according to the same principles that were applicable when private enforcement remained dormant?
- (ii) how do 'best practices' differ for expert economic testimony by competition authorities, and how relevant are they for effective and efficient public and private enforcement of competition law?<sup>10</sup>

<sup>9</sup> EC, White paper on modernisation of the rules implementing articles 85 and 86 of the EC Treaty – Commission programme No. 99/027 (OJ C 132, 12.05.1999, p. 1).

<sup>10</sup> K. Hüschelrath, H. Schweitzer, 'Public and Private Enforcement of Competition Law in Europe – Introduction and Overview' [in:] K. Hüschelrath, H. Schweitzer (eds.), *Public and Private Enforcement of Competition Law in Europe. Legal and Economic Perspectives*. ZEW Economic studies Vol. (48), Springer, Berlin – Heidelberg 2014, p. 1–8.

Answers to these questions impact issues of civil litigation which are still under development. Therefore, this paper attempts to make a contribution to this ongoing discussion looking in more detail into the quantification of harm and the establishment of causality.

### **III. The rules and case law applicable to private antitrust enforcement in Lithuania**

Audzevičius states<sup>11</sup> that the LCL and the TFEU contain the core legislation regulating antitrust policy in Lithuania. The purpose of the LCL is to protect and secure the freedom of fair competition in the country, and to harmonise Lithuanian and EU law regulating competition relations. The NCA is the designated institution for the execution of the competition policy of the Lithuanian State. The application of the LCL is reviewed by administrative courts. Private antitrust cases are resolved before Lithuanian civil courts (courts of general competence). There are no specialised courts (or even specialised court divisions) committed to the resolution of antitrust cases. However, the Vilnius Regional Administrative Court has the sole jurisdiction to hear antitrust cases as the court of 1<sup>st</sup> instance.

The legal basis for private antitrust enforcement in Lithuania is provided by the LCL together with rules of the new Lithuanian Civil Code (hereafter, LCC)<sup>12</sup> and the Lithuanian Code of Civil Procedure (hereafter, LCCP)<sup>13</sup> introduced in 2001 and 2003 respectively.

The basic principle behind such liability in Lithuanian law is that every person has the duty to act in such a way as not to cause damage to another person and, accordingly, that any harm caused as a result of a illegal action must be compensated by the person responsible for the claim being made by the injured party (a general law doctrine). The conditions for tort liability are generally similar to those found in most other European legal systems.

Article 43 LCL establishes that economic entities that violate this Law must compensate for damage caused to other economic entities or natural and legal persons in accordance with the procedure laid down by the LCC and LCCP.

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<sup>11</sup> R. Audzevičius, 'Lithuania' [in:] I.K. Gotts (ed.), *The Private Competition Enforcement Review*, Law Business Research Ltd 2014, p. 242–253.

<sup>12</sup> Lithuanian Civil Code, VZ No. VIII-1864, 06.09.2000. Available at: <http://www3.lrs.lt/pls/inter3/oldsearch.preps2?Condition1=107687&Condition2=> (accessed 21.10.2015).

<sup>13</sup> Lithuanian Code of Civil Procedure, VZ No. IX-743, 28.02.2002. Available at: <http://www3.lrs.lt/pls/inter3/oldsearch.preps2?Condition1=107687&Condition2=> (accessed 21.10.2015).

Article 47 LCL allows for two type of actions: 1) actions on the termination of illegal activities or, 2) actions on the compensation for damages incurred on the grounds of an antitrust infringement (of Articles 101 or 102 TFEU or the LCL) that has violated legitimate interests of the plaintiff. In most cases the latter is submitted as a follow-on action, which is pursuant to the finding of an antitrust infringement by the Lithuanian NCA. However, Article 47 LCL allows victims also to prove the infringement and request damages without the NCA having investigated this particular matter. However, not a single final court decision has yet been issued in Lithuania that satisfied the claims of a private claimant that applied to the court directly.

The above provision of the LCL corresponds to Article 1 of the Damages Directive that allows anyone who has suffered harm caused by an antitrust infringement committed by an undertaking (or by an association of companies) to effectively exercise its right to claim full compensation for that harm from the infringer.

Article 6.245 LCC allows any person to claim damages if it can be proved that a set of liability conditions have been met. They include: the infringement of the law by the defendant (Article 6.246 LCC); harm suffered by the plaintiff (Article 6.249 LCC); causality between the wrongdoing and the harm (Article 6.247 LCC). The fault of the infringer is presumed if an infringement has been proved according to Article 6.246 LCC. Article 6.263 LCC establishes also the main tort law rule which, among other things, constitutes a presumption of the wrongdoing by the defendant where the harm of the plaintiff is proven.

According to Article 6.249 LCC, damages cover the amount of direct expenses related to the injury (direct losses) and the income not received due to the infringement (indirect losses). The claimant has to prove the size of the damages claimed. Interest for damages is also awarded. The LCC sets the minimum interest rates at an annual rate of either 5 or 6 per cent, depending on whether the case at hand is civil or commercial respectively. The claimant may also seek compensation for extra reasonable expenses (such as those suffered to prevent the need for greater damages, expenses to evaluate damages or collect them without litigation)<sup>14</sup>. Moreover, Lithuanian courts are entitled to award damages based on their own estimation and discretion if the plaintiff can prove causality but has failed to prove the exact amount of damages suffered. Estimating the level of damages based on the defendants' profits gained from the illegal actions is also an apt evaluation method.

Article 178 LCCP allows and obligates the claimants to prove their statements while Article 199 LCCP enables the claimant to ask the court to order the disclosure of relevant data (written evidence) from the defendant

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<sup>14</sup> Ibidem.

or third parties. However, the plaintiff must prove the relevance of such information and the fact that the defendant, or a third person, actually hold it.

These rules correspond to Article 8 of the Damages Directive which gives claimants the right to request the court to order the defendant, or a third party, to disclose relevant evidence in their possession.

As R. Audzevičius reports<sup>15</sup>, practice shows that the Lithuanian NCA prefers investigating cases where an economic effect on competition does not have to be proven (in other words, abuse of dominance cases are not prioritised). As a result, case law concerning abuses is expected to decline. However, the amount of investigations into hard-core cartels is to grow – investigating horizontal agreements seems to be a priority for the Lithuanian NCA.

From 2000 to the summer of 2014, the Lithuanian NCA investigated 44 cases of restrictive agreements (Article 5 LCL). Most of these are cases that impose least burden of proof on the NCA (horizontal price-fixing and market-sharing agreements).

In theory, follow-on litigation should benefit from earlier public efforts, as it eases costs and results in higher awards making follow-on actions more attractive. Given that the decisions of the Lithuanian NCA have probative value; individuals should prefer to lodge a complaint to the Lithuanian NCA to investigate suspected anti-competitive practices<sup>16</sup>.

However, avoiding hard-to-prove cases by the Lithuanian NCA translates into a much heavier burden of proof placed on the plaintiffs in private damages actions cases. It is possible that this is the main reason why follow-on actions have not yet seen an increase domestically, even though the NCA has adopted a number of infringement decisions already. As J. Malinauskaite confirms, public enforcement is predominant in Lithuania in the antitrust field with barely any private actions to date<sup>17</sup>. As L. Prosperetti argues, a claimant in a follow-on action does not enjoy a substantial advantage over a claimant in a standalone action, as in most cases he will need to supply adequate proof of the harm suffered. Although antitrust authorities usually find agreements having an anticompetitive object, this is not sufficient to establish harm. Even when illegal exclusionary conduct (abuse of dominance) has been established, its effects may be difficult to disentangle from the results of [parallel] legitimate conduct. Moreover, the competitors of the dominant infringer may have been

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<sup>15</sup> R. Audzevičius, 'Lithuania' [in:] I.K. Gotts (ed.), *The Private Competition Enforcement Review*, Law Business Research Ltd 2014, p. 242–253.

<sup>16</sup> J. Malinauskaite, 'Private enforcement of competition law in Lithuania: a story of underdevelopment' (2013) 3 *Global Competition Litigation Review* 123–135.

<sup>17</sup> *Ibidem*.

affected to varying degrees by its illicit behaviour. Thus, in most cases, the claimant will need to prove both causation and harm<sup>18</sup>.

In the Lithuanian case, it appears that fulfilling the burden of proof can be a deterrent to private enforcement. As Woods et al. reveal, this is because it can be very difficult for claimants to amass sufficient evidence to prove their claim. It can be difficult to attribute loss specifically to the defendant's behaviour, rather than to other factors such as a general economic slowdown or even the claimant's own business strategy<sup>19</sup>. A short analysis of Lithuanian case law on private damages actions can confirm such fear.

Two cases have been uncovered here where private damages actions had actually been resolved by a final decision of Lithuanian courts. Both of them are follow-on cases, initiated after the adoption of a respective resolution by the NCA. The claims in *UAB Šiaulių tara v. AB Stumbras* was partially satisfied as the Court of Appeal awarded a much smaller amount of damages than actually claimed (case No. 2A-41/2006). The claim in *UAB Klevo lapas v AB Orlen Lietuva* was ultimately rejected by the Supreme Court of Lithuania (case No. 3K-3-207/2010) due to the absence of a causal link between the antitrust infringement and the damages incurred by the claimant. In both cases, plaintiffs asked for an award of damages after an abuse of dominance had been identified by the NCA.

In the first case, UAB 'Šiaulių tara' lodged a complaint to the NCA alleging that the defendant SPAB 'Stumbras' (while enjoying a dominant position in the strong alcoholic beverages market between 2000–2002) applied discriminatory conditions to equivalent marketing service agreements with certain undertakings, including the claimant. Hence, it placed Šiaulių tara, which was unable to sell the products at a lower price, at a competitive disadvantage. The claim was based on the NCA's decision that declared that the actions of Stumbras constituted a breach of Article 9(3) LCL (now it is Article 7(3) LCL). In the final decision, the Court of Appeal of Lithuania stated that an infringement decision by the NCA has probative value in Lithuania and that the defendant abused its dominant position. Although the court agreed that the claimant was entitled to compensation, it stated that Šiaulių tara had failed to prove the entire amount of the requested damages. The Court reduced, therefore, the amount of damages granted. The main focus of this case was on the calculation of damages. The court stressed that

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<sup>18</sup> L. Prosperetti, 'Proving and quantifying antitrust damages: an economic perspective' (2008) 10(3) *Mercato Concorrenza Regole* 527–564.

<sup>19</sup> D. Woods, A. Sinclair, D. Ashton, 'Private enforcement of Community competition law: modernisation and the road ahead' (2004) 2 *Competition policy newsletter* 31–37.

the claimant must prove indirect damages, such as loss of income, and that they should be realistic rather than just probable<sup>20</sup>.

In this case, the plaintiff claimed damages for two types of losses: 1) that it did not receive certain discounts that the dominant firm had offered to other competitors; 2) that this caused the claimant a loss of profits. The courts awarded those damages suffered by the plaintiff (loss of income) that could be calculated in accordance with executed business transactions. However, the courts rejected the claim concerning damages that might have been suffered because of sales loss due to the infringement.

In the second case, upon request of Klevo lapas, the NCA initiated proceedings against AB 'Mazeikių nafta' and concluded that the latter held a dominant position in certain gasoline and diesel fuel markets. By taking advantage of its unilateral decisive influence in those markets, it fixed dissimilar purchase conditions for its oil products for similar agreements with different companies. By so doing, Mazeikių nafta abused its dominant position.

Similarly to the first case, the courts rejected the claim for damages that might have been suffered because of sales loss due to the infringement. However, the court refused here also to award damages that could be calculated in accordance with executed business transactions. They did so, on the ground that the plaintiff obtained benefits of equal size from the postponement of the payments (the damages were calculated as a loss of the plaintiff's profit). It shall be noted that the facts of the case did not show if the benefits that the plaintiff obtained were directly from, or due to the defendant's infringement. It thus seems that the Supreme Court rejected this part of the claim without a clear legal background. It is interesting to consider what the judgment would have said instead, if the plaintiff had realized its right to demand profits received by a liable person due to the infringement as damages according Article 6.249 LCC.

As this case shows, the decision of the NCA is not binding upon the court under Lithuanian law. This creates the risk that an abuse needs to be proven all over again by the claimant in a private case. This should soon change thanks to the Damages Directive that makes the final decision of an NCA binding upon national courts of the same Member State. This case is also an excellent example illustrating another major issue in this context: proving a causal link between the abuse (here, price discrimination) and the losses suffered (here, bankruptcy). In the reviewed case, the Supreme Court found that the plaintiff would have gone bankrupt anyway, so no damages could be obtained<sup>21</sup>.

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<sup>20</sup> J. Malinauskaite, 'Private enforcement of competition law in Lithuania: a story of underdevelopment' (2013) 3 *Global Competition Litigation Review* 123-135.

<sup>21</sup> G. Monti, P.L. Parcu, *European Networking and Training for National Competition Enforcers (ENTRANCE 2012). Selected Case Notes (May 2014)*, Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS, 68, San Domenico di Fiesole 2014.

In both cases, the calculation of damages was quite easy, but it still did not guarantee the full success of the claim. Supreme Court Judge J. Stripeikienė noted that Lithuanian law does not yet contain any requirements to disclose information, and that no guidelines for the calculation of damages have been established yet<sup>22</sup>.

#### **IV. Challenges concerning the quantification of harm and the establishment of causality**

The above review of Lithuanian private antitrust enforcement and the Damages Directive's modernisation of this field, reveal that the quantification of damages and the establishment of causality remain a challenge in legal cases and not just for their participants but also for judges and even experts. Therefore, the Lithuanian NCA can play the role of *Amicus Curiae* (a friend of the court) helping with these issues.

Further arguments will show that the analysis of demand, which is needed in the market definition stage of competition proceedings, cannot be avoided when estimating harm and establishing the causal link either. Therefore, market definitions provided in the NCA's decisions would help claimants save money and time in private enforcement cases.

Tort law provides the general conceptual framework for the analysis of damages and causation. It defines the standards of proof, the basic tests for proving causation and for estimating damages, the rules on the burden of proof, and on access to information. Tort law does not offer substantive economic principles for such analysis however. It leaves economic arguments subject to the free consideration of evidence by judges. An economic interpretation is thus required to adapt the general legal framework for an economic analysis<sup>23</sup> – such interpretation should thus be consistent with legal rules.

Private enforcement of antitrust damages critically hinges upon proof that an antitrust violation caused damage. Existing research narrowly focuses on quantifying damages, but proving causation goes far beyond quantification. Strict legal requirements must be observed. To address causation adequately, an integrated legal and economic approach is necessary. Traditional tort law examines, for each transaction, whether an antitrust violation caused damages with near certainty. This quasi-deterministic approach offers a seemingly unequivocal solution for assessing causation. However, cases as complicated as

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<sup>22</sup> J. Stripeikienė, 'Klevo Lapas v. ORLEN Lietuva' [in:] G. Monti, P.L. Parcu, *op. cit.*

<sup>23</sup> H.A. Abele, G.E. Kodek, G.K. Schaefer, 'Proving Causation in Private Antitrust Cases' (2011) 7(4) *Journal of Competition Law and Economics* 847–869.

private antitrust damages cannot be decided by this methodological approach. By contrast, economic methods for proving causation (and quantification of harm) use statistical tools<sup>24</sup>.

From an economic point of view, collusion describes a situation where prices on a specific antitrust market (or markets) are raised or attempted to be raised, through direct or indirect communication between competitors, above a level that would have emerged without such communication. From a legal perspective explicit (but not tacit) collusion is prohibited. Proving damages suffered from such collusion is a complex endeavour. This definition highlights the fact that the focus of most damages calculations rests on estimating the price increase encountered by customers (rather than quantity or quality effects that generate much less attention in legal cases). When carrying out a damages calculation, this definition also highlights the need to first define antitrust markets – at least to some extent – in order to assess the affected volume. Finally, it stresses the importance of coming-up with a robust estimation of price levels which would have existed without the cartel agreement, the counterfactual, or ‘but-for’ price<sup>25</sup>.

The Commission issued a Practical guide on quantifying harm in actions for damages<sup>26</sup>. It provides therein some practical guidance on mathematical and econometrical methods that might be useful when quantifying harm, establishing causality, or even an infringement of antitrust law itself. Those methods include: interpolation, which provides the theoretical calculation of missing data; extrapolation is useful for forecasts based on data retrieved from past periods; regression analysis provides statistical techniques that help investigate the relationship between some variables; econometric modelling covers mathematical models that simulate demand and/or behaviour of market rivals.

This paper follows the categorisation of these methods put forward by most commentators in relevant literature<sup>27</sup>:

- ‘before and after’ (*ex post*) approaches compare prices during the alleged cartel period with prices before the cartel agreement was reached and/or after the cartel’s breakdown (reference here is to the ‘during and after

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<sup>24</sup> Ibidem.

<sup>25</sup> W. Friederiszick, L.H. Röller, ‘Quantification of harm in damages actions for antitrust infringements: insights from German cartel cases’ (2010) 6(3) *Journal of Competition Law and Economics* 595–618.

<sup>26</sup> Commission (EU), ‘Staff Working Document – Practical Guide – Quantifying Harm in Action for Damages Based on Breaches of Articles 101 or 102 of the Treaty on the Functioning of the European Union’, SWD (2013) (205) (Strasbourg, 11 June 2013) (Quantification Guide), paras 166–71.

<sup>27</sup> Ibidem.

approach' if no cartel-free period before the infringement took place is available);

- 'yardstick' approaches (in the narrower sense) compare the price in the cartelised region with prices in other geographic regions that are not affected by the cartel (regional benchmark). Specific challenges here centre on accounting for differences in the various regions and excluding indirect effects of the cartel, for example, the umbrella effect if neighbouring regions are used as benchmarks. As it turns out, cases based on a yardstick approach often tend to fail as the courts are easily convinced that no effective yardstick exists;
- a 'cost-based' approach constructs the 'but-for' price 'bottom up' by measuring the relevant costs of the affected product and adding a reasonable profit margin (which would emerge under normal market conditions). However, these methods do not seem very credible in practice because at the heart of their analysis lies a cost determination which is, in itself extremely difficult to achieve;
- simulations (theoretical modelling) are closely related to 'cost-based' approaches as they often requires some cost information. This methodology uses however an explicit model of competition, which is used to 'simulate' the profit margins. In addition to data on costs, simulations require thus also information on market structure and demand (such as demand elasticities)<sup>28</sup>.

Accuracy remains a problem with all of these methods. Their application to the facts of specific legal cases can provide 'true results on average' that do not necessarily hold true for each specific transaction.

However, judges generally prefer the first, most simple and practical method. Hence, 'before and after' methods are very commonly employed by civil courts to estimate the amount of contractual and tort liability, and should thus be regarded as the prime candidate for antitrust damage estimation. These methods are based on the construction of a hypothetical income statement of the claimant, which should not reflect any effect arising from the antitrust breach. Civil courts have solid experience across Europe in the application of these methods.

The inclusion of the 'before and after' analysis of the relevant NCA's decision would thus be very helpful for preparing damages actions by victims.

As it was mentioned before, Lithuanian courts are entitled to award damages based on their own estimation and discretion provided the plaintiff can prove causality but cannot prove the exact amount of its own damages.

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<sup>28</sup> L. Prosperetti, 'Antitrust Damages in Europe: An Economic Perspective' [in:] E.A. Raffaelli (ed.), *Antitrust between EC Law and National Law: 7 Conference, 18–19 May 2006*, Bruylant, Bruxelles 2007, p. 335–352.

It means that an exact quantification of the size of damages is usually not required by law, and would often pose an impossible task. Hence, estimation of damages does not pose a big issue – the challenge is to prove them.

Lithuanian courts adopt a flexible causal link criterion – illegal actions do not lead to, but influence the damage by a sufficient degree (decision of the Supreme Court, case No. 3K-3-53-2010). In an antitrust law approach, this means that causation aims to clarify whether some illegal behaviour (of the cartel members or an entity abusing its dominant position) was instrumental in inflicting damage upon the plaintiff (customer). It has to be ruled out that the damage was caused by other factors<sup>29</sup>.

In the first stage, courts apply a test of *conditio sine qua non* (equivalent causation theory) and determine the actual causal connection – whether harmful consequences would result in the absence of the unlawful act. A key legal test for assessing causation is the ‘but-for’ test. The latter examines whether damages would not have occurred without the antitrust violation. Hence, a hypothetical scenario without an antitrust violation must be considered. The key challenge here is to prove causation to the requisite legal standards.

In the second stage, courts establish a legal causal link – they decide whether the legal consequences are not too remote from the allegedly unlawful conduct. A key role here is played by the rule of the defendant’s ability to predict the consequences of his illegal actions (the standard of a reasonable person must be applied here to decide if the given consequences could be foreseen; if the answer is no, the legal consequences are considered to be too remote).

So, causation of the defendant’s act for the damage has to be proved to a high degree of certainty. For that reason, the burden of proof lies with the plaintiff and this means, first, collecting evidence. For a plaintiff, it is all the more difficult to meet this burden because antitrust infringers typically have much more information about the violation than outside parties. This informational asymmetry makes it harder for plaintiffs to provide sufficient proof. As it was mentioned before, the LCCP includes the right to order evidence from the defendant and third parties. However, such evidence shall be identified in advance. And here lies a problem. In antitrust cases much of the key evidence necessary to prove a case for antitrust damages is often concealed and, being held by the defendant or by third parties, it is usually not known to the claimant in sufficient detail<sup>30</sup>.

In many antitrust cases, it can be difficult for plaintiffs to establish which transactions were directly or indirectly affected by an antitrust violation, and which remained unaffected. Stochastic causation obviates the need to draw

<sup>29</sup> H.A. Abele, G.E. Kodek, G.K. Schaefer, *op. cit.*

<sup>30</sup> *Ibidem.*

such sharp distinctions as it suffices to examine the overall effect exercised by a group of transactions. Under this concept, the plaintiff would only have to show that some damage was caused by the hazardous activity to a certain group of customers. The requirement to provide proof with near certainty for each individual case is thereby relaxed. Since excessive claims are to be avoided, compensation is shared among all members of the group that suffered damages in proportion to the probability of having been affected<sup>31</sup>.

The passing-on defence should be noted also. When the price of an input rises, companies will try to shift the price increase to their own buyers. It can be proved that, in general, the ability to pass-on an increase in the input price will mainly depend on the given elasticity of demand. If the price increase was generated by a cartel, defendants in antitrust case must thus prove not only that passing-on actually took place, but also the size of the passing-on effect, which will depend upon demand elasticities (and other factors, such as the reaction of competitors). This means that defendants are to use one of the aforementioned methods designed to quantify harm and establish causality. So, all of the abovementioned issues remain more or less the same too. It will thus not be easy to fulfil such a heavy burden of proof. In practice therefore, the passing-on defence will rarely be successful<sup>32</sup>.

The legal principles of proving causation are too general to be directly applicable to a private antitrust case. Hence, an economic interpretation of these principles is required. First, damages have to be properly defined in terms of the actual prices and quantities affected by the antitrust violation and the hypothetical prices and quantities in a scenario without an antitrust violation. Next, based upon these definitions, the question can be raised as to how to prove differences in prices and quantities between the actual and the hypothetical scenarios so as to establish the existence of damages.

As mentioned, the 'but-for' test lies at the heart of causation analysis in tort law. Provided some damage has occurred, the goal of this test is to ensure that the damage cannot be explained by factors other than the actions of the defendant. In the case of excessive prices, it must be shown that high prices were due to an antitrust violation, rather than other price determinants. Conducting such an analysis requires a thorough understanding of the relationship between prices and their determinants, including the potential impact of the antitrust violation. A thorough understanding of price determinants is thus essential as both legal and economic assessments of causation focus on this question<sup>33</sup>.

Therefore, as H.A. Abele argues, the concept of average systematic damages has important implications for the burden of proof. First of all, it should

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<sup>31</sup> Ibidem.

<sup>32</sup> L. Prosperetti, *op. cit.*

<sup>33</sup> H.A. Abele, G.E. Kodek, G.K. Schaefer, *op. cit.*

be noted that, by its very nature, the average systematic price component relies upon a statistical concept. It does so to make sense of the multitude of different prices in the data and to account for the impact of other price factors. Even if complete data on all transactions in the market was available, it would still be necessary to resort to statistical procedures to analyse the data. Second, also due to the statistical nature of the concept, average systematic price effects can be computed from a representative sample of transactions<sup>34</sup>. Yet such analysis opens the way to approximations and estimations.

These issues related to the economic analysis of damages and causality affects the standard of proof. As mentioned, experts rely on the theoretical evaluation of harm and causality because of lack of relevant information. Moreover, this issue persists in almost all cases. Assistance from the NCA could thus be very helpful here. According to Lithuanian civil procedure rules, the NCA shall assist the court by providing those of its conclusions on the case which would be helpful in the determination of the quantum of damages and the causal link. On the order of the court, the NCA shall provide relevant evidence (the case file).

All these arguments can support the aforementioned opinion expressed by the Supreme Court Judge J. Stripeikienė whereby additional requirements concerning information disclose and extra guidelines on the calculation of damages need to be established in Lithuania. It is suggested here that this is of a matter of high importance, especially considering that Article 17 of the Damages Directive states clearly that: ‘the 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’.

## V. Private enforcement and the leniency programme

L. Prosperetti asserts that even though the use of the leniency programme helps, it remains insufficient to solve the problem of under-deterrence. Yet if cartel members knew beforehand that, if discovered, they will have to disgorge all their cartel profits as damages (and lose their reputation) as well as pay a fine, joining the cartel would become less appealing<sup>35</sup>. As to the cartels, the basic model of collusion is based on so-called incentive constraints. It reveals that collusion depends on the total payoff received if companies collude by comparison to the profit each of them may generate in an optimal deviation

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<sup>34</sup> Ibidem.

<sup>35</sup> L. Prosperetti, *op. cit.*

scenario. Collusion is sustainable if the collusive payoff exceeds the benefits achieved when a company deviates<sup>36</sup>. Clearly, a decrease of expected profits from the collusive practice due to the rising risk of damages actions (because of more effective private enforcement rules) makes collusion less sustainable. This means, decreasing incentives to collude.

Leniency programmes increase, perhaps substantially, the probability of detection, but the imposed fines are insufficient. It is thus expected that private antitrust enforcement increases the costs of colluding companies and, in turn, also decreases their incentives to apply for leniency<sup>37</sup>.

However, the Commission asserts that measures introduced in the Damages Directive will preserve the attractiveness of leniency programmes. The Directive includes measures that should help not to deter companies from cooperating with NCAs including:

- (i) self-incriminating statements shall be exempted from evidence disclosure; however, limitations on the disclosure of proof should not prevent NCAs from publishing their decisions, and this exemption applies only to voluntary self-incriminating statements; the Directive ensures the right of injured parties to retain sufficient alternative means how to obtain access to relevant evidence to prepare their actions for damages;
- (ii) an immunity recipient shall be relieved from joint liability for the entire harm, any compensation it must provide vis-a-vis co-infringers cannot exceed the amount of damages caused to its own direct or indirect purchasers or, in the case of buying cartels, its direct or indirect providers; responsibility for other entities should not exceed its relative responsibility for the harm caused by the cartel; full liability to an immunity recipient shall be applied only when full compensation from other infringers is not available.

As stated by the CJ in *Donau Chemie*, absolute protection for certain documents is incompatible with the primary law principle of effectiveness; it is also problematic to privilege successful leniency applicants at the expense of injured parties. Some commentators suggest that the best solution would be to privilege members of cartels who receive immunity from fines in relation to their co-infringers by giving them the right to full contribution from their co-infringers<sup>38</sup>.

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<sup>36</sup> M. Motta, *Competition policy: theory and practice*, Cambridge University Press, Cambridge 2004, p. 159–161, 193–202.

<sup>37</sup> L. Prosperetti, *op. cit.*

<sup>38</sup> Ch. Kersting, 'Removing the Tension Between Public and Private Enforcement: Disclosure and Privileges for Successful Leniency Applicants; (2014) 5(1) *Journal of European Competition Law & Practice* 2–5.

In practice, discovering cartels is a hard task for NCAs. This is a very expensive and time-consuming activity. However, NCAs are short of money and staff. It is particularly true for small, poorer EU countries, such as the Lithuanian Republic, with a NCA that disposes of less funding and lower staffing than some of its larger counterparts. It is thus necessary to invest precious resources to discover cartels, while their shortage lowers the possibility of detecting and proving collusive outcomes. Leniency helps save the sparse public resources – since companies bring evidence to the NCA directly, considerable costs in the prosecution stage are saved. As mentioned before, such evidence is useful in private enforcement cases.

The view of most authors has to be supported that asserts that the implementation of the Damages Directive is going to diminish the detection of cartels due to a fall in the number of leniency applications<sup>39</sup>.

## VI. Conclusions

The orthodoxy within EU law is to view public and private enforcement of Articles 101 and 102 TFEU as ‘complementary’ and, mostly, mutually reinforcing. Across the EU, private litigations normally follows an infringement decision of a NCA. Hence, private antitrust enforcement heavily depends in EU Member States on their public enforcement practice. Their compatibility and balance are thus of great importance to antitrust policy.

The review of Lithuanian legislation and case law relating to private antitrust enforcement shows the need for the introduction of more detailed rules on the identification of harm and causality. Uncertainty about the outcome of private enforcement cases does not facilitate private damages actions. For the last fifteen years, the Lithuanian NCA has investigated 44 cases of restrictive agreements (under Article 5 LCL) but only a few of them have resulted in damages actions, and only one of them was partially successful.

Investigations in cases where an economic effect on competition has to be proven (*inter alia*, abuses of a dominant position) are not a priority in Lithuania. Therefore, the claimant in a follow-on action does not enjoy a substantial advantage and bears a heavier burden of proof.

Decisions of the Lithuanian NCA are still not legally binding in civil cases – so far they only serve as *prima facie* written evidence only. If the court fails to confirm the decision of the NCA, claimants must bear the burden of proof

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<sup>39</sup> L. Prosperetti, *op. cit.*

of the illegal act. However, the implementation of the Damages Directive into the Lithuanian legal regime will solve this issue.

The paper reveals how challenging it can be to estimate and prove harm or a causal link in private enforcement cases. It would thus be very helpful to include the most popular 'before and after' analysis in the NCA's decisions. Market definitions provided in relevant NCA's decisions would help claimants save time and money in private enforcement cases. Demand analysis is needed for both market definition and the estimation of harm and causation. According to civil procedure rules, the Lithuanian NCA shall assist the court by providing those of its conclusions on the case which would be helpful in the determination of the quantum of damages and the causal link. On the order of the court, the NCA shall provide relevant evidence.

Although leniency helps, it is still insufficient to solve the problem of under-deterrence. Therefore, the Damages Directive introduced some measures that facilitate damages actions against infringers. However, these measures undermine leniency programmes because they place greater liability on leniency applicants.

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# **Directive on Antitrust Damages Actions and Current Changes of Slovak Competition and Civil Law**

by

Ondrej Blažo<sup>\*</sup>

## **CONTENTS**

- I. Introduction
- II. Protection of leniency applicants and participants in settlement procedures
  - 1. Position of the leniency programme and the settlement procedure in the Slovak legal order
  - 2. Protection of leniency and settlement documents in the APEC
  - 3. Actions for Damages and Access to Leniency and Settlement Documents
- III. Disclosure of Evidence and Slovak Civil Court Proceedings
- IV. Joint and several liability
- V. Collective redress
- VI. Limitation periods
- VII. Effect of NCAs' decisions
- VIII. Conclusions. Transposition of the Damages Directive into the Slovak legal order

## ***Abstract***

Slovak competition law enforcement can be characterized by infrequency of leniency applications and near absence of private enforcement. As a result, the adoption of the Damages Directive is not likely to cause substantial breakthrough in Slovakia, be it with respect to the rate of leniency applications or in private enforcement. A comprehensive amendment of Slovak competition law took place in 2014. Changes introduced therein reflected, among other things, the practice

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of the European Commission regarding access to its file. A new approach was also introduced towards damages claims submitted against leniency applicants. The paper will first consider the question whether it is necessary to further redesign these new Slovak rules because of the adoption of the Damages Directive, or if they have been successfully pre-harmonized. Along with changes to Slovak competition law, procedural rules for civil courts were also re-codified. Hence the second part of this analysis will focus on the question if a new civil procedure framework, including obligatory harmonization, could foster private enforcement of competition law. Summarizing the resulting answers, the third question focuses on who could benefit from further changes to Slovak legislation – final consumers or enterprises that are involved in the production chain. Finally, will changes in Slovak legislation driven by the Directive be coherent with its overall legal system, or will they appear to be an odd and peculiar piece of legislation?

### *Résumé*

Le droit slovaque de la concurrence peut être caractérisé par la rareté des demandes de clémence et par la quasi-absence de l'application privée du droit de la concurrence. En conséquence, l'adoption de la Directive relative aux actions en dommages n'est pas susceptible de causer percée importante en Slovaquie, quoi que ce soit le taux des demandes de clémence ou l'application privée du droit de la concurrence. La réforme complexe du droit de la concurrence slovaque a eu lieu en 2014. Les changements introduits par cette réforme ont pris en compte, entre autres, la pratique de la Commission européenne concernant l'accès aux documents figurants dans ses dossiers. Une nouvelle approche a également été introduite vers les actions en dommages concernant les demandeurs de clémence. Cet article examinera d'abord la question si il est nécessaire de remanier ces nouvelles règles slovaques en raison de l'adoption de la Directive, ou si elles ont été déjà pré-harmonisé. Outre les modifications apportées à la loi slovaque de la concurrence, la réforme mentionnée ci-dessus a ré-codifié les règles de procédure civile. En conséquence, la deuxième partie de cette analyse se concentrera sur la question si un nouveau cadre de la procédure civile, y compris l'harmonisation obligatoire, pourrait contribuer à encourager le développement de l'application privée du droit de la concurrence. En résumant les réponses données, la troisième question porte sur qui pourraient bénéficier des changements à la législation slovaque – consommateurs finaux ou des entreprises impliquées dans la chaîne de production. Enfin, l'article va tenter de répondre si les changements dans la législation slovaque entraînés par la Directive seront cohérent avec le système juridique, ou vont-ils plutôt être une pièce étrange et particulière de la législation?

**Key words:** competition law; Directive 2014/104/EU; Slovakia; civil law; commercial law; reform of competition law; leniency programme; settlement; procedural law.

**JEL:** K23; K42.

## I. Introduction

In its opinion in the *Pfleiderer* case, Advocate General Mazák presented his thoughts regarding the position of private enforcement of competition law. He said, *‘I consider that Regulation No 1/2003 and the case-law of the Court have not established any de jure hierarchy or order of priority between public enforcement of EU competition law and private actions for damages. While no de jure hierarchy has been established, at present the role of the Commission and national competition authorities is, in my view, of far greater importance than private actions for damages in ensuring compliance with Articles 101 and 102 TFEU. Indeed so reduced is the current role of private actions for damages in that regard that I would hesitate in overly using the term “private enforcement”’*.<sup>1</sup> All disputes concerning private antitrust enforcement seemed to have been ultimately reduced to the relation between the effectiveness of leniency programmes and access to the files held by competition authorities by antitrust victims (in order to support their damages claims in civil court proceeding) and other forms of preferential approach given to leniency applicants in civil<sup>2</sup> damages actions. Even the long-awaited Damages Directive, which was finally adopted in 2014, dedicated its entire Chapter II to access to the file in order to protect the interests of leniency applicants.

The procedural sphere of Slovak competition legislation (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, hereafter, APEC) has recently been subject to significant changes. Private enforcement, protection of leniency applicants and the settlement procedure were all part of an extensive Amendment introduced in 2014 (hereafter, Amendment 2014). Moreover, a new Civil Dispute Code (Act No 160/2015 Coll., hereafter, CDC) was adopted by the Parliament in May 2015. The latter will replace, with effects from 2016, the current Civil Court Procedure Code of 1963 (Act No. 99/1963 Coll., hereafter, CCPC) that has been amended more than eighty-times since its introduction. In light of the above, the first question to be considered in this paper is: do these recent modernization amendments go in line with 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

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<sup>1</sup> Opinion of Advocate General Mazák delivered on 16 December 2010, Case C-360/09 *Pfleiderer AG v. Bundeskartellamt*.

<sup>2</sup> The Slovakia civil law system is broadly divided into two subsystems: civil law in the narrower sense of the word and commercial law.

Member States and of the European Union<sup>3</sup> (hereafter, Damages Directive). Moreover, harmonization by way of the Damages Directive is limited to ‘certain rules’ only and so a further question to be addressed here is if these ‘certain rules’ are in fact compatible with the Slovak legal order and if, together with ‘non-harmonized’ national civil rules, they make a adequate legal framework for sufficient private enforcement of competition law in Slovakia.

The paper will focus on a number of selected elements of damages claims for harm caused by competition infringements in the Slovak legal order *vis-a-vis* the EU ‘private enforcement package’ (the Damages Directive and the soft law of the Commission dealing with private antitrust enforcement). These include: the position of leniency programme and the settlement procedure in the overall legal system, joint and several liability, the passing-on defence, limitation periods, and effects of decisions issue by national competition authorities (hereafter, NCAs).

## **II. Protection of leniency applicants and participants in settlement procedures**

### **1. Position of the leniency programme and the settlement procedure in the Slovak legal order**

The European Commission (hereafter, EC or Commission) always declares its cautiousness when it comes to the protection of the interests and legal certainty of leniency applicants as well as the predictability of its leniency programme as a whole. Yet the EC never actually introduced any legally binding provisions regarding its leniency programme. In comparison to the benefits associated with a settlement (part of the EC’s procedural rules laid down in a Regulation<sup>4</sup>), the basis of EU leniency is still only contained in a Commission notice – a non-binding soft law act<sup>5</sup>.

Still, the Slovak legislator, inspired by the EC Leniency Notice, introduced conditions for immunity from fines and fine reductions directly into the

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<sup>3</sup> OJ L 349, 05.12.2014, p. 1–19.

<sup>4</sup> Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.04.2004, p. 18) as amended by Commission Regulation (EC) No. 622/2008 of 30 June 2008 amending Regulation (EC) No. 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ L 171, 01.07.2008, p. 3).

<sup>5</sup> Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ C 298, 08.12.2006, p. 17).

APEC in 2004 (Article 38 APEC). Certain specific issues regarding leniency applications, as well as markers, summary applications and hypothetical applications, were further explained in a soft law document issued by the Antimonopoly Office of the Slovak Republic (hereafter, AMO or NCA) in 2004<sup>6</sup>. Amendment 2014 made leniency provisions more visible in the APEC (Article 38d received the title: ‘Leniency Programme’) as well as increased their precision. Furthermore, rules on leniency applications, their form and requirements, markers, summary applications, hypothetical applications were all made binding by a new decree of the AMO<sup>7</sup>. Hence the Slovak leniency programme has become more predictable lately – it now provides leniency applicants with a higher degree of legal certainty because it is fully regulated by ‘hard law’.

Similarly, before Amendment 2014, the Slovak settlement procedure was set out in ‘soft law’ guidelines of the AMO only<sup>8</sup>. Amendment 2014 introduced the settlement procedure directly into the APEC (Article 38e APEC); some of its procedural details as well as the percentage of the available fine reduction are regulated by a new decree of the AMO<sup>9</sup>.

Fully regulating the national leniency programme and settlement procedure by binding legal instruments is an important step towards their protection in court proceedings, as required by the Damages Directive. It would be quite difficult to provide protection to given procedural instruments and their corresponding documentation, as well as undertakings involved in respective procedures, if there was no actual legal basis for such procedures. In other words, it would be difficult to protect them if they were guided merely by the ‘soft laws’ of an administrative body – the AMO.

## 2. Protection of leniency and settlement documents in the APEC

Amendment 2014 completely re-designed Slovak provisions on access to the file in competition proceedings, especially those based on the use of the leniency programme.

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<sup>6</sup> Non-imposing or reducing a fine in some types of agreements restricting competition pursuant to the Article 38 para. 11 and 12 of the Act (leniency program) [http://old.antimon.gov.sk/files/30/2009/Leniency5\(k\)-en.rtf](http://old.antimon.gov.sk/files/30/2009/Leniency5(k)-en.rtf) (accessed 20.10.2015).

<sup>7</sup> Decree of the Antimonopoly Office of the Slovak Republic No. 172/2014 Coll. laying down details on leniency programme of 19 June 2014.

<sup>8</sup> Conditions for the application of settlement procedure available at: <http://old.antimon.gov.sk/files/26/2012/Conditions%20for%20the%20application%20of%20settlement%20procedure.rtf> (accessed 20.10.2015).

<sup>9</sup> Decree of the Antimonopoly Office of the Slovak Republic No. 171/2014 Coll. laying down details on settlement of 19 June 2014.

First, Amendment 2014 introduced a definition of ‘confidential information’. The latter was defined in Article 40(5) APEC as information which is neither a trade secret, nor information protected pursuant to special legislation (such as classified information, bank, telecommunication, tax or post secrets), and which ‘is available only to the restricted group of persons and its disclosure would significantly harm the legally protected interest of person which has provided it or other person’. Information submitted by the applicant within the leniency programme, if disclosing it could endanger the application of the procedure pursuant to Article 38d APEC, is explicitly deemed to fall within the category of ‘confidential information’. Parts of a leniency application can obviously contain trade secrets, triggering the application of the specific rules of the protection of trade secrets. Although this is not explicitly stated by the provision of Article 40(5), it is clear that settlement statements will also fulfil the criteria of ‘confidential information’.

Second, leniency applications themselves are protected under Article 40(3) APEC. A leniency application, as well as other documents and information which have been provided in connection with a leniency application, are not part of the file. As such, they are excluded from access to the file until the issuance by the AMO of a Statement that precedes the rendering of a decision under Article 33 APEC (a similar act to the EC’s Statement of Objections).

In general, confidential information, classified information, bank secrets, tax secrets, trade secrets, telecommunication secrets, and post secrets are excluded from access to the file. However, Amendment 2014 evolved a specific regime for granting access to those parts of the file that contain trade secrets or confidential information in case these documents contain evidence of an antitrust infringement and are necessary for defending against such charges<sup>10</sup>. Since this specific access to the file regime is relevant for procedural parties only, it cannot be requested by other persons, particularly within private enforcement.

### 3. Actions for damages and access to leniency and settlement documents

Alongside procedural parties which have the right to access the file *ex lege* under Article 40(1) APEC, access to the file can also be granted to all other persons that prove the legitimacy of their request. It is probable that persons that suffered harm from an antitrust infringement will be granted such access. Hence, procedural parties have the right to access the file *ex lege*, and the

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<sup>10</sup> Cf. Art. 40(8)-(10) APEC.

possibility of access to the file by other persons depends on the assessment and decision of the AMO.

If access is granted, those that benefited from it have full access to the entire file apart from those of its parts which contain: confidential information, classified information, bank secrets, tax secrets, trade secrets, telecommunication secrets, and post secrets. Regarding those parts of the documents that contain trade secrets or confidential information, persons granted access to the file have only access to their summaries or general descriptions. In practice therefore, a person who suffered harm from an anticompetitive behaviour and was granted access to the file by the AMO may look at a document containing a leniency application or settlement statement. However, he will likely only see a redacted/shortened version of such documents (where relevant parts are blanked or replaced by a general summary or description that contains no details). Even the need to prepare an action for damages due to harm caused by an antitrust infringement does not change the extent of the rights of such person.

### **III. Disclosure of evidence and Slovak civil court proceedings**

The Slovak legal order does not provide for a possibility to seek a court order before starting civil proceedings which would be meant to facilitate a civil action. The court can be asked to order the securing of evidence only if there is concern that a given piece of evidence will not be available in the future, or will be produced only with serious difficulties. Such request can be submitted even before filling an action by the plaintiff<sup>11</sup>.

Although during court proceedings the court or the judge can order anybody to produce a document that may be used as evidence<sup>12</sup>, due to the contradictory character of civil 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 duty 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 and 3<sup>rd</sup> persons. There is no limitation of such request in Slovakia, unlike required in the Damages Directive. Hence, it will be necessary to transpose this limitation as a specific rule for ordering the provision of a document. On the other hand, the possible sanction for refusing to provide a documents is quite low (currently up to 820 €, or up to

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<sup>11</sup> Cf. Art.78 CCPC, Art. 338 CDC.

<sup>12</sup> Cf. Art. 129(2) CCPC, Art. 185 CDC.

1640 € in case of a repeat offence<sup>13</sup> – after the forthcoming re-codification it will be up to 500 € for a single and 2000 € for repeat offences<sup>14</sup>). The fine is low when compared to the possible level of damages in antitrust cases. It is thus unlikely that a defendant will be willing to produce such document, even if risking a court fine. Clearly, this fine is neither effective, nor proportionate, nor dissuasive as required by the Damages Directive (Article 8 para 2) in cases of high amounts of damages claimed. On the other hand, the Damages Directive orders (or suggests<sup>15</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 new CDC strengthens the contradictory character of civil court proceedings whereby the party that is not able to prove its factual statement with evidence loses the case.

The formulation of possible penalties for non-compliance with a court order to provide evidence in favour of the counter-party seems, therefore, to modify the contradictory character of civil proceedings. After the transposition of that rule into the Slovak legal order, it will thus appear quite out of place. The position of the defendant can become peculiar: in some cases, due to a court order, the defendant will either provide the requested evidence against himself, or he will lose the case completely. Although not all principles of criminal proceedings apply strictly in civil litigation, breaking the principle of *nemo tenetur* in civil litigation can appear problematic since the very same evidence can be used in criminal proceedings (since abuses are a crime in Slovakia). However, admittedly, some crucial documents that could be helpful for plaintiffs are excluded from court disclosure orders (leniency applications or settlement statements). Yet the actual text of the prohibited agreement, if written down, is not excluded. Nevertheless, the following situation can also appear: a plaintiff is seeking an order requesting the submission of non-specific evidence, or evidence the existence of which is uncertain at the time of the court order. Furthermore, if there is a sanction whereby the facts claimed by the victim are considered proven if the defendant fails to provide the requested evidence, the plaintiff will easily be able to create a rebuttable presumption of claimed facts. Still, it will be ultimately irrelevant whether the defendant refuses to provide the requested evidence supporting the claim of the plaintiff, or if the defendant simply does not have such document or piece of evidence.

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<sup>13</sup> Art. 53 CCPC.

<sup>14</sup> Art. 98 CDC.

<sup>15</sup> The wording of this provision is unclear throughout different language versions: some formulate it as an order to the Member State (‘shall include’ for instance in respective English, Czech, Italian, Spanish versions) or a suggestion to the Member States (‘should include’ or ‘can include’ respectively in the Slovak and German version).

So Chapter II of the Damages Directive entitled ‘Disclosure of Evidence’ shall be transposed into the Slovak legal order by completely new, tailor-made rules because current national legislation does not provide such approach to court disclosure orders and corresponding sanctions on the one hand, and the protection of some classes of documents on the other. However, it will be necessary to establish measures against abuses by plaintiffs.

#### **IV. Joint and several liability**

Basic rules of liability for damage caused by an infringement are contained in Article 373 et seq. of the Commercial Code<sup>16</sup>, irrespective of the fact if the injured party is an undertaking or not. When compared to the rules on damages liability under the Civil Code (general system), liability under the Commercial Code is based on principles of strict liability. Under Article 379 of the Commercial Code, an injured party has the right to compensation for actual loss and the loss of profit. This compensation is limited to loss that was anticipated by the infringer as a possible outcome of his illegal activity, or could be expected due to circumstances that the infringer was aware of or should have been aware of. Although the requirement to pay interest in order to compensate harm can be understood either as a form of additional compensation for the loss of profit or the payment of punitive interests for a delayed payment<sup>17</sup>, the limitation of damages to expected harm only can be considered contrary to the Damages Directive. It is also a procedural obstacle to effective claims since it can be an additional issue to be resolved during court proceedings. Article 383 of the Commercial Code clearly defines the principles of joint and several liability. This principle of the Damages Directive is thus coherent with the Slovak legal order and does not require further adjustments.

Amendment 2014 introduced a specific regime and a modification of joint and several liability regarding leniency applicants whereby:

- party to a 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 to the same competition restricting agreement;

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<sup>16</sup> Act No. 513/1991 Coll. Commercial Code as amended of 5 November 1991.

<sup>17</sup> The content and extent of this type of compensation is not sufficiently described in the Damages Directive, and can cause problems during transposition, since it can be understood in different ways, as it was suggested above.

- party to a competition restricting agreement, which fulfilled the conditions for the participation in the leniency programme, is excluded from the obligation to settle with those of the other participants to the same competition restricting agreement which paid damages;
- if the damage cannot be paid by other participants to the same competition restricting agreement, the party 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>18</sup>.

What must be noted first is that this provision covers only those successful leniency applicants that gained full immunity under the leniency programme established by the Slovak AMO (under Article 38d APEC). Thus this special regime does not, therefore, cover successful leniency applicants that were granted immunity from fines by the Commission.

Second, the Slovak legal order does not contain a special regime for joint and several liability in cases involving small and medium enterprises (hereafter, SMEs). Importantly, the definition of SMEs is based on EU-wide criteria and in small economies such as Slovakia, the majority of its companies will fall into this category.

Third, even if Slovakia introduced a special regime for successful leniency applicants, this does not correspond with Article 11(4)&(5) of the Damages Directive. The Slovak regime is much more ‘lenient’ to successful applicants while still providing the victims with the possibility of full compensation. The basic principle in Slovakia is that an immunity recipient is excluded from a compensation scheme, provided that such compensation by other members of the cartel is sufficient.

Hence due to the requirements of the Damages Directive, it is clear that Slovakia is obliged to change its provisions dealing with limited liability for damages of immunity recipients. This change will remove one of the features that could strengthen the attractiveness of the Slovak leniency programme and thus improve the effectiveness of competition enforcement overall.

Regarding the attribution of civil liability and the possible success of a claim, the question of the ‘passing-on defence’ must be mentioned. Slovak civil law does not have a similar provision at the moment so the legal institution of a ‘passing-on defence’ shall be designed as a brand new feature of the Slovak legal order. There are two ways how this institution can be understood: (1) it can be considered a limitation of liability of undertakings that infringed competition rules; or (2) it can constitute a form of procedural defence. Forcing the introduction of a ‘passing-on defence’ into national legal orders is a strong interference with domestic civil law regimes of individual Member

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<sup>18</sup> Cf. Art. 42 APEC.

States. While it is not as interesting to consider how this institution will be transposed into national legislation (it is probable that the text of the Damages Directive will be copied only), its application in practice will be far more interesting.

## V. 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 need to submit a well-prepared action, supported by sufficient evidence, will become even more evident in Slovakia under the new CDC. According to its new procedural rules, Slovakian courts are not obliged to find the ‘objective truth’ (real state of matters) but only to decide which ‘truth’ of the parties can be considered proven. Hence a party can lose merely because it is not able to produce enough evidence in time. Individual claims for damages arising from antitrust infringements can thus be effectively enforced mainly in disputes between undertakings – they seem to be less effective in cases affecting final customers. An effective collective redress system can overweight economic power and the legal resources at the disposal of the offending undertaking. Unfortunately, the EU did not dare to require Member States to introduce a collective redress system in antitrust matters in the Damages Directive. The whole system of the Directive is more focused on addressing undertaking-undertaking claims than customer-undertaking disputes. This realisation is illustrated by the Directive’s specific, and elaborate provisions on the ‘passing-on defence’ on the one hand, with almost no provisions facilitating customers claims on the other.

Neither the current CCPC nor the newly adopted CDC contain provisions on collective redress that can be employed in order to recover damages in competition matters. Since the Damages Directive does not impose a duty upon the Member States to introduce a collective redress system in competition matters, it is unlikely that Slovakia will enact such system any time soon.

Yet some authors<sup>19</sup> see certain features of opt-in actions in Slovakia’s general procedural rules – it is currently possible to file a joint action by several plaintiffs, or the court can join several cases into one joined case, in order to achieve procedural economy. These actions remain, however, still separate and individual claims that must be individually assessed by the court,

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<sup>19</sup> For instance: S. Šramelová, ‘Kolektívne žaloby pri súkromnoprávnom vymáhaní súťažného práva’ [‘Collective Actions in Private Enforcement of Competition Law’] (2010) II *Notitiae ex Academia Bratislavensi Iurisprudentiae* 107–114.

even though this can be done by a single judgment with multiple operative parts. As Professor Bejček warns<sup>20</sup>, the majority of claimants will not be willing to push through their relatively small claims, and thus infringers will not fear substantial claims for damages if the total damage consists of a myriad of small individual harms caused to individual customers. Finally, consumer associations do not have standing in Slovak courts in damages claims unless they act as a proxy for certain individual consumers<sup>21</sup>.

## VI. Limitation periods

Slovakia's general rules of limitation periods for damages claims set by the Commercial Code will currently also apply to damages claims stemming from antitrust infringements. There is a general four-year limitation period that shall start running when an injured party gets to know, or can reasonably be expected to know, of the harm incurred and the identity of person liable for damages. This limitation period will expire no later than 10 years from the end of the injurious behaviour that caused the harm at stake<sup>22</sup>.

Aside from a similarity in the definition of when the time of the limitation period begins to run, the rules on limitation periods are different in the Damages Directive and Slovak commercial law. The required limitation period is longer in the Directive, which also does not provide for a final limitation period (for instance, after several suspensions or interruptions, it can run almost forever). Moreover, Slovak law does not consider at the moment an investigation by an administrative body to be a reason for the interruption or suspension of the limitation period. These new specific rules of the Damages Directive shall thus be transposed into Slovak civil rules.

Although Article 10(4) of the Damages Directive allows Member State to choose if they suspend or interrupt the limitation period, the results of such choices across Europe can undermine the harmonisation initiative of the damages claim system. An interruption of the limitation periods is less problematic – the limitation period will restart after a final infringement

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<sup>20</sup> J. Bejček, 'Vybrané ekonomické a právni aspekty náhrady škody v rámci soukromého 9vymáhání soutěžního práva' ['Selected Economic and Legal Aspects of Damages in Private Enforcement Actions'] [in:] *Súkromnoprávne vymáhanie súťažného práva* [*Private Enforcement of the Competition Law*], Bratislava 2010, p. 9 et seq.

<sup>21</sup> Associations of consumers have standing in protection of 'collective interests of consumers' cases. However, only refraining from illegal behaviour and *restitutio in integrum* can be requested in such proceedings (Cf. Art. 54 of Commercial Code).

<sup>22</sup> Art. 397 and 398 of the Commercial Code.

decision. A suspension can be more problematic, however, since its term shall be calculated with reference to an ‘action for the purpose of the investigation or its proceedings’. Yet the latter can be hard to establish in Slovakia because the AMO does not publish such information. Furthermore, the beginning of an investigation or proceedings is irrelevant, what is of importance is the ‘action for the purpose of investigation/proceeding’ which can precede the investigation or proceedings themselves. Still, interruptions and suspensions of the limitation period appear irrelevant in practice for follow-on actions where a plaintiff gets the knowledge of the infringement and the identity of the infringer from the infringement decision only.

## **VII. Effect of NCAs’ decisions**

Under Article 135 CCPC (and Article 189 CDC), Slovak courts are bound by the decision of the responsible body finding that an administrative infringement has been committed and stating the identity of the infringer. Since the AMO adopts such decisions in competition matters, these provisions are in line with Article 9(1) of Damages Directive. On the other hand, although decisions issued by foreign NCAs are acceptable as evidence, the Slovak legal order does not have a legal instrument of ‘prima facie evidence’. Furthermore, it is not clear from the wording of Article 9(2) of Damages Directive if the duty of a Member State is fulfilled by not prohibiting the use of such decisions as evidence, or if Member States are required to explicitly allow their courts to use such evidence or to explicitly order the courts to use such evidence as a ‘prima facie evidence’.

## **VIII. Conclusions. Transposition of the Damages Directive into the Slovak legal order**

It is clear that the transposition of the Damages Directive will require amendments of several Slovakian legal acts. These will include at least the APEC, the Commercial Code and the CCPC/CDC because some of their current provisions are not in line with the Damages Directive. Furthermore, it is necessary to introduce completely new rules on joint and several liability, its limitations regarding SMEs, as well as the ‘passing-on defence’. Regarding access to the file and access to evidence, rules on joint and several liability, the passing-on defence, and limitation periods, Member States are left by the

Damages Directive with little room to consider the extent and content of their national provisions. On the other hand, when the Directive does provide the Member States with a certain degree of discretion, its rules do not seem to be clear enough. This is so, for instance, with respect to possible sanctions for the failure to provide evidence or the estimation of the quantification of harm. There are two possible paths for the transposition of the Damages Directive: (1) amending at least all of the above-mentioned acts or, (2) enacting a new act designed to deal with damages claims stemming from antitrust infringements and repealing all existing provisions contrary to this act (Article 42 APEC). The first path will make transposition more consistent with the rest of the acts and regulations at stake, the second path is, however, far simpler from the legislative point of view.

Nevertheless, the Slovak legal order is currently containing provisions that are fostering some aspects of private antitrust enforcement or mitigating its possible conflict with public enforcement (Article 42 APEC). Yet private enforcement of competition law is still almost non-existent and changes introduced due to the transposition of the Damages Directive will hardly change this situation. These changes are partially technical, partially odd and incoherent with Slovak private law (as well as ‘downgrade’ the attractiveness of the Slovak leniency programme) and do not change the system as a whole. Without an effective collective redress system for final customers, private enforcement of competition law will remain solely in the ‘undertaking-undertaking’ sphere.

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# C O N F E R E N C E   R E P O R T S

## **Private Enforcement of Competition Law. Key Lessons from Recent International Developments. London, 5–6 March 2015**

### **I. Introduction**

The international seminar entitled ‘Private Enforcement of Competition Law – Key Lessons from Recent International Developments’, held in London on the 5<sup>th</sup> and 6<sup>th</sup> March 2015, was organised by the Competition Law Commission of the International Association of Lawyers (*Union Internationale des Avocats*, ‘UIA’) in cooperation with the UIA Litigation Commission and with the support of the Law Society of England and Wales, Berwin Leighton Paisner law firm (London, UK) and MLex as its media partner. The seminar brought together experts from many jurisdictions, including academics, a leading Judge, officials, private practice lawyers and in-house lawyers from global corporations.

On the first day of the seminar participants were invited to a welcome cocktail hosted by the Law Society of England and Wales. The cocktail provided the participants with the opportunity to get introduced to one another, exchange experiences and conduct informal talks.

The second day of the seminar included speeches and presentations which were held at the premises of Berwin Leighton Paisner. The seminar was opened by Harold Paisner (Senior Partner, Berwin Leighton Paisner), Stephen Sidkin (Partner, Fox Williams, UK and Co-Director of Communications of the UIA) and Aleksander Stawicki (Senior Partner, WKB Wierciński, Kwieciński, Baehr, Poland and President of the UIA Competition Law Commission). Mr Stawicki expressed his delight that the seminar was being held in London – the place where the heart of private enforcement beats.

The seminar was inaugurated with the speech by Sir Peter Roth, Justice of the High Court and President of the Competition Appeal Tribunal (UK) – one of the most eminent experts in the field of private enforcement. Sir Peter Roth introduced the conference agenda and noted a number of recent issues which would be discussed during the seminar. They included: the issue of a potential claimant and defendant; admissibility of assigning claims to a third entity (such as a specialised law firm); the competent court; exclusive jurisdiction clauses; liability of subsidiaries; and limitation period. He highlighted also several problems or difficulties that may arise in private

enforcement cases. These include inequality created between a potential claimant and defendant if the publication of a given infringement decision is delayed (while the potential defendant does have the text), or when the decision is published but contains redactions (especially with respect to information relating to leniency applications). Sir Roth expressed his concern that private actions for competition damages can be unattractive for small and medium-sized enterprises (hereafter, SMEs). He noted that a fast track procedure for SMEs, which will be introduced as a result of recent legislative works in the UK<sup>1</sup>, might somewhat remedy this problem. Regarding the disclosure of evidence, Justice Roth pointed out that disclosure should be proportionate, yet the application of such general principles is not easy. The quantification of harm (where there is relatively little jurisprudence to provide guidance on this matter) was named as another difficulty here. Furthermore, Justice Roth voiced concerns about judges needing to assess economic evidence that is often very complex posing a challenge for competition lawyers in assisting the judiciary to properly understand the evidence.

## II. Key issues in private enforcement

The first panel was dedicated to key issues in private enforcement. The panel was introduced and chaired by Adrian Magnus (Partner, Berwin Leighton Paisner). Daniel Beard (Barrister, Monckton Chambers, UK) first discussed recent trends in private antitrust enforcement in the UK as well as the legislative changes in this field introduced by the Consumer Rights Act 2015. Mr Beard noted that the claims are becoming more frequent and bigger, but that there is still a large scope for obstruction in private enforcement proceedings. He indicated that following the above legislative reform, a new form of actions for competition claims will be available in the UK for potential claimants – so-called opt-out actions<sup>2</sup>. The Competition Appeal Tribunal (hereafter, CAT) will determine whether a claim should be proceeded as opt-in or opt-out. The CAT's jurisdiction will also be extended so that it will be competent to hear stand-alone actions (and not only follow-on claims)<sup>3</sup> and grant injunctions.

Dr Florian Neumayr (Partner, Hügel Rechtsanwälte, Austria) proceeded to speak of umbrella claims. There may be damages to be collected (also) because of a non-

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<sup>1</sup> On 26 March 2015, the Consumer Rights Act 2015 was enacted. The new law entered into force on 1 October 2015. For more information see: <https://www.gov.uk/government/policies/providing-better-information-and-protection-for-consumers/supporting-pages/consumer-bill-of-rights>. The text of the Act is available at: <http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted> (last accessed on 25 August 2015).

<sup>2</sup> In an opt-out action, the claim is brought by a representative on behalf of a defined class without the need to identify each individual class members. Those class members can be consumers or businesses. All those falling within the opt-out class will be bound by the judgement in the case unless they opt-out. Source: <http://eu-competitionlaw.com/uk-consumer-rights-bill-proposes-opt-out-class-action-for-uk-competition-claims/> (last accessed on 25 August 2015).

<sup>3</sup> So far only the High Court was competent to hear stand-alone claims.

cartelist that had raised its own prices for products or services in the wake of a cartel. Dr Neumayr presented recent Austrian and EU case law relating to the issue of umbrella pricing, which in principle has allowed for bringing umbrella claims. He concluded that currently it is possible to bring an umbrella claim against a cartelist, even if a potential claimant had not been a party to any agreement with the cartelist, on condition that the claimant is able to prove that the effects of the cartel could have affected the pricing of services or products that the claimant has obtained from a third party.

Christopher Rother (Head of Deutsche Bahn Group Regulatory, Competition and Antitrust, Germany) continued the presentations by speaking of Deutsche Bahn's policy and strategy in enforcing claims for competition damages against DB's contractors. He briefly described cases where DB sought or is seeking damages, including the air cargo cartel, the rail tracks cartel and the carbon and graphite products cartel.

The last presentation in this panel was made by Laurie Webb Daniel (Partner, Holland & Knight, USA) who discussed the US private enforcement model and cited recent US Supreme Court case law.

### **III. Recent policy and legislative developments – what are their likely impacts?**

The second session, chaired by Aleksander Stawicki, was devoted to recent policy and legislative developments and their likely impacts. Filip Kubik (European Commission – DG Competition, Private Enforcement Unit, Belgium) characterised the guiding principles of the EU Damages Directive. He highlighted that the Directive pursues two main goals: more compensation for victims and stronger enforcement overall (both public and private). He indicated that the Directive guarantees a right to full compensation, easier access to evidence, or the possibility to rely on a final decision of a national competition authority (hereafter, NCA) finding an infringement. The Directive allows also for a certain level of 'forum shopping' which is considered by DG Competition to be a good trend. According to the Commission representative, it will also be easier to settle damages out of court. Mr Kubik stated that DG Competition is very closely following the implementation of the Directive.

Paolo Palmigiano (Chairman, European Association of In-house Competition Lawyers & General Counsel and Chief Compliance Officer Sumitomo Electric Group, UK) explained why the UK is considered a forum of choice for private enforcement of competition law. He listed a number of factors: access to documents through wide-ranging discovery; easiness in establishing jurisdiction; experience of courts in awarding damages; high quality of judges, most with competition law expertise; speed of the process; possibility for English or foreign claimants to seek to recover the entire loss in English courts, irrespective of where the loss was actually suffered, provided there is an English subsidiary that implemented the cartel. However, proceedings in the UK can also be expensive, complex and time consuming for jurisdiction disputes. In his concluding remarks, Mr Palmigiano noted also the possible downsides of the

UK's recent legislative changes stating that they may lead to the increase of the cost of doing business in the UK. He also wondered whether there will be enough safeguards for opt-out actions.

Dr Aniko Keller (Szecskay Attorneys at Law, Hungary) focused her presentation on the current situation in Hungary and changes to be introduced because of the implementation of the Damages Directive. The speaker indicated that the main reasons for few damages actions in Hungary are costs of litigation matters, lack of effective collective redress, limitation period, and access to documents. She expressed also her conviction that the implementation of the Damages Directive would significantly change the current practice by, for instance, raising the awareness and knowledge of competition law in Hungary.

Professor Renato Nazzini (King's College London, UK) gave the last presentation of this session devoted to the issue of seeking competition damages in arbitration proceedings. Professor Nazzini listed several legal problems connected with the fact that arbitration tribunals are not 'courts of a member state' according to EU case law. For this reason, procedural rules such as Articles 15 and 16 of Regulation 1/2003 or the rules on evidence and on the effect of national infringement decisions in the Damages Directive do not apply before arbitrators. This means, among other things, that arbitrators are not bound by strict rules on the disclosure and admissibility of evidence, even if the seat of the arbitration is in the EU.

#### **IV. Claimant considerations**

David E. Vann (Partner, Simpson Thacher, UK) opened the third session dedicated to the issue of a claimant. Andrew Hockley (Partner, Berwin Leighton Paisner) provided guidance on how the strategy of a potential case should be prepared and, in particular, how to assess the loss suffered in case of purchases directly from a cartel. Dr Till Schreiber (CDC Cartel Damage Claims, Belgium) followed-up with legal and practical issues connected with proving damages. Mick Smith (Partner, Calunius Capital, UK) closed the panel with a presentation of the factors which make a case fundable. According to him, these include: quantum (realistic value of a claim), merits (probability of positive outcome), recoverability (can the opponent pay?), time (likely investment period), costs and variability (likelihood of changing factors).

#### **V. Defence considerations**

The fourth panel, chaired by Dr Florian Neumayr, focused on defence considerations. Fernando de le Mata (Partner, Baker & McKenzie, Spain) provided some remarks on the issue of legal standing in order to verify if a claimant is really entitled to sue. He indicated the following points to be considered: due assignment – different laws will need to be taken into account (at least, *lex contractus* and *lex fori*); compliance with

organisational laws; the claimant's business model; the passing-on argument; and, in case of umbrella damages, whether they fall within the scope of assignment.

Martin André Dittmer (Partner, Gorrisen Federspiel, Denmark) presented the possible defence tactics that a defendant can use in case of a follow-on claim. He advised that the best way to pre-empt follow-on litigation is to ensure that there is no infringement decision for claimants to follow on. A potential defendant should explore as early as possible whether the public enforcement investigation (be it before the EU Commission or NCAs) can be closed by way of a settlement procedure, or even better, by way of informal undertakings, thus resulting in no decision at all. If a decision finding an infringement has been issued, a defendant should in general look for any and all indications in the decision that infringing undertakings enjoyed limited market power. It may be helpful to look in detail at the scope of the infringement in order to obtain information on whether the claimant's business falls in some way outside the scope of the infringement/decision.

Stephen Wisking (Partner, Herbert Smith Freehills, UK) discussed the consensual methods of enforcing claims indicating potential problems which may arise.

## **VI. Discussion of claimant and defence tactics on hypothetical case study**

The last panel, chaired by Beckett McGrath (Partner, Cooley, UK), included a case study of a hypothetical scenario where a decision finding a cartel has been issued. Participants conducted a vivid discussion on possible tactics and steps to be taken, and exchanged a great deal of practical remarks on the basis of their experience in private enforcement cases.

## **VII. Concluding remarks**

The programme of the seminar was very rich and speakers had a lot of experiences to share in this context. Time allowing, panels were followed by questions or comments from the audience. These included some remarks from economists in areas such as, for example, the quantification of harm.

The seminar was closed by Aleksander Stawicki who briefly summarised the proceedings, thanked all seminar speakers as well as its other participants, and expressed his sadness that Poland is not yet among those EU countries where private enforcement of competition law actually takes place.

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**Abuse Regulation in Competition Law: Past, Present and Future.  
10th Annual ASCOLA.  
Tokyo, 21–23 May 2015**

The 10<sup>th</sup> Annual Conference of the Academic Society for Competition Law (ASCOLA) was hosted by Meiji University in Tokyo, Japan on 21-23 May 2015. The Conference was entitled 'Abuse Regulation in Competition Law: Past, Present and Future.' ASCOLA is an academic association embracing lawyers and economists who specialize in competition law. ASCOLA promotes the exchange of views and ideas between scholars through the organization of annual conferences and the publication of their proceedings.

This year's conference focused on one of the pillars of modern competition law – the regulation of the abuse of market power. Even though rules on unilateral conduct are part of competition law worldwide, there are many points which differentiate one regime from another. The Conference was meant to facilitate a discussion between scholars in order to find different solutions to similar problems.

The Conference was opened on the 21<sup>st</sup> of May with several welcome addresses. The first to take the floor was Mr Kazuyuki Sugimoto, Chairman of the Japan Fair Trade Commission. Mr Sugimoto welcomed the participants and thanked everybody for coming to Tokyo. He introduced the basis and fundamental values protected by Japanese competition law and provided an insight into the recent practice of the Japan Fair Trade Commission. Professor Kenichi Fukumiya, the President of Meiji University, spoke next expressing his gratitude to all that arrived at Meiji University. He emphasised that it was a great honour for the Meiji University to host an ASCOLA conference and expressed the hope that the Conference would be a meaningful experience for both Meiji University and ASCOLA. The theme of the conference was explained in the next welcome speech delivered by Professor Paul Nihoul, Chair of ASCOLA. The structure of the conference was thereafter outlined by the main organizer of this event Professor Iwakazu Takahashi (Meiji University).

After the opening remarks, keynote speeches were delivered by Professor Mitsuo Matsushita (Tokyo University) and Professor Eleanor Fox (New York University). Professor Matsushita spoke about abuses of superior bargaining position in Japanese antitrust law. The two elements that constitute an abuse of superior bargaining position are: superior bargaining position and its unreasonable use in a particular transaction. Professor Matsushita emphasised that what differentiates abuses of superior bargaining position from abuses of dominance or monopolization offences

is that the former requires only an impact in a particular transaction, whereas the two latter concepts require an impact on a market as a whole. To give examples of the discussed conduct, the speaker referred to retail trade and the financial sector. After outlining the historical evolution of Japanese regulation in the discussed field, Professor Matsushita presented the legislative definitions of superior bargaining position in Japanese law. The speaker stressed a major feature of abuses of superior bargaining position, namely the fact that a party with a weaker position is coerced into accepting conditions which it would not have accepted had there been an alternative way.

According to Professor Matsushita, the law governing abuses of superior bargaining position is important to Japan because it protects medium and small enterprises. Since over 99% of enterprises in Japan are small and medium-sized, and almost 70% of all workers are employed by such enterprises, the promotion and protection of such businesses is important from a political, economic and social point of view. Such concerns, however, may not be shared by other jurisdictions and in different antitrust philosophies. The focus of antitrust philosophies may be on the protection of different values such as efficiency, consumer welfare, freedom, egalitarianism, fairness, or a pluralistic society. Professor Matsushita mentioned in this context the Harvard School, the Chicago School and Ordoliberalism. Each country should decide its antitrust philosophy and identify what it would protect. The regulation of abuses of superior bargaining position in Japan is mainly concerned with fairness, egalitarianism and independence. The speaker noted in conclusion that the regulation of these abuses is closely related to civil law principles and presented a diagram of the relationship between civil law and competition law.

Professor Fox spoke subsequently about US law on the prohibition of monopolization. Her main thesis was that this part of US law is hermetically sealed. Professor Fox distinguished two periods in US antitrust law on monopolization. The first period extends from 1890 to 1980 when US law protected various values. Since the law was general, much space was left for courts to interpret the law. Professor Fox concluded that in that first period, the law was basically against power and was not concerned with efficiency. She stressed that US law was never against excessive prices; rather, it protected the open market. According to Professor Fox, it could thus be said that US law resembled the ordoliberal approach.

The second period began in 1980s when the law started to aim to protect efficiency and consumer welfare, with no recourse to other values. Professor Fox mentioned the *Trinko* case which expresses the philosophy that markets work, and that the government and antitrust law should be kept out of them. In conclusion to her speech, she stated that there are jurisdictions outside the US which are concerned with legitimacy and democracy problems and that such approaches may be justified. If society does not see economic transactions as legitimate, the problem spreads to the whole market which, in turn, is not seen as legitimate. Professor Fox offered a few recommendations for jurisdictions protecting values other than economic efficiency. In her opinion, clear standards and some limitations on the application of the law must be developed. Otherwise, anything can be treated as illegal.

The opening session ended with a dialog between Professor Matsushita and Professor Fox. Professor Matsushita asked about antitrust law at the level of individual American States and whether it protects more than efficiency. Professor Fox replied that she was not aware of individual States having antitrust laws protecting values other than consumer welfare, but it was possible that same States might have 'unfair practices' laws to focus on the protection of other values. Professor Fox then asked Professor Matsushita whether he would agree that if Japanese law protected small businesses, then this might be in conflict with consumer welfare. Professor Matsushita agreed that this might be the case.

Thereafter the opening session and the first day of the Conference was concluded by Professor Takahashi.

The second day of conference included general and parallel sessions. Two general sessions we held, one in the morning and one in the afternoon of the 22<sup>nd</sup> of May. The morning general session was chaired by Professor Fox. First to take the floor was Dr Adi Ayal (Bar Ilan University) whose presentation was entitled 'Abuse of Power: Market, Economic, and Bargaining.' His starting point was a political cartoon depicting the Standard Oil octopus as an example of a monopoly that controlled the economy and the government in the USA. According to Dr Ayal, in the era of Standard Oil, antitrust was aimed at fighting economic power because of the effects that this power had on politics. The central point of his presentation was to find an answer to the question: what is an abuse? Dr Ayal claimed that the concept of abuse is unhelpful and it is hard to distinguish between behaviour that should be desired and conduct that should be punished. Nobody would argue that abuses of power should go unpunished, since the concept of abuse as such denotes some kind of unfair conduct. On the other hand, one may have different opinions as to whether a particular business practice (without any connotations of unfairness) should be lawful or not. Therefore, in order to determine what an abuse is, it is necessary to go deeper.

Dr Ayal proposed to delineate antitrust and mentioned three points to consider: (1) public or private character of antitrust; (2) current or future oriented; (3) focused on local or general effects. In his view, antitrust should be seen as public in character, economy-wide and future-oriented. Competition is a network structure: it is stable but shifting; markets are linked and firms holding power may lose it to their competitors. Abuse should be seen through the paradigm of fairness. In order to determine what an abuse is, one should look for the cause of the problems in the structure. Antitrust should protect markets rather than its current participants. Therefore, focus on individual transactions is not warranted unless the current action is part of a plan. Dr Ayal's conclusion was that the fairness that antitrust should protect is 'a right to compete' rather than 'a right to win.'

Professor Peter Behrens (University of Hamburg) spoke next on ordoliberalism and its impact on Article 102 of the Treaty on the Functioning of European Union (TFEU). Professor Behrens emphasised that he intended to clarify some of the misunderstandings concerning ordoliberalism present in the current scholarship on dominant position abuses in the EU. In his opinion, the concept of abuse contained in Article 102 TFEU was in fact influenced by ordoliberalism. It is, however, unfortunate

that some authors in the debate about the roots of Article 102 TFEU depicted ordoliberalism as a static and frozen concept. Widespread views about ordoliberalism and its features refer only to the first (out of four) generation of this set of ideas; this, according to Professor Behrens, is an unduly narrow approach. Although the various generations of ordoliberalism differ, it is possible to identify some common constituent elements which they share: (1) competition as a rivalry resulting from individuals' freedom of choice; (2) competition as a dynamic system of interactions between choice-making individuals; (3) competition law protecting the system as well as individuals' rights.

In the second part of his presentation, Professor Behrens tried to identify concepts in EU competition law that could be regarded as parts of the ordoliberal approach. Among them he mentioned concepts of competition on the merits and special responsibility of dominant firms. He also claimed that ordoliberal thinking is present in the contemporary jurisprudence of EU Courts. This may be seen in judgments such as *TeliaSonera* (from the Court of Justice) and, most recently, *Intel* (decided by the General Court). In conclusion, Professor Behrens referred to Judge Richard Posner who stated that even though efficiency is the ultimate goal of antitrust, protection of competition may be a mediate goal to achieve efficiency. Ordoliberalism protects a system of undistorted competition as the most efficient way of organizing the economy.

Next to take the floor was Dr Pablo Ibáñez Colomo (the London School of Economic and Political Science). He delivered a speech entitled 'Uncovering the Rationale of Article 102 TFEU: The Real Nature of Abuse of Dominance Provisions.' Dr Ibáñez Colomo recalled that the jurisprudence of EU Courts on Article 102 TFEU is surrounded by controversy. The most recent example of a debate in EU scholarship relates to the ruling of the General Court in the *Intel* case. He noted that recent literature trends to analyse the jurisprudence of EU Courts on abuses from the perspective of its conformity with economic theories. By contrast, the speaker wanted to analyse EU judgements from a legal perspective.

The starting point of Dr Ibáñez Colomo's analysis was a reference to the distinction between restrictions of competition by object and by effect contained in Article 101 TFEU. This distinction differentiates between practices which are most harmful to competition, and thus considered restrictive of competition by object, and practices the detrimental effects of which are not certain, and thus need to be determined on a case-by-case basis. In light of recent jurisprudence, object restrictions should be interpreted narrowly. Hence conduct could only be regarded as an object restriction when confirmed by economic analysis.

Dr Ibáñez Colomo thesis was that a similar distinction between abuses that are anticompetitive by their very nature, and those the effects of which need to be established, is present in EU jurisprudence on Article 102 TFEU. Examples of the former are exclusive dealing and loyalty rebates. In the context of these practices, Dr Ibáñez Colomo referred to rulings such as *Hoffmann-La Roche* or, most recently, *Intel*. On the other hand, margin squeezes and selective price cuts are not considered abusive by their very nature, a fact confirmed by cases such as *TeliaSonera* or *Post Danmark I*.

The main problem with the current position of EU law is that similar practices receive different treatment under Articles 101 and 102 TFEU. For example, the ruling of the Court of Justice in *Delimitis* is an example of a different treatment of exclusivity arrangements under Article 101 TFEU compared to that of the *Hoffmann-La Roche* judgement under Article 102 TFEU. According to Dr Ibáñez Colomo, it would be desirable to provide consistent treatment of similar practices under both provisions. He concluded by making reference to the recently published opinion of Advocate General Kokott in *Post Danmark II* which could mark a different approach to Article 102 TFEU.

The next presentation was given by Dr Thomas K. Cheng (University of Hong Kong) and Professor Michal S. Gal (University of Haifa). They focused on the issue of the prohibition of the abuse of superior bargaining position as a regulatory tool to deal with problems of aggregate concentration. The latter phenomenon occurs when a small number of firms control a large part of the economy. Aggregate concentration is a problem in Japan and South Korea and the speakers focused on these jurisdictions. They discussed effects of aggregate concentration on competition and welfare. They also analysed abuse regulation in South Korea by distinguishing five types of abuses.

Professor Nihoul (Université catholique de Louvain) was the last to deliver a speech in this session entitled ‘Dominance and Market Power – Do We Need an Abuse?’ Professor Nihoul strived to find an answer to the question whether competition law should focus on abuses of market power or whether the sole existence of market power suffices for an intervention. He claimed that emphasis is currently being placed on abuses, rather than on market power. Yet, there are some judgements such as *Hoffmann-La Roche* and *Continental Can*, which put great emphasis on market power. Professor Nihoul also considered this issue within the area of anticompetitive agreements and merger regulation. He stressed that the current position is derived from the strong influence of the Chicago School, which is part of the ‘more economic approach’ to EU competition law.

The morning general session ended with a panel discussion and brief, one minute conclusions from the panellists.

The general session in the afternoon focused on ‘The relationship with dominance’ and was presided over by Professor Barry Rodger (University of Strathclyde). Dr Florian Wagner-Von Papp (University College London) delivered the first presentation focusing on unilateral conduct by non-dominant firms. In the first part of his presentation, Dr Wagner-Von Papp took a comparative law approach and looked at various jurisdictions such as Germany, Japan or the United States, in order to find provisions dealing with unilateral conduct of non-dominant firms. He concluded that all three jurisdictions apply certain rules to regulate conduct of such firms. In the following, normative part of his presentation, Dr Wagner-Von Papp spoke about desirability of non-economic dependency rules such as rules on superior bargaining position.

Professor Stefan Thomas (Eberhard Karls University) spoke subsequently about *ex-ante* and *ex-post* control of buyer power. Professor Thomas started by explaining what buyer power is. According to him, there are two types of buyer power: one is

single price monopsony and the other is that based on bargaining power. Monopsony power is a mirror image of single price monopoly, where the monopsonist can obtain lower prices by reducing its purchase quantity. Bargaining power allows the buyer to influence prices and contract conditions for reasons other than efficiency. Professor Thomas tried thereafter to identify potential effects that buyer power can have on downstream markets. Particular attention was also given to the issue of supplier harm as a justification for an antitrust intervention. He concluded that supplier welfare cannot be treated as a legitimate goal of antitrust law.

Dr Mor Bakhoun (Max Planck Institute for Innovation and Competition) delivered the next speech entitled 'Abuse without Dominance in Competition Law: Abuse of Economic Dependence and its Interface with Abuse of Dominance.' He began by outlining the interface between economic dependence, freedom of contract and competition law. Freedom of contract may be used to lock-in smaller business partners. By creating a network of such contracts, a relatively dominant firm limits the economic freedom of its partners and strengthens its market power. This was the scenario in the *Carrefour* case in France. Dr Bakhoun then moved on to discuss the legal approach to economic dependence as well as the international dimension of economic dependency situations.

The last paper of the second general session was authored by Professors Mariateresa Maggolino and Maria Lillà Montagnani (Bocconi University). The speech entitled 'Wandering in the Land of the EU Abuse of Rights. Coordinates from the Antitrust Experience?' was presented by Professor Montagnani as Professor Maggolino was absent. The paper concerned the abuse of rights doctrine which, according to the authors, had emerged in EU law. This fundamental doctrine had then turned into a principle of EU abuse of rights. In order to support their theses, the authors surveyed a number of cases from various areas of EU law.

The afternoon general session ended with a panel discussion and, afterwards, Professor Takahashi thanked all participants for their presence and closed the second day of the Conference.

Two general sessions took place on the 23<sup>rd</sup> of May. The first focused on national practices relating to abuses of dominance and superior bargaining position; the second general session of the day covered unconscionable conduct and the Japanese Subcontract Act.

Professor Josef Drexler (Max Planck Institute for Innovation and Competition) chaired the earlier general session. Professor Toshiaki Takigawa (Kansai University) spoke first on regulating abuses of bargaining position through competition law. He addressed, in particular, Japanese law in comparison to EU regulation on exploitative abuses. He started by introducing the enforcement practice of the Japan Fair Trade Commission concerning abuses of superior bargaining position, which form part of Japanese antimonopoly law, and is directed at business methods which are abusive to weaker trading partners regardless of their effect on competition.

According to Professor Takigawa, abuses of superior bargaining position can be characterized as exploitative abuses. However, dominant enterprises may only be prohibited from engaging in unreasonable exploitation, which is difficult to identify.

Professor Takigawa analysed examples of unreasonable procedures in reaching agreements on trading terms as well as the ‘unreasonableness’ in the substance of trading terms. The speaker referred also to the regulation of exploitative practices in the EU and to examples from other jurisdictions. In conclusion, Professor Takigawa pointed out the weaknesses of substantive standards for identifying illegal abuses. In his opinion, the regulation of exploitative abuses should be exercised with restraint so as to minimize sacrifices to consumer welfare.

Professor Josef Bejček (Masaryk University) spoke next on ‘Regulatory Dancing Between a Plain Market Power and Genuine Significant Market Power’. He discussed the notion of significant (but still subdominant) market power in the context of relevant Czech legislation. He critically examined potential goals which could be ascribed to this legislation, namely: protection of weaker parties, protection of fairness, protection of competition (abuse of sub-dominance) and disguised redistribution. The speaker also stated that the concept of significant market power may overlap with other market positions and conduct (such as market power, economic dependency, buyer power, bargaining power or fairness). He considered that the objective concept of significant market power can be equated with qualified sub-dominance and went on to discuss its theoretical foundations.

Professor Valeria Falce (European University of Rome) delivered the next speech on Italian regulations against abuses of economic dependence. Professor Falce started from explaining the current stance of Italian legislation on abuses of economic dependence. In her opinion, this legislation has different rationales and is not harmonized. In Italy, the law that regulates abuses of economic dependence can be found in the 1998 Law on Subcontracting. The scope of the application of this law in Italy is not clear – while some courts are in favour of a broad interpretation (abuses occur in all kinds of relations), other courts tend to favour a narrow one (abuses occur in subcontracting relations only). Professor Falce continued on to discuss the notion of economic dependence, examples of abusive conduct as well as public law regulations dealing with abuses of economic dependence. The last part of the speech concerned a new law on late payments as abuses of superior bargaining position.

The last to take the floor in this panel was Dr Emmanuela Truli (Athens University of Economics and Business) who spoke of Greek provisions on economic dependence. Dr Truli began by providing an overview of how economic dependence rules function in different competition law regimes in Europe. Then she turned to the Greek legal system. Prior to 2009, legal provisions concerning economic dependence were contained in the Greek Competition Act. According to Dr Truli, this part of this legislation was not in line with the general purposes of competition law, since it was concerned with private interests of weaker parties. In 2009, provisions on economic dependence were moved to the Unfair Commercial Practices Act. Accordingly, the Greek National Competition Authority is no longer required to enforce them – the competence to apply these rules was given to civil courts. Dr Truli concluded her presentation by discussing the impact of relevant changes in Greek competition law.

The session ended with questions from participants and a brief conclusion from the chairman.

The last general session of the Conference was devoted to unconscionable conduct and the Japanese Subcontract Act and was chaired by Professor Allan Fels (University of Melbourne). Professor David Bosco (Aix-Marseille University) delivered a speech on unconscionable conduct in France. He focused firstly on identifying what unconscionable conduct is. For that purpose, he surveyed US and Australian laws and subsequently went on to discuss relevant French legislation. For a long time there were relatively few means in France to address contractual abuses by dominant parties. This situation changed because of a judgement delivered by the Supreme Court and amendments to the relevant French commercial legislation. The current rules on unconscionable conduct are enforced through the concept of abuse. After explaining relevant provisions on this issue, Professor Bosco finished his presentation by raising some objections to the French regulation of unconscionable conduct.

Dr Kazuhiko Fuchikawa (Yamaguchi University) devoted his presentation to a legal analysis of the Japanese Subcontract Act. The said act was established to prevent abuses of superior bargaining position of parent companies against subcontractors. After describing the history of the Subcontract Act, Dr Fuchikawa moved on to explain its contents and examples of practice prohibited by the Subcontract Act. In general, the purpose of the act is to protect fairness in transactions between subcontracting entities and their subcontractors, as well as to provide protection to subcontractors. Subsequently, the speaker demonstrated how the Subcontract Act works in practice by surveying relevant case law. Most of the cases concerned reduction in the cost of the subcontract or unjust lowering of prices. According to Dr Fuchikawa, the main flaw of the Subcontract Act lies in its enforcement practice, which was described by the speaker as 'weak'.

Dr Abayomi Al-Ameen (Cardiff University) delivered a speech entitled 'Application of Abuse of Dominance in New Competition Regimes: Unconscionability as a Stabilising Tool at Time of Indecision.' Dr Al-Ameen focused on finding alternative legal tools that could be used by new competition law regimes to address problems of dominance abuse. In his opinion, there is no ultimate method for assessing abuses. Pure economic models used in advanced competition law jurisdictions, such as the US or the EU, have proven unreliable and may cause difficulties in new competition law regimes. The speaker proposed therefore to use the doctrine of unconscionability as an alternative method of addressing abuses of dominance. What this doctrine could offer to emerging economies is, among others, the ease of establishing legal liability, a simple and amenable tool of enforcement and the improvement of understanding among stakeholders such as lawyers.

In the final speech of the conference, Professor Fels and Mr Matthew Lees (Arnold Bloch Leibler) discussed unconscionable conduct in the context of competition law with reference to retailer-supplier relationships in Australia. The current structure of the national retail grocery industry and factors which had led to it was the starting point of the presentation. According to the speakers, the high level of concentration in Australian grocery retail is problematic. Potential policy responses include divestiture, proper use of merger law, direct price control, use of cartel laws, prohibition of misuse of market power, or the concept of unconscionable conduct. That last concept was

then discussed by the two panellists in detail. This included a case study of a decision of the Australian Competition and Consumer Commission issued against one of the supermarket chains. In their concluding remarks, Professor Fels and Mr Lees categorized various policy responses that may be employed in Australia to deal with the current situation in the retail grocery industry and explained their pros and cons.

After the closure of the last session Professor Daniel Zimmer (University of Bonn) delivered a summary of the Conference. Professor Zimmer noted that the Conference shed light on a major divide between different jurisdictions in terms of abuses of market power regulations. Some jurisdictions focus on pursuing exclusionary conduct, while others would rather target exploitative behaviours. In regard to the latter, Professor Zimmer warned that it is a tricky and difficult task to intervene in pricing policies of firms. Another point to consider relates to the issue of market power. Should competition law be concerned solely with market power? Or should it be devoted also to the concept of economic dependence? These are questions to which there are no uniform answers. Professor Zimmer placed particular emphasis on the point that in addressing concerns of market power abuses one should look at a number of different legal areas – such as the law on unfair practices, administrative law or private law – rather than only looking at competition law. He considered the Conference to be a real eye-opener that generated vast amount of knowledge. Professor Zimmer thanked all speakers and organizers for their work.

Apart from a morning and an afternoon general session, the schedule of the second day of the Conference (22<sup>nd</sup> of May) also included five parallel conference sessions and three workshop sessions where a variety of contributors presented papers on a number of subjects related to the regulation of market power abuse. The two parallel sessions which started shortly after the general morning session were devoted to topical issues.

Four speakers participated in a session concerning general matters and state intervention, which was chaired by Professor Daniel Zimmer. Professor Rupprecht Podszun (University of Bayreuth, Max Planck Institute for Innovation and Competition) spoke therein about pitfalls of market definition. He was followed by Mr Lorenz Marx (research assistant and PhD Candidate, University of Bayreuth) who shared the results of his statistical analysis of Article 102 TFEU enforcement. Professor Francisco Marcos (IE Law School) discussed different forms of state intervention which result in granting market power. Professor Fang Xiaomin (Nanjing University) addressed the issues of the application of Chinese antimonopoly law to state-owned enterprises.

Another parallel session chaired by Professor Sandra Marco Colino (Chinese University of Hong Kong) focused on conduct which may amount to an abuse of market power. Professor Antonio Robles (Universidad Carlos III de Madrid) presented his research on exploitative prices in EU competition law. Professor Andreas Fuchs (University of Osnabrück) delivered a speech about margin squeezes both in EU and US antitrust law. Mr Krzysztof Rokita (research assistant, PhD candidate, University of Wrocław) addressed the issue of rebates granted by dominant undertakings in EU competition law. Dr Petri Kuoppamäki (Aalto University Business School) spoke of tying in the context of two-sided digital platforms.

Professor Michal S. Gal presided over another parallel session which focused on abuses in specific economy sectors. Professor Luís Silva Morais (University of Lisbon) discussed regulation of abuses in the financial sector. Dr Maria Ioannidou (Queen Mary University of London) presented the issues of abuse regulation in the EU energy sector. Dr Björn Lundqvist (Copenhagen Business School) spoke about abuses in the pharmaceutical and biotech sectors. Professor Claudia Seitz (University of Basel) delivered a speech entitled 'Healthcare Systems and Competition: Challenges and Boundaries for the Application of Competition Law in Highly Regulated Markets of the Healthcare Sector in the European Union'. The session ended with a presentation concerning abuses of market power in the context of online platforms given by Dr Jonathan Galloway (Newcastle Law School).

Another round of parallel sessions took place in the afternoon. Conference participants could also choose to join workshops which were held simultaneously. Professor Marcos chaired a parallel session concerned with intellectual property rights. Professor Wolfgang Kerber and Mr Severin Frank (School of Business and Economics, Philipps-University Marburg) spoke of patent settlements in the pharmaceutical industry. Their presentation was followed by a speech by Professor Sofia Oliveira Pais (Catholic University of Portugal) who addressed the issue of standard essential patents. Professor Shuya Hayashi and Mr Kunlin Wu (Nagoya University Graduate School of Law) gave a speech entitled 'Exclusionary Effects of Blanket Copyright License Agreement Offered by a Dominant Firm'. The session concluded with a presentation from Dr Sven Gallasch (UEA Law School and Centre for Competition Policy) on unilateral product hopping through pay-for-delay settlements under Article 102 TFEU.

Participants interested in procedural issues could join a session chaired by Dr Lundqvist. The first to speak in this session was Dr Pieter Van Cleynenbreugel (Leiden Law School) who delivered a speech on legal presumptions in the regulation of abuses. Thereafter Dr Ewelina D. Sage and Professor Tadeusz Skoczny (Centre for Antitrust and Regulatory Studies, University of Warsaw) addressed the issue of negotiated enforcement of the abuse prohibition by means of commitments decisions. This panel ended with a presentation by Dr Viktoria HSE Robertson (University of Graz) who presented her reaches conducted with Dr Marco Botta (University of Vienna) concerning injunctive relief for standard-essential patents under US antitrust and EU competition law.

Three different workshops were also held. The workshop chaired by Professor Bosco started with an address delivered by Professor Rodger who spoke about abuses of dominance before UK courts. Dr Gintare Surblyte (Max Planck Institute for Innovation and Competition) discussed dominance in the digital economy. The next presentation was given by Mr Knut Fournier (City University of Hong Kong) and entitled 'The dark side of "authors as customers": Amazon as a two-sided market and its antitrust implications.' Dr Sujitha Subramanian (University of Bristol) discussed the car spare parts decision taken by the Indian Competition Authority.

In another workshop, Professor Michal S. Gal and Professor Daniel L. Rubinfeld (U.C. Berkeley, New York University) spoke of the hidden costs of free goods.

Thereafter, Dr Peter Whelan (University of Leeds) addressed the issues of section 47 of the Enterprise and Regulatory Reform Act 2013 in the UK. The next contribution was presented by Dr Alexandr Svetlicinii (University of Macau) who spoke also on behalf of his two co-authors: Dr Marco Botta (University of Vienna) and Dr Maciej Bernatt (University of Warsaw). Their paper concerned the assessment of the 'effect on trade' by NCAs of new EU Member States. This session ended with a speech from Ms Florence Thépot (University College London) who discussed corporate compliance with competition law.

Professor Podszun chaired the third workshop session. Professor Amedeo Arena (University of Naples 'Federico II') discussed recent developments in Italian law concerning abuses of economic dependence. He was followed by Professor Colino whose presentation dealt with boundaries of abuse regulation. Professor Kelvin H. Kwok (University of Hong Kong) spoke about abuses of substantial market power under Hong Kong competition law.

The 10<sup>th</sup> Annual ASCOLA Conference on abuses of market power was closed by Professor Takahashi. He thanked all participants and expressed his hopes that the conference would be a new start in approaching abuses of market power.<sup>1</sup>

**Krzysztof Rokita**

Assistant, PhD Candidate, University of Wrocław

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<sup>1</sup> The official conference website is available at: <http://ascola-tokyo-conference-2015.meiji.jp/>.



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Conference was subsequently closed by Professor Anna Piszcz.

**Paulina Korycińska-Rządca**

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**2<sup>nd</sup> International PhD Students Seminar.  
Competition Law in Portugal and Poland.  
Białystok, 1 July 2015**

The 2<sup>nd</sup> Polish-Portuguese PhD Seminar took place on 1 July 2015 at the Law Faculty of the University of Białystok, Poland. The seminar was devoted to competition law issues in Portugal and Poland. The 1<sup>st</sup> meeting of this seminar series was held at the initiative of Professor Sofia Pais (Católica Porto Law School, Catholic University of Portugal) on 13 May 2015 in Porto, Portugal. Four representatives of the University of Białystok participated in the 1<sup>st</sup> Seminar including Professor Anna Piszcz, Dr Maciej Etel and two doctoral students: Marlena Kadej-Barwik and Paulina Korycińska. The 2<sup>nd</sup> Seminar was organized by the Department of Public Commercial Law of the University of Białystok and conducted by Professor Piszcz with the participation of Professor Pais and Dr Etel, among others.

The first speech was delivered by Rita Leandro Vasconcelos, a doctoral student supervised by Professor Pais; it was entitled '*Public enforcement tools – How far can the Portuguese Competition Authority go?*'. The speaker presented key information concerning the procedure and proceedings conducted by the Portuguese National Competition Authority (hereafter, NCA) – *Autoridade da Concorrência*. The fact was noted that the Portuguese NCA was only established as an independent institution in 2003, when it took over the powers and responsibilities of two entities which had directly belonged to Portuguese State administration.

The Portuguese NCA gained the same tools and powers as the European Commission under the 2012 amendment of the Portuguese Competition Protection Act (hereafter, PCPA) in order to ensure compliance with competition law provisions such as those on inspections, the settlement procedure or the possibility to end the proceedings with a commitments decision. Proceedings concerning restrictive practices, hence violating bans referred to in Articles 9 and 11 of the PCPA (equivalent to Articles 101 and 102 TFEU) are instituted either *ex officio* or by request. However, the Portuguese NCA, same as its Polish counterpart, is not bound by a request (notice) filed by a 3<sup>rd</sup> party. Unlike in Poland however, the party whose request was denied (that is, when the NCA decides not to institute proceedings) may appeal such decision in Portugal. All actions taken by the Portuguese NCA relate to the protection of the public interest which, similarly to Poland, can be seen in the promotion and protection of competition – a basis of market economy. They are meant to ensure the efficient functioning of markets while, at the same time, taking into account consumer interests. In her

speech, Rita Leandro Vasconcelos repeatedly emphasized that public enforcement of competition law may not serve the protection of private interests.

Rita Leandro Vasconcelos discussed also the individual tools and powers of the Portuguese NCA. During its proceedings, the NCA may not only request that both undertakings (parties to the proceedings) and 3<sup>rd</sup> parties deliver information and make statements, but has also the right to seize things. If a party to the proceedings or a 3<sup>rd</sup> party fails to fulfil the above requests, the NCA may impose a fine upon them. In presenting the principles of carrying out an inspection in Portugal, the speaker noted that a search of an undertaking's premises is subject to an authorisation by a public prosecutor. By contrast, court approval is required to search private premises, such as those belonging to the members of the managerial board, shareholders or employees of a specific undertaking. Still, the Portuguese NCA has not yet searched any private premises.

As a result of the proceedings, the Portuguese NCA may impose on the undertaking a fine equal to 10% of the turnover achieved in Portugal in the previous fiscal year. Nevertheless, if the undertaking is a repeat offender, the fine may amount to 20% of such turnover.

Rita Leandro Vasconcelos devoted a large part of her speech to the presentation of the NCA's practice regarding the imposition of commitments, either structural or behavioural in nature, in cases of both multilateral and unilateral restrictive practices. The speaker pointed out, when discussing the mechanism of a commitments decision under Portuguese law, that before issuing such a decision, the NCA must disclose the proposed commitments to the public and can issue such a decision only after market testing the commitments. Importantly, a commitments decision issued by the Portuguese NCA may not be appealed – it does not find or forbid the use of the questioned practices by a specific undertaking. Therefore, it may not constitute grounds for claiming redress of damages caused by the competition restricting practice.

Looking at the Portuguese competition protection system overall, Rita Leandro Vasconcelos noted also the very formalistic approach of its courts. She stressed that the Portuguese judiciary fails to use knowledge and instruments of an economic nature in considering competition law cases.

Paulina Korycińska delivered the second speech entitled '*Cooperation between the undertaking and the competition authority – unrealistic dream or inevitable future?*'. She presented an overview of those legal institutions available under the Polish Competition and Consumer Protection Act (hereafter, PCCPA) which are based on a certain level of cooperation between undertakings and the Polish NCA – the UOKiK President. These instruments include: the conditional consent to a concentration, commitments decisions, voluntary submission to a fine and leniency. The speaker presented a synthetic analysis of these legal solutions, which are largely based on public-private cooperation. She spoke of various advantages of such dialogue as well as factors impeding such cooperation. Considering the standpoint of the NCA, the main advantages of a public-private dialogue include, first of all, the possibility to shorten proceedings, as compared to the typical – classic – administrative procedure. Cooperation during proceedings minimizes also the probability of a court appeal against

a decision of the UOKiK President – if the decision ending the proceedings stems from an agreement between the NCA and the parties, the odds of the undertakings appealing it are small. Paulina Korycińska spoke subsequently of the advantages of public-private cooperation for undertakings. She mentioned here: (i) the fact that the undertaking can attempt to convince the NCA that the alleged violation did not take place at all; (ii) the undertaking can also influence on the authority's final decision, e.g. by the undertaking attempting to persuade the competition authority to impose on it commitments that may be cheaper and/or easier to carry out than those originally intended by the UOKiK President; (iii) the ability to limit reputational damage for an undertaking charged by a competition authority; (iv) reducing costs sustained by the undertaking in connection with pending proceedings (the shorter the proceedings, the lower the related legal costs); (v) the possibility of persuading the competition authority to refrain from imposing a fine or reducing it considerably.

Despite so many advantages to public-private cooperation, Paulina Korycińska noted that such dialogue is not yet common in Poland, albeit it is growing. The speaker attributed this situation to, *inter alia*, psychological barriers whereby undertakings continue to perceive the NCA as an adversary, rather than a negotiating partner. Another obstacle for the development of public-private cooperation and dialog in Poland was found in the market's low level of awareness of the advantages available to those companies that decide to cooperate with the UOKiK President.

Marlena Kadej-Barwik presented subsequently a paper entitled '*Criminalization of antitrust enforcement*' pondering the role of criminal law in the economy, with an emphasis on competition protection under criminal law. The speaker noted that the criminalization of competition law has long since been an established tradition in the United States and has been generally accepted. By contrast, this issue is still widely debated in Europe by representatives of legal doctrine. Apart from the United States, the criminalization of competition law has been taking place in: Australia, Canada, Brazil, Israel, India, Mexico, Norway, Russia, Japan, South Korea and Republic of South Africa, among others. Two opposing trends can be identified in EU Member States: both the criminalization and the de-criminalization of competition law. The criminalization model has been followed, *inter alia*, in Ireland, Slovenia, Czech Republic, Estonia or the United Kingdom. On the other hand, Austria followed the de-criminalization model – since 2002, its penal regime applies only to tender fixing.

The model of liability under administrative law is dominant in the majority of EU Member States with respect to competition law infringements – this situation stems, primarily, from the general application by Member States of TFEU rules. Nevertheless, specific solutions concerning the nature and scope of liability for competition law infringements do differ in individual Member States – and often to a sizable degree.

Marlena Kadej-Barwik presented also the conclusions of a number of analyses to be included in her forthcoming PhD dissertation concerning issues such as: (i) What is the scope of competition restricting practices that trigger criminal liability? (ii) Which categories of entities are criminally liable for those practices? (iii) What are the basic arguments for and against the penalization of actions of collective entities that violate

competition law? (iv) What are the basic arguments for and against the penalization of actions of managers that violate competition law? (v) What sanctions are appropriate for collective entities? (vi) What sanctions are appropriate for managers? Marlena Kadej-Barwik concluded her speech by outlining her own opinion on the direction of the development of criminal law liability for competition law infringements in Poland, and on the impact of such regulations on liability under administrative law.

Teresa Kaczyńska delivered the last paper entitled '*Leniency programme for managers under Polish competition law*' focusing on the assumptions of the Polish leniency programme for managers. She explained that as a result of the amendment of the Polish Competition and Consumer Protection Act (PCCPA) which came into force in January 2015, the UOKiK President may now impose fines on management – managers or members of the undertaking's management bodies – for deliberately allowing their undertaking to violate the ban on competition restricting agreements. The fine for a manager, which can be up to PLN 2 million (ca. EUR 500 000), may only be imposed by way of a decision finding that the undertaking has violated the ban on anticompetitive multilateral practices. In light of the Polish NCA's ability to fine managers, the amended provisions thus also provide for the possibility for such managers to benefit from the leniency programme. The speaker pointed out that the purpose of the amendment was, *inter alia*, to fine-tune the conditions that have to be met when applying for leniency by both undertakings and managers. Teresa Kaczyńska presented a list of conditions that have to be satisfied so that a manager can count on the NCA refraining from imposing a fine upon him/her or reducing it. She then briefly compared the list of conditions that must be met by an undertaking applying for leniency and by a manager. On this basis, the speaker noted that it would be very difficult to show in practice the limitation of the scope of information that a manager is required to present only to such information that he/she possesses due to his/her position at the undertaking and his/her role in the agreement. In light of the conditions for managerial fines – that is, deliberate actions or omissions – the speaker was of the opinion that it is hard to imagine a situation where a manager's knowledge of a restrictive agreement, in which that manager's undertaking participates, is in any way limited. In summing up the assumptions of the Polish leniency programme for managers, the speaker outlined also the ethical aspects and business consequences of a manager's leniency application.

All the three Polish speakers are doctoral students of Professor Piszcz (Department of Public Commercial Law at University of Białystok).

A discussion took place between the individual speeches and at the end of the seminar. Professor Pais and Professor Piszcz concluded that a 3<sup>rd</sup> Polish-Portuguese PhD Seminar should take place in 2016.

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## The First Polish Competition Law Congress Warsaw, 13–15 April 2015

1. The First Polish Competition Law Congress took place between the 13<sup>th</sup> and 15<sup>th</sup> of April 2015 in the Conference Centre of Polish Office of Competition and Consumer Protection (in Polish: *Urząd Ochrony Konkurencji i Konsumentów*, hereafter, UOKiK). The event was organised by the Centre for Antitrust and Regulatory Studies (CARS), part of the Faculty of Management of the University of Warsaw. The energy company TAURON Sprzedaż sp. z o.o acted as a strategic partner of the Congress.

2. Directly prior to the Congress, **Adam Jasser**, the current UOKiK President hosted a commemorative session celebrating the 25<sup>th</sup> anniversary of the first competition law issued in modern Poland and of its first competition authority – the Anti-Monopoly Office. Many distinguished guests participated in this event including **Ewa Kopacz**, the Polish Prime Minister, and Professor **Małgorzata Gersdorf**, the President of the Polish Supreme Court. A letter written by Professor **Marek Safjan**, Judge of the Court of Justice of the European Union (hereafter, CJEU), was read out by Professor Maciej Szpunar, the EU Advocate General. In conclusion, the UOKiK President Adam Jasser informed the audience that the President of the Republic of Poland will soon award Professor Anna Fornalczyk (the first President of the Polish Anti-Monopoly Office) and Professor Tadeusz Skoczny (Director of CARS and Chairman of the current Advisory Council to the UOKiK President) with, respectively, an Officer's and a Knight's Cross of the Order of Polonia Restituta.

3. The opening session of the Congress was chaired by Professor Anna Fornalczyk, Professor **Tadeusz Skoczny** and the UOKiK President Adam Jasser. On behalf of Professor Fornalczyk and himself, Professor Skoczny first thanked Mr Jasser for supporting CARS's idea of organising the Competition Law Congress jointly with the official celebration of the 25<sup>th</sup> anniversary of Poland's first modern competition law regime and enforcement authority. President Jasser replied by emphasizing the need and the usefulness of a dialogue and co-operation between academic circles, UOKiK officials and competition law practitioners. This is illustrated, among other things, by the impressive statistics shown by Professor Skoczny concerning the Congress itself which gathered 152 participants and 30 scientific papers. Professor Skoczny expressed also his appreciation for the generous sponsorship of the entire event by the energy company TAURON Sprzedaż Sp. z o.o. – the strategic partner of the Congress.

4. Starting the opening session Professor **Stanisław Softysiński**, a government advisor in the early 90s and founder of the law firm SKS, was asked: what is competition

law for, and whether its objectives are the same now as they were at the beginning of the transformation process? Professor Soltysiński answered in affirmative as the natural dilemma of free-market economy (struggling for efficiency and consumer welfare) is a never-ending story. Professor Soltysiński evaluated positively the establishment of the first Polish Anti-Monopoly Office and sector-specific regulators. He also strongly emphasized the role of the Constitutional Tribunal. The speaker mentioned the beginnings of Poland's road to the European Union and emphasized the role of Article 2 of the Polish Competition and Consumers Protection Act (hereafter, PCCPA), which enables the National Competition Authority (hereafter, NCA) to take actions in many fields.

5. Professor **Maciej Szpunar**, Advocate General at the CJEU, was asked about the borders between private enforcement and private international law. Professor Szpunar spoke primarily of the persistent doubts about cross-border use of private competition law enforcement. These doubts concern two key issues: where to sue an enterprise responsible for an antitrust violation and in accordance with which law? With respect to identifying the appropriate court, Professor Szpunar discussed briefly issues connected with the specifics of claims (among others, the multitude of parties responsible for damages, large number of injured, issue of group vindication of claims, etc.), the location of the damage and the location of the damaging event itself. As regards governing law, the speaker emphasized that the vast majority of cases concerning claims for damages caused by antitrust infringements take the form of follow-on cases governed by the law of the EU Member States defining the premises of compensation. Finally, Professor Szpunar shared his doubts concerning joint and several liability of cartel participants.

6. Emphasizing the fact that Poland has a substantial amount of both case law and competition law jurisprudence already, Professor Skoczny spoke to Judge **Teresa Flemming-Kulesza**, the current President of the Labour and Social Security chamber of the Supreme Court responsible for competition law issues. Professor Skoczny asked Judge Flemming-Kulesza whether it is possible to talk about Poland already having its own jurisprudential canon. He then asked the Judge to pin point what are, in her view, the jurisprudential milestones in competition and consumer protection law in Poland. Judge Flemming-Kulesza began her speech by reminiscing about her personal involvement in the creation the Anti-Monopoly Court (now: Court of Competition and Consumers Protection, hereafter, SOKiK). She continued by presenting seven milestones in competition-related jurisprudence of the Polish Supreme Court. She listed, among crucial rulings, judgment in case III SK 6/06 regarding the features of a 'conspiracy' as well as judgment in case III SK 15/06 related to the understanding of the concept of 'competition restriction'. Noted also was the widely commented judgement in case III SK 67/12 (PKP Cargo) which was emphasized for its significance in view of intertemporal issues. Judge Flemming-Kulesza mentioned also the eight prejudicial questions sent to the CJEU by the Labour and Social Security Chamber of the Polish Supreme Court.

7. The next speech concerned issues connected with the relation between economics and competition law. Professor Skoczny asked Professor **Anna Fornalczyk** how much,

and which economics should be and is necessary in competition law and its application? Professor Fornalczyk stated, also on the basis of her own personal experience as an economic consultant, that there is a need for as much economics as necessary but it should be that sort of economics which solves problems. In her opinion, jurisprudence opens the road to the introduction of economics into competition law. The speaker also stated that it is essential not to focus on economic theories, but to look for economic justifications of legal terms included in competition law. Different methods can be used here: managerial economics, econometrics or games theory. Professor Fornalczyk spoke of two conditions for a successful economization of competition law. The first condition is the popularization of this idea by the NCA and the opening of a discourse through the presentation of methods and econometric results in the justifications of individual UOKiK decisions. The second condition – attributable to entrepreneurs – is the provision of ‘good’ data. Hereafter, Professor Fornalczyk presented the indicator of an anti-monopoly risk elaborated in her consulting firm.

With reference to the speech of Professor Fornalczyk, the UOKiK President Adam Jasser took the floor and emphasized that the NCA had raised the rank of economic analysis in all decisions which are currently being rendered. In his opinion, economic grounds are necessary particularly when investigating agreements restricting competition by their effects. As regards gaining and analysing data from the market, the UOKiK President is open to co-operation with entrepreneurs.

8. Last but not least, Mr **Grzegorz Lot**, the President of TAURON Sprzedaż, took the floor to speak of problems connected with the application of competition law on regulated markets, focusing on the energy sector. First, Mr Lot analysed the changing of the electricity seller from the perspective of an average consumer, showing how such switch is performed as well as what premises are most often followed by consumers. Mr Lot presented next the characteristics of the Polish energy market with its four large companies (for instance, TAURON Sprzedaż sells electricity to approx. 5 million households) as well as other smaller electricity sellers. The President of TAURON Sprzedaż referred to the issue of regulating electricity prices (tariffs) and stated that it is currently almost impossible to get positive margins. He noted also a current trend of providing different services (including the sell of electricity or gas) by telecommunications firms or banks using their own marketing channels and customer base. Mr Lot spoke also of a separate issue which still remains in whether customers will want to get the majority of their services from the same supplier.

9. The first session of the Congress entitled: “‘Competition’ and ‘public interest’ in competition law and the law on combating unfair competition”, was chaired by Professor **Andrzej Wróbel**, Judge of the Polish Constitutional Tribunal.

10. In the first speech, Professor **Marek Szydło** (Faculty of Law, Administration and Economics of the University of Wrocław) presented his paper on the ‘Judicialization of European and Polish competition policy: directions of the revision of the current paradigm’. Professor Szydło indicated that the term ‘judicialization’ means the creation of public administration authorities (of a judicial or quasi-judicial character) entitled to implement competition policy through the interpretation and execution of competition law rules. Second, judicialization of competition policy is visible in judicial

control of decisions taken by the aforementioned public authorities. Professor Szydło described the judicialization of European and Polish competition policy considering the independence of competition authorities from other public authorities. He focused on European and Polish competition policy with respect to judicial control over decisions issued by the NCA. In conclusion, he listed five key aspects: (i) judicialization of competition law means, on the one hand, giving administrative (public) competition authorities a judicial or quasi-judicial character, (ii) neither Polish nor European law guarantee that NCAs have a sufficient scope of institutional independence from public authorities (iii) it is desirable to harmonize some aspects of judicial control over decisions issued by NCAs, (iv) current judicial control over decision of the UOKiK President is exercised by SOKiK and adopts the character of a control exercised by administrative courts over administrative decisions, (v) this jurisprudential trend should be supported as it moves into the right direction, which means that it should be sanctioned in a normative manner.

**11. Mr Jarosław Soroczyński** (Markiewicz & Soroczyński law firm) presented a paper 'On the necessity (and traps) of a more inter-disciplinary approach to public and private enforcement of competition law'. He indicated the need to use the accomplishments of other scientific fields in the practical application of competition law. He listed specific areas where development is necessary which included: economy, sociology, and criminal law. According to the speaker, a broader, methodological view will make it possible to limit the risks and traps coming from the notion of a 'more economic approach'. Mr Soroczyński also indicated the need to use various tools during competition assessments. Benefits which may arise from a more inter-disciplinary approach to competition law include, in his view, a uniform understanding of definitions, which would eliminate the 'Babel Tower' which currently exists. The speaker also noted the excessive fetishization of interdisciplinary methods, simultaneously raising the risk of deviation mistakes, especially if decisions are contrary to commonsensical rules. In practice, this suggests the growing importance of industry experts, using experts in lawsuits, and relying to a greater extent on the results of the behaviours of consumers and managers.

**12. Mr Marcin Kolasiński** (Kieszkowska Kolasiński Rutkowska law firm) presented a speech entitled 'The essence of "competition" that should be protected in the public interest, in the context of business entities performing public duties'. He pointed out that the PCCPA uses the term 'competition' but does not define this phenomenon. The UOKiK President understands it as 'businesses operating independently to achieve similar economic goals'. A distortion of competition takes place as a result of actions taken by entrepreneurs within the meaning of the Act on Freedom of Economic Activity as well as due to actions of 3<sup>rd</sup> parties towards entrepreneurs within the meaning of this act (that is, public administration bodies, or entities other than public administration but performing public duties). Despite the fact that the definition of an entrepreneur provided in the PCCPA indicates a person organizing or performing services of public utility, the law does not define this notion either. Mr Kolasiński pointed to the broad reasoning of the concept of public services used by the Polish Supreme Court. In his opinion, the Polish NCA has so far never addressed

its decisions to other public institutions, which in fact have the character of organizing or providing public services. According to the speaker, the type of services, as well as entrepreneurs performing them, should therefore be identified more accurately. The same is true for those activities of such entities, which affect the market and which are thus under the scrutiny of the UOKIK President.

**13. Mr Piotr Adamczewski** (Director of the UOKIK Branch Office in Bydgoszcz) gave a speech on the 'Application of competition law on regulated markets – participation of the State in the economy and competition protection'. The speaker considered first the issue of the direction taken by the State in order to ensure economic development simultaneously with growth in the welfare of its citizens, arising from the proper functioning of competition. Mr Adamczewski talked about the freedom to conduct business in the context of ensuring public utility services by the State. Next he addressed the issue of liberalization and regulation, focusing on: liberalization of markets and the necessity of an intervention by the NCA designed to bring desired market effects. In conclusion he also mentioned that the jurisprudence of the Polish Supreme Court directs the actions of the UOKIK President towards the most important competition law infringements committed by entrepreneurs ruled by the quest for profit. The role of the UOKIK President is to properly choose which of the available measures to use in order to obtain the highest profits possible for consumers from the functioning of the mechanism of competition.

**14. Professor Agata Jurkowska-Gomułka** (Higher School of Information Technology and Management in Rzeszow) spoke of 'The public interest and private enforcement of competition rules'. She began by pointing out that both Polish case law, as well as Polish doctrine, accepted seeking compensation for antitrust breaches before court. In the first place, she focused on defining what the 'public interest' is within the framework of the public antitrust enforcement model. Next she touched upon the relationship between the prerequisite of public interest and private antitrust enforcement. She pointed out that the condition of public interest positions the PCCPA firmly in the field of public law. By asking the question what to do with the prerequisite of public interest in the context of private enforcement, she presented a conceptualization of several options which may solve this issue. She described the following options: (i) no need for legislative amendments or modifications to the position of courts in defining the public interest; (ii) direct 'absorption' of the public interest prerequisite into private enforcement; (iii) private interest in the law on competition and consumer protection; and (iv) resignation from the prerequisite of public interest. Professor Jurkowska-Gomułka noted that the use of each of these solutions will in fact result in the elimination (or at least weakening) of the division into public and private competition law. However, this seems to be in line with current development trends and cannot be seen as a weakness of the proposed solutions.

**17. Professor Dawid Miąsik** (Institute of legal Sciences of the Polish Academy of Science) concluded the panel with a speech on 'Interactions between combating unfair competition through public law and through private law on the example of the prohibition of practices infringing collective consumer interest'. The speaker first

indicated that conducting an analysis of the aforementioned interactions is caused by the fact that the same action may be seen as an act of unfair competition as well as a practice infringing collective consumer interests. The speaker mentioned: (i) issues concerning consumer protection on the basis of the Combating Unfair Competition Act (hereafter, CUCA); (ii) prohibition of practices infringing collective consumer interests in competition protection; (iii) combating unfair competition acts on the basis of public law. Professor Miąsik noted that the interactions within the national legal system between combating unfair competition and infringements of collective consumer interests are regulated in Article 25 PCCPA. This rule makes it possible to accumulate defence measures against unfair competition. According to the speaker, such accumulation should not be a surprise considering the differences between the instruments prescribed to realize convergent goals. Professor Miąsik pointed out in conclusion that where the prohibition of collective consumer interest is applicable to practices which harm the sovereignty of their decisions, the goals of both institutions are overlapping.

**18.** A discussion took place thereafter. First Professor **Sławomir Dudzik** (Faculty of Law and Administration of the Jagiellonian University in Kraków, partner at SPCG Studnicki Pleszka Cwiąkański Górski law firm) mentioned the need to develop procedural guarantees based upon the *Menarini* case and Article 6 of the European Convention on Human Rights (hereafter, ECHR). He also indicated that Polish civil courts are already dealing with cases of a similar degree of difficulty than competition law (such as those on the liability of managers or cases on financial markets). He stated that every analysis should also take into account the evolution of the jurisprudence of civil courts in the last 25 years of competition law enforcement in Poland. Mr **Maciej Berger** spoke subsequently of the public interest notion in staid aid case law. Professor **Bożena Borkowska** (Wrocław Economic University) indicated that there is only one ‘economics’ and behavioural economics is probably a way for psychologists to enter the social sciences area.

**19.** The morning session held on 14<sup>th</sup> April related to the application of competition law. It was moderated by Ms **Bernadeta Kasztelan-Świetlik** (UOKIK Vice-President) and **Tomasz Wardyński** (partner at Wardyński & Partners law firm).

**20.** Professor **Małgorzata Król-Bogomilska** (Institute of Legal Sciences of the Polish Academy of Science and the Faculty of Law and Administration of the University of Warsaw) took the floor as the first speaker and discussed the issue of the right to a fair trial in combating cartels as well as the question of the criminalization (traditional or hidden) of competition law. The speaker noted four contentious issues: (i) the character of antitrust cases and their sanctions; (ii) the application of the European Convention on Human Rights (hereafter, ECHR) to undertakings; (iii) the question of striking a fair balance between the protection of undertakings’ rights and the effectiveness of competition law; and (iv) whether the criminalization of competition law would be a good solution. With regard to the first issue, Professor Król-Bogomilska referred to judgments of the European Court of Human Rights (hereafter, ECtHR) such as *Engels* and *Menarini*, which confirmed that the criminal part of Article 6 ECHR applies to competition cases. As to the application of the Convention, the

speaker indicated that Article 34(1) ECHR clearly states that the Convention applies to 'anyone' (German '*alle Personen*'). With regard to the third issue, the speaker made reference to the criteria provided in Article 8 ECHR and by the ECtHR regarding the protection of the right to privacy and stressed the importance of the principle of proportionality. The speaker noted also that the last issue is hard to achieve since the criminalization of competition law may result in hidden penal liability. Professor Król-Bogomilska concluded that guarantees in competition law should be reinforced and national laws harmonized in order to prevent 'forum shopping'. She also stated that the relevant provisions should be contained in Poland in a single act, instead of being spread across several.

**21. Dr Maciej Bernatt** (Faculty of Management of the University of Warsaw) presented the findings of his research project concerning the application of Article 101 and 102 TFEU by the Polish, Czech and Slovakian NCAs. After a brief introduction regarding the decentralization of the application of EU competition law based on Regulation 1/2003, Dr Bernatt presented various statistics that have shown the infrequency of the direct application of Articles 101 and 102 TFEU by the aforementioned NCAs. He also presented a number of hypotheses explaining this state of things. According to the speaker, low levels of direct EU law application in the relevant Member States may result, first of all, from the strict interpretation of 'impact on trade between Member States' prerequisite. Second, infrequent application of the TFEU in Poland results from the fact that a significant number of domestic decisions is taken by local branch offices of the UOKiK, which deal with cases concerning local geographic markets only. Third, such stance may be caused by existing procedural obstacles. In conclusion, Dr Bernatt noted that despite some relevant CJEU jurisprudence, it is still not clear which types of decisions may be issued by NCAs and suggested the introduction of a quantitative criteria for judging 'the effect on trade'.

**22.** The third presentation given by Dr **Grzegorz Materna** (Institute of Legal Sciences of the Polish Academy of Science) focused on the restriction of competition as a factor limiting the application of Article 6(1)7 PCCPA to agreements influencing a tender. The speaker commenced by analysing the characteristics of bid-rigging and presented the current approach of the Polish NCA (the President of UOKiK) and of the national judiciary (SOKiK) to this type of anticompetitive conduct, which is prohibited *per se*. Subsequently, Dr Materna noted that not every agreement regarding a tender may lead to the restriction of competition. He presented relevant examples showing that some seemingly anticompetitive conducts do not automatically and always infringe competition law. Thus, the speaker argued that the assessment of undertakings' conduct in relation to tenders should always be based on a case-by-case study of its effects. In particular, the variety of types of conduct falling within the category of agreements relating to a tender should be taken into account in this regard.

**23.** Mrs **Joanna Noga-Bogomilska** (UOKiK) discussed selected issues regarding the protection of business secrets as an element of the procedural justice principle. This question was analysed in the context of cases on anticompetitive agreements

in Polish competition law. Mrs Noga-Bogomilska stressed the importance of this protection as an element of procedural justice. She argued that the high level of such protection granted to undertakings by the Polish NCA encourages them to provide the authority with their sensitive information. The speaker noted that the protection of business secrets is regulated in various legal acts, including the ECHR, the PCCPA, the CUCA, Regulation 1/2003 and the Polish Code of Administrative Procedure. The speaker noted several issues connected with this subject, for instance undertakings' obligation to provide the requested information to the UOKIK President or the restriction of the right to access the file (right to defence). The speaker concluded that despite the high level of protection given to business secrets already, there is always space for some additional legal improvements.

**24. Anna Młostoń-Olszewska** (UOKIK) compared subsequently Polish and EU rules on the material scope of undertakings' duty to provide information to a competition authority. First, the speaker denied the existence of any practical problems regarding this obligation in the context of the protection of undertakings' right to defence. Mrs Młostoń-Olszewska argued that it was the media and the legal doctrine that have created a fake problem since in practice undertakings hardly ever raise an argument regarding the protection of their right to defence in this regard. Subsequently, however, the speaker discussed various contentious aspects relating to the material and procedural scope of the information duty, including a case currently pending before the Polish Supreme Court regarding the very issue of the privilege against self-incrimination. She also presented differences between EU and Polish rules and concluded that due to the principle of procedural autonomy, Member States do not have to adapt their own rules in this regard to the solutions adopted at the EU level. In conclusion, she pointed at the principle of procedural autonomy of EU Member States.

**25. Dr Dominik Wolski** (in-house lawyer in Jeronimo Martins) spoke about the implementation of Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the Damages Directive). The speaker noted numerous difficulties regarding the implementation of the Directive, including whether the relevant provisions should be incorporated in already existing legal acts or whether the implementation should result in the adoption of a new, separate act. While discussing the content of the Directive, distinguishing its material and procedural provisions, Dr Wolski focused on possible practical problems that may arise in the context of its implementation and application. He concluded that the development level of private enforcement depends mainly on the efficiency of proceedings, the level of preparation of courts and on the legal awareness of consumers.

**26.** The above presentations were followed by a discussion including questions and comments from the audience. Professor **Fornalczyk** spoke of the difficulties in calculating damages, resulting from the lack of relevant data, and underlined the necessity of collecting data by undertakings in order to manage anticompetitive risks. Mr **Marcin Berger** did not agree with the opinions presented by Ms Młostoń-Olszewska. He stressed that protection of the right to defence in the context of

undertakings' duty to provide information to the competition authority is a very real problem which was vividly discussed during the consultation process that preceded the introduction of the last amendments to the PCCPA, albeit current rules are still far from being perfect and so more changes are needed in this regard. Dr **Bernatt** added here that the sole fact that a case regarding this issue is currently pending before the Supreme Court proves the existence and the importance of this problem.

Mr **Tomasz Dec** (UOKIK Branch Office in Łódź) asked three questions related to the presentations of Dr Wolski, Mrs Młostoń-Olszewska and Dr Materna. The first question related to the possible way of implementing Article 17 of the Damages Directive which states that the NCA may help in assessing the damage if it believes it to be appropriate. With regard to this issue, Mrs **Katarzyna Lis** (Ministry of Justice) – notably in charge of the implementation of the Directive in Poland – acknowledged that NCAs were afraid during the Directive's legislation process of introducing upon them a duty to provide help in assessing damages. Mr Dec asked also how to strike a fair balance between the right to access the file and undertakings' right to defence. Mrs **Młostoń-Olszewska** responded that the refusal to access the file should only be used exceptionally and to a limited, necessary extent. For instance, access might be refused to that part of a document which contains business secrets. Mr Dec's third question related to bid-rigging. He asked whether a change in practice would suffice, or if a legal change (i.e. PCCPA) would also be needed in this context? However, since the available time limit for this session has already been significantly exceeded, Dr **Materna** could not express his opinion on this matter.

27. The next session held on the 14<sup>th</sup> of April focused on cartels and economization. Professor **Zbigniew Jurezyk** (Director of the UOKIK Branch Office in Wrocław; lecturer at the Wrocław School of Banking) presented first how diversified the assessments of cartels used to be in various periods of economic history and trends. According to the speaker, cartels emerged as an economic phenomenon in the 2<sup>nd</sup> half of the 19<sup>th</sup> century – their main objective was the desire to survive economic crises. Until World War II, cartels operated legally in nearly all market economies. The positive attitude to cartels of the so-called 'historical school' resulted from that school's greater concern for producers than for consumers. A positive attitude to cartels characterised the Austrian School also according to which cartels were an alternative form of market organisation, allowing for better coordination of decisions by undertakings. The fact that cartels constitute a threat to competition was realised when it emerged that they did not have a temporary nature and did not disintegrate after the crises had subsided. The harmfulness of cartels was shown by neoclassical economics proving their external and internal ineffectiveness on the basis of economic models. As part of competition law, the economisation trend began in the 1970s thanks to the so-called Chicago School, which postulated that competition policy should aim to establish which practices are anti-competitive and which are pro-effective. The Chicago School spoke also in favour of using in competition policy of economic tools and theories. They included: consumer prosperity (allocation and production efficiency), price theory, institutional economics (transaction costs), and behavioural economics (study of motivation). In turn, the so-called post-Chicago

School postulated that competition policy should study the actual effects of the alleged monopolistic practices from the perspective of consumer prosperity. An economic analysis of the actual effects of agreements took on the form of the rule of reason in the judgments of the US Supreme Court in the mid 1970s concerning vertical arrangements. The US Supreme Court continued the approach based on effectiveness in the 1980s extending the application of the rule of reason to horizontal agreements also. Professor Jurczyk showed that in practice an examination of the actual effects of cartels exceeds the capabilities of courts. Nevertheless, the effect of economization on the actions of courts is apparent – their assessments are made through the prism of the effects of cartels, which have been described in economic models and theories, for instance with respect to the assessment of discounts, exclusivity clauses, tying and bundling.

**28.** Professor **Bożena Borkowska** (Economic University in Wrocław) gave a presentation on creating competition in sectors with a natural monopoly showing first the theoretical premises for new regulation of sectors with a natural monopoly and the effects of competition promotion therein. In her opinion, market regulation aimed at creating competition in sectors with a natural monopoly is a relatively new and controversial practice. The speaker noted that economics does not provide clear arguments in favour of creating competition in these sectors. This is because there are two competing hypotheses in economic theory: on the one hand, the hypothesis that launching the mechanism of competition will result in increased efficiency; on the other, the hypothesis that the restructuring of incumbent companies will result in under-investment in sectors with a natural monopoly. The speaker pointed out that according to the contemporary concept of a natural monopoly, a non-regulated natural monopoly may operate efficiently provided that there is a high risk of potential competition. Such a situation takes place on so-called ‘contestable markets’, which have low entry and exit barriers and where potential competitors have access to the same technologies as the monopolist. Examples of contestable markets can be found in flight connections between individual cities, which can be entered by other undertakings, thanks to the possibility of sales and lease of aircrafts, without incurring high sunk costs. At the same time, with reference to Williamson’s transaction costs theory, the speaker noted that a natural tendency to monopolise occurs in the case of trading in highly specific assets – the higher the transaction costs of such trading, the greater the importance of bilateral contracts and transaction coordination within an individual undertaking. According to the speaker, introducing competition on these markets leads to an under-investment problem. She stated that this is visible, for example, in Polish water mains and sewage networks. The correctness of the hypothesis of efficiency growth and the hypothesis of under-investment is verified through the reform of a given sector. Professor Borkowska gave here the example of the Polish electricity sector which, after it was regulated, became under-invested and characterised by raising electricity prices. An analysis of these issues has led the speaker to conclude that in de-regulated sectors an experiment takes place testing new economic hypotheses with results that are difficult to predict.

29. The next speech delivered by Professor **Konrad Kohutek** (Andrzej Frycz Modrzewski Kraków University) referred to problems of an anti-competitive ‘object’ or ‘effect’ of agreements in the context of vertical resale price maintenance (RPM). The aim of this presentation was to set out and assess the antitrust qualification of vertical RPM in the Polish jurisprudence and in the practice of the UOKiK President. According to the speaker, it is incorrect to classify RPM as a competition constraint when there is an absence of actual or potential constraints on inter-brand competition. In support of this thesis, the speaker cited the US ruling in the *Leegin* case which assessed RPM on the basis of the rule of reason. Professor Kohutek criticised the judgment of the Polish Supreme Court in the *Röben* case and the UOKiK decision in the *Sphinx* case as having excessively stressed the role of price competition among the various forms that competition can take. According to the speaker, price (although certainly material) constitutes only one of the areas of market competition; depending on the sector, the price may be of less importance – there are even markets lacking in price competition (e.g. Internet search engine markets). He argued that an agreement’s type should not in itself prejudge whether or not a given practice belongs to the category of agreements prohibited by ‘object’ or by ‘effect’. Professor Kohutek spoke for changing the law (or its interpretation) so that RPM is not treated as prohibited by ‘object’ but subject to the rule of reason.

30. The presentation of Dr **Bartosz Turno** (WKB Wierciński, Kwiecieński, Baehr law firm) focused on problems, methodology as well as proposed alternative solutions regarding defining the relevant market in antitrust cases. The thesis of the presentation was that it is not the market definition that is crucial in antitrust cases, but rather determining competitive pressures and therefore determining market power that may result in the restriction of consumer welfare. The speaker noted that it is indispensable to define the market in cases concerning: agreements benefitting from the *de minimis* exemption, those concerning infringements which are prohibited due to their effects, and in the case of concentration control. On the other hand, there is no need to define the relevant market in cases concerning agreements prohibited by object. Dr Turno presented the problem of defining the relevant market with the use of the SSNIP (Small but Significant, Non-transitory Increase of Price) test. He then set out his own proposed systematised assessment of competitive constraints impacting market players. The speaker presented also a number of solutions with regard to defining the relevant market that appear in economic literature. With regard to concentration control, they include direct forecasts (with the aid of econometric instruments) of the impact of the concentration on unilateral behaviour (unilateral effects) with respect to ‘upward pricing pressure’. According to Dr Turno, the concept of ‘upward pricing pressure’ is also subject to criticism as it does not seem easier, quicker or more efficient than ‘traditional’ methods of defining the relevant market due to lack of suitable data to calculate it quickly. In summary, Dr Turno noted that the definition of a relevant market, although imperfect, makes it possible (for lawyers in particular) to preserve the necessary discipline (it guarantees that the assessment will not be arbitrary) and places economic analyses in a certain organisational and conceptual

framework. By doing so, it simplifies and speeds up the analysis of anti-competitive effects.

31. The next presentation was given by Mr **Paweł Ważniewski** (UOKIK) on behalf of himself and Dr **Wojciech Dorabialski** (also UOKIK). It focused on the economics of the ‘economization of competition protection’ from the point of view of the UOKIK, especially its priorities in the application of economic tools. The aim of the speech was to analyse selected economic methods used in competition protection, and to determine the optimal direction of ‘economization’ from the point of view of the Polish NCA. The introduction to this analysis included an explanation of the sources of, and reasons for the increasing involvement of economists in competition enforcement and a brief summary of the history of ‘economization’ of competition protection worldwide and in Poland. Individual areas where economic theory and economic methods are applied were then discussed in detail. In particular, this concerned competition protection *sensu stricto*, illustrated by antitrust case law as well as other aspects of competition policy (competition protection *sensu largo*). The facts described in the first part of the speech were the starting point and background of an analysis of the ‘economics’ of the Polish NCA’s use of economic tools. The analysis resulted in a list of priorities for the application of economics in competition enforcement and an outline of the development route of the economic approach in competition protection by the UOKIK.

32. This speech was followed by a discussion of the economic approach to competition law. Commenting on the effectiveness of competition law, Mr **Sroczyński** (in response to Professor Kohutek’s presentation) pointed out the decision in the *ToolTechnic* case where the Australian antitrust authority held that RPM was legal on the basis of the rule of reason. Mr Sroczyński asked Professor Borkowska and Professor Jurczyk what they understood by the term ‘competition for competition’ and whether competition should be an aim in itself. In her reply, Professor **Borkowska** stated that it was necessary to avoid such generalisations and stressed that modelling the market from the point of view of its structure did not always bring the expected results. She also warned against the simplification used in legal discussions which states that regulation ‘x’ will have a specific effect ‘y’. According to Professor **Jurczyk**, competition is not an aim in itself – it cannot be defined without reference to a specific axiological context. Competition is only a means to efficiency and it is efficiency that is the aim. Summarising, Professor Borkowska stated that it was not difficult for an economist to calculate efficiency – what poses a problem is an interpretation of the result and model that can be applied where the market is legally regulated.

As regards economic methods in the work of the UOKIK, Professor **Fornalczyk** asked about the economic methods the NCA currently uses, for example when defining the relevant market. According to this commentator, the NCA should tell undertakings clearly which methods they should use in proceedings before the President of UOKiK. In response, Mr **Ważniewski** gave the example of analysing substitutability between rail and road transport. At the same time, he proposed a future presentation of additional examples of cases where the UOKIK had used economic methods. Professor Fornalczyk postulated that the NCA should explain

in the justifications to its decisions which analytical methods it had used. This would serve to advocate the use of economic methods.

Dr **Turno** wanted to discuss the disadvantages of an economic analysis. At this point, he expressed concern whether economics should define the standards, tests and rules used in competition law. In his opinion, the excessive application of an economic analysis by the NCA could incapacitate the system and result in legal uncertainty.

The last part of the discussion during this session concerned the combination of law and economics in competition policy. Professor **Skoczny** expressed the view that competition policy should combine law and economics. He cited the example of western countries where such a solution is beneficial to competition. He also noted that the Department of Market Analyses of the UOKIK has recently managed to strengthen its role, even though its output is still minor. Professor Skoczny spoke also in favour of law firms increasing their use of economic analyses in preparing competition cases. To close, he added that it would be difficult to apply an economic analysis straight away to all practices violating competition law. He suggested to first 'test' the use of economic analysis tools in relation to a specific anti-competitive practice.

Some commentators referred also to the economization of consumer cases and cases from specific sectors. Dr **Bartosz Targański** (Warsaw School of Economics and Clifford Chance law firm) asked about the practice of using an economic analysis in consumer protection cases, which was one of the postulates of the UOKIK in 2014 (the beginning of the term of office of the current UOKIK President). Mr **Ważniewski** confirmed that an economic analysis is applied in this category of cases as well. He gave the example of the analysis of the behaviour of banks towards customers with loans in Swiss francs. Professor **Borkowska** shared a critical comment concerning the expectations for regulation of the financial services sector (amendments to the PCCPA giving the President of UOKIK greater powers in the financial services sector). According to her, such interference could have the opposite effect to the one intended – it could result in increased costs, which are ultimately borne by the clients.

**33.** The last session held on the 14<sup>th</sup> of April was jointly chaired by Professor **Agata Jurkowska-Gomułka** and **Małgorzata Szwał** (Linklaters law firm). It was devoted to negotiated competition law enforcement.

**34.** Professor **Tadeusz Skoczny** delivered the introductory paper entitled 'Negotiated competition law enforcement: realities, substance, problems' was delivered. Negotiated competition law enforcement is the object of extensive discussions both in jurisprudence and in legal literature. In his introductory remarks, Professor Skoczny emphasized that both the practice and the doctrine of competition law are at a very interesting juncture at the moment because of the implied negotiated enforcement of competition law. It is thus up to representatives of judicial literature to forge the nomenclature and terminology related to that concept. On the other hand, it is up to practitioners to elaborate on the principles of using negotiations in competition law cases. In his paper, Professor Skoczny outlined two existing models of competition law enforcement: the adversarial (contested) model and the negotiated (non-contested) model. In his opinion, over the last decade or so, a significant change has taken

place in the nature of the relations between competition authorities and undertakings. Moreover, undertakings' influence on competition decisions has also changed its scope and form. Preliminary research results confirm that the negotiated model of competition law enforcement (and the resulting 'settlements') has begun to be increasingly prominent. The speaker listed the most important advantages and losses associated with the use of the negotiated model and noted a number of issues related to competition law enforcement under this model.

Individual legal instruments (commitments decisions, voluntary submission to a fine, compliance programmes and leniency) that could be used within the framework of negotiated competition law enforcement were discussed in subsequent papers.

**35.** The speech of Mrs **Małgorzata Modzelewska de Raad** (Modzelewska & Paśnik law firm) entitled 'Commitments decision as a form of an undertaking's participation in the decision of the competition authority: advantages and traps' was devoted to practical aspects of commitments decision. In the opinion of the speaker, co-operation and dialogue between the interested undertaking/undertakings and the competition authority are of key importance for an effective use of commitments decisions. A brief analysis of the three-year negotiations between the European Commission and Google was the starting point of Mrs. Modzelewska de Raad's presentation of her 12 truths on commitments decisions. Further on, the speaker emphasized that issuing a commitments decision must be preceded by a real, thorough and intense dialogue between the competition authority and the undertaking/undertakings concerned where both sides need to actively take part in the entire negotiation procedure. Another important truth related to commitments decisions is the fact that the results of such a decision affect *de facto* the entire market. At this point, the subject of a market test was brought up and it was postulated that this instrument should be used as broadly as possible (repeatedly if necessary) in antitrust cases. Mrs Modzelewska de Raad drew the audience's attention to Polish statistics which confirm that commitments decisions have constituted over half of all recent UOKiK decisions and that they are most frequently used in cases concerning the abuse of a dominant position. As one important obstacle to the consensus between the authority and the undertakings, the speaker pointed to the fact that it is a *sine qua non* condition for the issuing of a commitments decision to institute explanatory proceedings. Mrs Modzelewska de Raad believes that such pending proceedings make the dialogue more difficult and reduce the effectiveness of negotiations. The dialogue should start as early as possible. In the current legal framework, it is exceptionally difficult to detect the exact moment (between the institution of antitrust proceedings and the substantiation by NCA of its findings) when the undertaking can propose commitments. In that context, a postulate *de lege ferenda* was made for the competition authority to also propose possible commitments. Introducing legal grounds for the authority to suggest to undertakings certain actions in order to remedy their allegedly illegal behaviour would provide grounds for the UOKiK's full involvement in the negotiations, without detriment to the executive nature of a commitments decision. In conclusion, Mrs Modzelewska de Raad emphasized that a commitments decision implies numerous advantages for the undertaking/undertakings concerned, the

competition authority and the entire market. There is no doubt that market effects of commitments will be generated the fastest by the undertaking placed under those obligations.

**36.** Professor **Anna Piszcz** (Faculty of Law of the University of Białystok) spoke next delivering her paper entitled ‘Voluntary submission to a fine in light of the Law on Protection of Competition and Consumers vs. the Damages Directive’. Professor Piszcz contemplated therein whether in line with the provisions of the Damages Directive, information and documents provided by undertakings under the procedure of a voluntary submission to a fine (Polish legal instrument resembling the EU settlement procedure) may be disclosed to 3<sup>rd</sup> parties. The situation is unambiguous in cases examined under EU laws by the European Commission – the EU lawmakers have excluded (indefinitely) the disclosure of evidence in settlement proposals, also including withdrawn settlement proposals (in which case the exclusion is temporary). According to the speaker, the situation is not so unambiguous in light of domestic laws and regulations, because a Member State does not have to have in place a procedure covering settlement proposals that fits the Directive’s definition. Professor Piszcz emphasized that a Member State may have a ‘settlement’ procedure in place, the form of which does not make it possible to conclude that it in fact has ‘settlement proposals’ falling within the meaning of the Directive. The requirement to transpose the Directive into Polish law does not mean that the national lawmakers will be obliged to alter the provisions of the PCCPA that govern the Polish procedure for a voluntary submission to a fine. The Directive requires harmonization of civil law procedures, *inter alia*, to the extent of protecting settlement proposals and the disclosure of evidence in damages lawsuits. It does not require competition law to be harmonized regarding its settlement procedures. Therefore, as long as the PCCPA does not provide for settlement proposals within the meaning of Article 2(18) of the Damages Directive, it will not be possible to effectively protect information and evidence obtained under the Polish procedure for a voluntary submission to a fine in civil lawsuits with an EU element. The proposal *de lege ferenda* made by Professor Piszcz referred to the requirement to adjust Polish provisions to the EU model of evidence protection. Furthermore, in the speaker’s opinion, the Polish procedure for a voluntary submission to a fine may not be considered expedited or simplified because such procedure may only start when the UOKIK President is already familiar with the preliminary findings of the antitrust proceedings (as well as the anticipated content of the UOKIK decision, including the amount of fine that is going to be imposed upon the party).

**37.** The next paper entitled ‘Compliance programmes as an instrument of effective implementation of competition law: Stick and carrot?’ was delivered by Dr **Małgorzata Kozak** (Łazarski University). It was devoted to compliance programmes and their role in competition law compliance of undertakings. According to the speaker, compliance programmes are in between the adversarial and the negotiated model of competition law enforcement. Dr Kozak also noted the phenomenon of the European compliance culture, which she briefly described using the example of the policies of the European Commission, the French *Autorité de la Concurrence* and

Competition and the British Market Authority. In her speech, Dr Kozak also referred to the speech of the UOKIK President Adam Jasser, delivered on 24 November 2014, where he extensively addressed the role of compliance programmes from the perspective of the Polish NCA. Dr Kozak stressed that there is no uniform definition of compliance, and the way compliance programmes are understood depends on the industry. In her opinion, there is no single compliance model. Nevertheless, as a basic characteristic of compliance programmes, the speaker pointed to their voluntary and motivational nature. Ensuring compliance with competition law ought to be seen as the main objective of compliance programmes. In conclusion, she stated that despite an in-depth analysis of the possibilities of an effective application of compliance programmes, it would be difficult to create a compliance programme that takes into account all the expected features and objectives of those types of instruments. Moreover, without a clear and univocal interpretation of legal provisions, it will be hard to talk about a compliance culture in the Polish legal system.

Speaking *ad vocem*, Mrs **Szwaj** commented on Mrs Kozak's paper saying that the application of compliance programmes by undertakings should not be a matter of fashion (and if so, it should be perennial) but a matter of classics. In her opinion, a compliance programme itself, if effectively implemented, contributes to building a culture of compliance with competition law.

**38.** The last paper during that session was delivered by Dr **Antoni Bolecki** (Greenberg Traurig Grzesiak law firm) under the title 'How much room is there for negotiated law enforcement in the leniency procedure?' Dr Bolecki referred to American roots of both the leniency procedure and the model of negotiated competition law enforcement. He stressed that almost 90% of cases conducted by competition authorities in the US end in a settlement, and that the model of negotiated antitrust enforcement is considered by Americans to be the best and the most effective. According to Dr Bolecki, a Polish substitute for the model of negotiated competition law enforcement can be considered to include the commitments decision, a decision granting a voluntary submission to a fine, a decision to conditionally consent to a concentration, and also undertakings' cooperation with the competition authority within the leniency procedure. In his opinion, the possibility of negotiated competition law enforcement within the leniency procedure stems from the discretionary nature of the actions of the NCA, general provisions of the Code of Administrative Procedure and the requirement of cooperation of leniency applicants with the President of UOKIK. Dr Bolecki listed the areas that may become the subject of negotiations between the undertaking/undertakings and the NCA. Within the leniency procedure, such negotiable areas include: the scope of the presented evidence; the scope of the agreement; the amount of the fine; the evidence that the President of UOKIK can deem sufficiently credible; the issue of potential misleading of the NCA, and the consequences of such action for the undertaking, as well as negotiations concerning legal status, in particular its interpretation and which jurisprudential line to follow. The speaker emphasized that there is no room for negotiations between undertakings and the NCA concerning the legal status of other participants of the proceedings and findings concerning substantive truths – the applicant may not

negotiate with the competition authority the submission of evidence to suit a given thesis.

**39.** The session ended in a discussion where the participants of the Congress expressed their opinions about the instruments of negotiated competition law enforcement as discussed in the papers.

**40.** The last day of the Congress was devoted to the law on unfair competition, which includes in Poland primarily the already mentioned Act on Combating Unfair Competition Act (CUCA) of 1993. Also relevant are the Act against Unfair Commercial Practices of 2007 and Article 24 PACC with respect to collective consumer interests. The first session, entitled 'The multiplicity of legal remedies aimed at combating unfair competition', was chaired by Professor **Piszc**.

**41.** In his speech, Professor **Marian Kępiński** (Faculty of Law and Administration of the Adam Mickiewicz University in Poznań) analysed the relationship between the general clause contained in Article 3(1) of the Combating Unfair Competition Act (hereafter, CUCA) and specific provisions set out in the second chapter of this Act. The speaker admitted that the application of the general clause is sometimes necessary in order to classify a commercial behaviour as an act of unfair competition. However, Professor Kępiński argued that Article 3(1) CUCA is not designed to lay down additional conditions to be fulfilled in all circumstances. The speaker criticised judicial practice which undermines the role of specific provisions by requiring compliance with the conditions of Article 3(1) CUCA for no valid reason.

**42.** Professor **Ryszard Skubisz** (Maria Curie-Skłodowska University in Lublin) presented a paper entitled 'Objectives and scope of the CUCA. Dilemmas surrounding the CUCA's difficult neighbourhood with the Act against Unfair Commercial Practices'. The speaker pointed out that the implementation of Directive 2005/29/EC caused considerable difficulties in EU Member States, which traditionally adopted an integrated model of equal protection of competitors, consumers and the general public. Professor Skubisz expressed doubts whether the concept of 'good practice' introduced by the Polish legislator is in conformity with EU law. Given the principle of full harmonisation, as well as an extensive enforcement activity of the European Commission, it may prove necessary to amend the CUCA in order to remove the aforementioned discrepancy. Professor Skubisz called also for a wider reform *de lege ferenda* which would restore an integrated protection model while staying in compliance with EU law.

**43.** The issue of collective redress in cases based on the Combating Unfair Competition Act (CUCA) was dealt with by Professor **Paweł Podrecki** (Faculty of Law and Administration of the Jagiellonian University in Kraków). The speaker emphasised the difference between the protection of economic interests afforded by the CUCA and the protection of intellectual property rights. He further argued that in order to ensure that the line between these two types of protection is not blurred, claims for breaches of the CUCA must respect the general principles of civil liability, in particular its compensatory function. The speaker went on to analyse the preconditions for the admissibility of group proceedings, pointing to significant practical problems with regard to the condition of 'the same or common factual

grounds of the claim'. In conclusion, Professor Podrecki described the main benefits and risks of examining a case based on the CUCA in group proceedings while stressing the need for a careful examination whether all admissibility criteria are met.

44. Subsequently, Professor **Rafał Sikorski** (Faculty of Law and Administration of the Adam Mickiewicz University in Poznań) analysed the limitation regime for antitrust damage actions in the light of Directive 2014/104/EU and respective national provisions. The speaker presented the main policy considerations supporting and opposing different types of limitation periods. In his view, it would be advisable to make a distinction between limitation periods for stand-alone and follow-on actions. When actions are brought following a decision issued by a competition authority, a five-year limitation period set out in the Directive may prolong the proceedings unnecessarily. Other elements of the limitation regime, such as prerequisites for the starting of the limitation period and circumstances affecting its running, were assessed rather positively.

45. Professor **Monika Namysłowska** (Faculty of Law and Administration of the University of Łódź) spoke of unfair commercial practices between businesses under EU law. The author described the current EU *acquis* in the field of unfair competition, noting the limited scope of the rules applicable to unfair practices in business-to-business transactions. New developments in this field are anticipated, though, the most important of which being the draft Business Marketing Directive. The speaker noted that no regulatory actions are currently taken with regard to aggressive practices and B2B marketing practices other than misleading. It remains to be seen also whether future laws will provide for a differentiation between practices in vertical and horizontal trading relations. Professor Namysłowska stressed the need to rethink the model for assessing marketing practices between businesses and expressed the view that the introduction of new provisions at EU level may require the Polish CUCA to be repealed and a new one formulated.

46. In the last speech of this session Dr **Anna Zientara** (Institute of Legal Sciences of the Polish Academy of Sciences) analysed what sanctions can be imposed on traders involved in the organisation of prohibited consortium systems in the context of the *ne bis in idem* principle. The speaker examined legal provisions applicable to such infringers, concluding that the sanctions laid down in the PCCPA may be accompanied by further criminal sanctions under the Act against Unfair Commercial Practices, the Act on Liability of Collective Entities as well as Polish Banking law. Dr Zientara stated that in the light of the jurisprudence of the Polish Constitutional Court and the ECtHR, a financial penalty imposed under the PCCPA can be qualified as a criminal sanction. This qualification leads to the conclusion that the *ne bis in idem* principle might in fact be breached. In her concluding remarks, Dr Zientara called for the introduction of a general rule that would offer a solution to the problem of overlapping criminal and administrative liability. She further emphasised that protection should not only be granted against double punishment but also against multiple trials for the same offence.

47. The session concluded with a panel discussion opened and moderated by Professor Piszcz. First to speak was Professor **Beata Giesen** (Faculty of Law and

Administration of the University of Łódź) who expressed her reservations regarding the presentation of Professor Kępiński. The commentator argued that specific provisions of the CUCA are poorly designed and so their correct interpretation requires a reference to the general clause. In his response Professor **Kępiński** stated, that Article 3(1) CUCA may have a correcting role, however he considers this as a function of last resort. In his opinion, Article 3(1) CUCA should primarily be applied to behaviours which are unlawful or contrary to good practice, but are not regulated in the second chapter of this Act. Professor Kępiński reiterated his critical observations regarding the judicial practice of applying the general clause in order to exclude the application of specific torts, for example by requiring the trader to show his legitimate interest. According to the speaker, the trader may also act in the public interest, and the lack of interest may only be relevant to damages actions.

Subsequently, Dr **Wolski** asked Professor Sikorski whether Directive 2014/104/EU should be implemented into Polish law so as to extend the limitation period for stand-alone actions beyond the 5-year period set out in the Directive. Dr Wolski also pointed to another important aspect of the limitation regime, namely the impact onto the limitation period of the initiation of proceedings by a competition authority. Professor **Sikorski** replied that a better solution would be to shorten the limitation period for follow-on actions, but he admitted to being aware of the fact that this is an argument of a purely academic nature since the harmonisation model provided for in the Directive excludes such possibility. With regard to the second question, Professor Sikorski spoke in favour of suspending the limitation period if a competition authority takes action, claiming that an interruption could unnecessarily prolong the proceedings.

Mr **Robert Gago** (Hogan Lovells law firm) asked about the relationship between the CUCA and the PCCPA. He expressed his doubts whether the removal of ‘consumer interests’ from Article 3(1) CUCA did not, in fact, have a normative character which should have an impact on the application of PCCPA (Article 24 PCCPA states that acts of unfair competition constitute an infringement of collective consumer interests). In response, Professor **Skubisz** expressed the view that, according to current law, Article 24 PCCPA should continue to be applied to acts of unfair competition. At the same time, the speaker stressed that an expert group should be established in order to conduct a comprehensive study on this issue and propose necessary regulatory improvements.

**48.** The second session concerning the law on combating unfair competition (CUCA) was dedicated to problems of applying the prohibitions of unfair competition acts. The session was chaired by Professor **Marian Kępiński** and Professor **Ryszard Skubisz**.

**49.** The first paper in this session was presented by Dr **Łukasz Żelechowski** (Faculty of Law and Administration of the University of Warsaw) and entitled ‘Protection of distinctive signs in the law on combating unfair competition. Problems surrounding the civil law protection regime’. The speaker started with asking about the character of the protection granted to distinctive signs. He stated that the consequences of the accepted qualification constitute the starting point for a further analysis if

the principles governing the trade in distinctive signs protected by the CUCA. Dr Żelechowski continued on to discuss the term ‘distinctive signs’ and developed the issue of the potential bases of absolute subjective rights to distinctive signs. The speaker presented also essential prerequisites of protection from the perspective of the qualification of protection regime.

**50.** The next speech was delivered by Dr **Jarosław Dudzik** (Faculty of Law and Administration of the Maria Curie-Skłodowska University in Lublin). He presented a paper entitled ‘*Locus standi* on the basis of CUCA rules – current problems’. Dr Dudzik began his speech with a discussion of *locus standi* based on Article 18 CUCA and the definition of an ‘entrepreneur’. He then discussed, on the basis of existing jurisprudence, the prerequisite of the ‘participation in an economic activity’. The second part of the speech was dedicated to the status of a foreign dominant company as an entrepreneur within the meaning of Article 2 CUCA. Here, the speaker also referred to existing jurisprudence.

**51.** Dr **Edyta Całka** (Faculty of Law and Administration of the Maria Curie-Skłodowska University in Lublin) presented a speech entitled ‘Application scope of the rules contained in the Combating Unfair Competition Act concerning the protection of the geographical indication of origin’. Discussed first was the understanding of the term ‘geographical indication’, also in view of the so-called ‘average’ recipient. The speaker presented next the categories of products to which geographical indications apply, together with their specific examples as well as classification. The second part of the presentation was dedicated to the protection model for geographical indications, including the identification of the legal sources that give such protection (international, European, Polish). Dr Całka put special emphasis on the existing EU framework, discussing key sources of its secondary law and selected judgments of the CJEU.

**52.** Dr **Anna Tischner** (Faculty of Law and Administration of the Jagiellonian University in Kraków) delivered the penultimate paper of the session entitled ‘Prohibition of unfair imitation in Article 13 CUCA in light of the extensive protection given to the character of products by intellectual property rights including EU legislation’. The speaker began with the presentation of the ban referred to in Article 13 CUCA in light of the available forms of protection of the character of products in two time frames: 1) from the year of the entry into force of the CUCA; and 2) from the present perspective. She subsequently analysed the external relations of CUCA rules concerning imitations with intellectual property rights, as well as its internal relations within unfair competition law. The second part of the paper was dedicated to selected issues concerning the structure of unfair imitation, among others, related to the character of the product, a slavish imitation, or the market identity of the product.

**53.** Dr **Beata Giesen** (Faculty of Law and Administration of the University of Łódź) presented the closing speech on ‘Collecting slotting fees – a practice justified by economic freedoms or an act of unfair competition? Controversies surrounding the interpretation of Article of 15 section 1 point 4 of the Act on Combating Unfair Competition’. Presented first were issues connected with so-called ‘slotting fees’ and with long standing controversies which they have been causing. In this respect, the

speaker presented the position of the judicature and the doctrine referring to key controversies which occur in cases of Article 15 section 1 point 3 CUCA. In the second part of her speech, Dr Giesen presented her own views concerning slotting fees, referring to such issues as: the subjective scope of the ban of collecting slotting fees or the premise of ‘dishonesty’ of hindering access to the market.

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# A C T I V I T I E S       O F       C A R S

## CARS Activity Report 2013–2014

### 1. General Information

The Centre for Antitrust and Regulatory Studies (CARS) continued its regular publishing, research and educational activities in the 7<sup>th</sup> (2013) and 8<sup>th</sup> (2014) year of its existence. This was an exceptional time for CARS's evolution, which has given its activities a truly international dimension. The Academic Society for Competition Law (ASCOLA) granted CARS the privilege of organizing its 9<sup>th</sup> annual conference, which was ultimately held in June 2014 in Warsaw. Simultaneously, CARS has set up a network of academic cooperation in research on competition and pro-competitive regulation in Central and Eastern Europe and Balkans – the Competition and Regulation Academic Network Europe (CRANE - Visegrad, Balkan, Baltic, East). The year 2014 had a remarkable influence on CARS's institutional development also. On 1 October 2014, CARS received the status of an independent organizational unit subordinate to the Dean of the Faculty of Management, University of Warsaw. This was a significant institutional upgrade for CARS keeping in mind that until then, that is for the first seven years of its existence, CARS had acted solely in the form of a research group constituted of ordinary and affiliated members as well as permanent co-operators. As a result, CARS is now a fully institutionalized scientific research centre specializing in economics, competition protection and sector specific regulation.

CARS continued also to grant awards for outstanding academic monographs on the law and economics of competition protection. The 2013 CARS Award honoured Professor Dawid Miąsik (Institute of Law Studies, Polish Academy of Sciences) for his outstanding book entitled 'The interface between competition and IP laws' (Wolters Kluwer, Warsaw 2012). Dr hab. Agata Jurkowska-Gomułka received the 3<sup>rd</sup> edition of the CARS Award in 2014 for her excellent monograph on 'Public and private enforcement of prohibitions of anticompetitive practices: searching for a sustainable model' (Wyd. Naukowe Wydziału Zarządzania UW, Warsaw 2013). Both awards were once again generously funded by PKO BP, one of Poland's biggest banks.

The years 2013 and 2014 were also an active period for CARS's advisory activities. In April 2013, a specially formed CARS research team prepared a reply to the European Commission's call for input in the public consultation on its Green Paper on Unfair Trading Practices in Business-to-Business Food and Non-Food Supply Chain in Europe. In 2014, CARS prepared its first publicly available academic expertise.

CARS continued also to publish the English-language 'Yearbook of Antitrust and Regulatory Studies' (YARS) – one volume of YARS (vol. 6(8)) was released in 2013 and two volumes in 2014 (vol. 7(9) and 7(10)). In addition, CARS published also the Polish-language journal – 'internetowy Kwartalnik Antymonopolowy i Regulacyjny, iKAR ('internet Quarterly on Antitrust and Regulation'). Overall, three volumes of YARS and nine volumes of iKAR were published between 2013 and 2014. Five new publications were also added in 2013 to the CARS Publishing Series 'Antitrust and Regulatory Monographs and Textbooks'.

2013 and 2014 saw CARS organizing two national conferences as well as the international 9<sup>th</sup> Annual ASCOLA Conference Warsaw 2014. CARS arranged two workshops in 2013, held its first two 'guest lectures' and three sessions of the Open PhD Seminar (2013-2014). A Regulatory Student Workshop series was held in 2014.

Importantly, CARS signed a cooperation agreement in 2014 with the Office of Competition and Consumer Protection (UOKiK).

## 2. Research and academic expertise

In April 2013, CARS submitted to the European Commission a written position prepared by a specially formed CARS Working Group within the public consultation process on the Green Paper on Unfair Trading Practices in Business-to-Business Food and Non-Food Supply Chain in Europe. The Working Group was headed by Professor Tadeusz Skoczny and included researchers from the Faculty of Management as well as representatives of suppliers and retail chains. The answers of the CARS Working Group to the Commission's questionnaire are accessible via its website (<http://www.cars.wz.uw.edu.pl/tresc/doradztwo/08/Responses.pdf>).

CARS's advisory activities had a two-fold character in 2014. First, CARS prepared a scientific expertise entitled 'Legal and economic analysis of the insurance clause in mortgage agreements requiring a small deposit' commissioned by one of Poland's banks. The paper is available on the CARS website ([www.cars.wz.uw.edu.pl](http://www.cars.wz.uw.edu.pl)). The main goal of the expertise was to address the question whether the typical insurance clause contained in mortgages that require only a small deposit (a low 'down payment') has an economic and regulatory justification or whether it could be considered a potentially illegal clause in the light of Article 385<sup>1</sup> of the Polish Civil Code – a so-called abusive clause.

In terms of its advisory activity, CARS prepared also two separate lists of academic journals which publish papers on, respectively, competition protection and on sector-specific regulation ([www.cars.wz.uw.edu.pl/doradztwo-12.html](http://www.cars.wz.uw.edu.pl/doradztwo-12.html)). The lists are intended to help CARS members (as well as other individuals, such as young academic employees, PhD candidates and practitioners) choose the academic journal best suited to their publication needs – offering them a wide spectrum of readers and a high number of points.

### 3. Publications

#### 3.1. Yearbook of Antitrust and Regulatory Studies (YARS) [www.yars.wz.uw.edu.pl](http://www.yars.wz.uw.edu.pl)

The 8<sup>th</sup> volume of YARS (YARS 2013, vol. 6(8)) is characterised by its wide geographical scope – it presents competition protection and sectorial regulation discussed not only from the Polish, but also Central-Eastern European and Balkan perspective. Contributions written by foreign authors largely outweighed Polish papers. YARS 2013, vol. 6(8) contains: six articles related to the issue of competition protection in Poland, Slovenia, Estonia, Serbia, Bosnia and Hercegovina, and Hungary; six overviews of legislation and jurisprudence related to competition protection in countries such as Poland, Czech, Hungary, Slovenia, Macedonia; three case comments to Polish, Slovak and Czech jurisprudence; two book reviews – one Polish and one Serbian; CARS's annual report for 2012; as well as an antitrust and regulatory bibliography for 2012 based on publications from Poland, Czech, Slovakia, Hungary, Estonia, Macedonia and Croatia.

The 9<sup>th</sup> volume of YARS (YARS 2014, vol. 7(9)) was prepared in order to commemorate the 10<sup>th</sup> anniversary of the 2004 EU accession of ten new Member States deriving, among others, from the Central-Eastern European region. This volume contains contributions from authors originating in the Czech Republic, Moldova, Poland, Slovakia and Hungary. The 10<sup>th</sup> volume of YARS, the 2<sup>nd</sup> of 2014 (vol. 7(10)), constitutes a special issue. It contains selected papers presented during the 'Competition Policy Workshop' organized within the 9<sup>th</sup> Annual ASCOLA Conference Warsaw 2014.

#### 3.2. Internet Quarterly on Antitrust and Regulation (*internetowy Kwartalnik Antymonopolowy i Regulacyjny, iKAR*) [www.ikar.wz.uw.edu.pl](http://www.ikar.wz.uw.edu.pl)

The recognisability of iKAR as an antitrust and regulatory journal has increased substantially since 2013 strengthening its position on the Polish market of academic journals. Eight separate volumes of iKAR were published in 2013 – four were 'general' in nature containing articles on a variety of topics within the competition protection and sector specific regulation fields (nr 1(2), 3(2), 5(2), 6(2)). The remaining four volumes were specialised – one was dedicated to the topic of 'slotting allowances' (nr 2(2)), the three remaining focused on regulated sectors: rail transport (vol. 4(2)) and telecommunications (vol. 7(2) and 8(2)).

The year 2014 was very productive also. Out of the nine volumes of iKAR published in 2014 overall, four were general in nature (volumes 1(3), 3(3), 6(3), 9(3)). The remaining five volumes were once again specialised: volume 4(3) was dedicated solely to the issue of consumer protection; the remaining three dealt with specific regulated sectors: post (nr 2(3)), finance (nr 5(3)), rail transport (nr 7(3)) and telecommunications (nr 8(3)).

### **3.3. Monographs and research reports**

#### **3.3.1. 'Exchange of Information among competitors in the assessment of competition protection authorities' (ISBN: 978-83-63962-18-0)**

This monograph written by Antoni Bolecki constitutes the 11<sup>th</sup> position in the CARS Textbooks and Monographs Publishing Series. It contains a legal and economic analysis of one of the most interesting economic phenomena in the competition protection field – information exchange between entrepreneurs. The author presents therein the forms and methods of information exchange as well as the scope of information available to other entrepreneurs, competitors in particular. The analysis of the character of the exchanged information, and the method of its exchange, leads to the assessment of the influence of entrepreneurs' behaviours on competition. The conclusions are presented in relation to Polish and European jurisprudential and case law practice concerning the information exchange process. The author concludes the book by providing business managers with some practical guidelines on the provision of safe information flow between competitors (adopting the perspective of competition protection rules).

#### **3.3.2. 'Private and public enforcement of prohibitions of practices restricting competition' (ISBN: 978-83-63962-23-4)**

The 12<sup>th</sup> position of the CARS Textbooks and Monographs Publishing Series is written by Agata Jurkowska-Gomułka. The book focuses on the correlation between two competition law enforcement modes. The author shows interdependent relations between the two modes in the area of the interests pursued by each of the two manners of implementing the prohibitions placed on restrictive practices, proving a violation of these prohibitions, as well as the mutual impact of verdicts and sanctions used in both modes. One of the most important conclusions drawn by the author implies that it is not possible to ensure complete equality of the two enforcement modes, as this would weaken the overall enforcement system. Nonetheless, it is possible and desirable to create a sustainable model, which would ensure the optimal effectiveness of both, the two modes of enforcing competition rules as well as of the system as a whole. This book was honoured by the CARS Award of 2013.

#### **3.3.3. 'Polish Airports in the European Union – Competitive Challenges, Regulatory Requirements and Development Perspectives' (ISBN: 978-83-63962-25-8)**

The 13<sup>th</sup> book in the CARS Textbooks and Monographs Publishing Series provides a compilation of updated articles published previously (in Polish) in the form of two volumes edited by Filip Czernicki and Professor Tadeusz Skoczny. The included articles provide an overview of a research project on competition and regulatory issues related to airport activities undertaken by the employees of the Faculty of

Management, University of Warsaw and the employees of the State Enterprise ‘Polish Airports’ (Przedsiębiorstwo Państwowe ‘Porty Lotnicze’).

**3.3.4. ‘Judicial control of the decisions of the President of the Office of Electronic Communications’ (ISBN: 978978-83-63962-45-6)**

The 14<sup>th</sup> position in the CARS Textbooks and Monographs Publishing Series is authored by Mateusz Chołodecki, PhD. It presents the model of judicial control exercised over the decisions taken by the President of the Office of Electronic Communications (the National Regulatory Authority responsible for the Polish telecommunications sector). The author analyses the legal basis of the judicial control model used in order to assess its homogeneity and to identify significant differences between the two judicial control methods (control by administrative courts and by the Court of Competition and Consumer Protection) applied within this model. The author makes an attempt at defining the concept of a regulatory decision taken by the Polish Telecoms NRA.

**3.3.5. ‘Telecommunications Regulation in Poland’ (ISBN: 978-83-63962-48-7)**

The end of the 2013 was marked by the release of a book edited by Professor Stanisław Piątek. This publication compiles a variety of articles dedicated to the evolution of Polish law and regulatory practices in the telecommunications sector. EU regulatory frameworks for telecommunications form the reference point for the various analyses made in this book. Most of the papers go further than just discussing the areas of complete, or incomplete compatibility of national provisions with EU law. They also identify and analyse the legal solutions, which in the light of EU law had to be accepted in Poland because of the specificity of the national telecommunications sector.

## **4. Conferences and workshops**

### **4.1. National conferences**

#### **4.1.1. ‘Slotting fees. Necessity for amending regulations or their interpretation?’**

A conference dedicated to the regulation of so-called ‘slotting fees’ was held on 19 March 2014 at the Faculty of Management, University of Warsaw. An introductory speech was delivered by Maciej Bernatt, PhD (Faculty of Management, University of Warsaw). The conference programme covered two panels. The first panel was moderated by Professor Tadeusz Skoczny (Faculty of Management, University of Warsaw); it was entitled ‘What is “an unfair competition practice” defined in Art. 15(1)(4) of the Act on Combating Unfair Competition?’. Professor Adam Noga

(Leon Koźmiński Academy, Warsaw) moderated the second panel entitled ‘Where does the problem lie: in not making things difficult or in the lack of equivalence? Economic problems related to the application of Art.15(1)(4) of the Act on Combating Unfair Competition’.

The conference was primarily attended by business representative. Papers based on speeches delivered during this conference were published in iKAR 2013, vol. 2(2).

#### **4.1.2. Impact of European law on Polish competition law and sector specific regulation**

CARS organised a conference focusing on the ‘Impact of European law on Polish competition law and sector specific regulation’. The conference was held on 21 May 2014 in order to commemorate the 10<sup>th</sup> anniversary of Poland’s accession to the European Union. The goal of the conference was to discuss the most interesting aspects of the impact that EU law has on Polish competition law and sector specific regulation.

The conference was attended by 78 participants, both practitioners and academics representing 10 different research institutions.

#### **4.2. International conference**

CARS organized the 9<sup>th</sup> Annual ASCOLA Conference Warsaw 2014 held on 26-28 June 2014 in Warsaw – it was the event of the year in the field of competition protection in Poland. The conference was organized by CARS at the request of the ASCOLA Board ([www.ASCOLA-conference-warsaw.2014.wz.uw.edu.pl](http://www.ASCOLA-conference-warsaw.2014.wz.uw.edu.pl)). The conference focused on the topic of ‘Procedural fairness in competition proceedings’. Its programme contained four plenary sessions and a ‘Competition Policy Workshop’.

The conference was attended by 84 participants from as many as 5 different continents, 18 countries, representing 23 universities as well as a large group of invited guests. The post-conference materials were published in the book ‘Procedural Fairness in Competition Proceedings’ edited by Paul Nihoul and Tadeusz Skoczny released in 2015 by Edward Edgar Publishing as a part of its ‘ASCOLA Competition Law series’. Selected papers presented during the ‘Competition Policy Workshop’ were published in YARS 2014, vol. 7(10).

#### **4.3. Workshops**

##### **4.3.1. ‘Current problems of restricting the right to access files in proceedings before the Court of Competition and Consumer Protection (SOKiK)’**

This workshop held on 16 April 2013 was inspired by two separate orders issued by the Polish Court of Competition and Consumer Protection (SOKiK) in January and March 2013 (XVII AmA 112/12 i XVII AmA 113/12). An introductory speech was delivered by the President of SOKiK, Judge Andrzej Turliński. The workshop was attended by a large number of lawyers.

#### **4.3.2. ‘The application of the prohibition of competition restricting agreements to agency agreements’**

The workshop held on 20 June 2013 was inspired by practitioners facing major problems and expressing doubts about the antitrust assessment of agency agreements. Grzegorz Materna, PhD (Institute of Law Studies, Polish Academy of Sciences) delivered an introductory speech. His presentation focused primarily on the interpretation of Polish rules (contained in the Polish Competition and Consumer Protection Act (PCCPA) and in the Polish Regulation on the Block Exemption of Vertical Agreements from the Prohibition of Agreements Restricting Competition) meant to identify the category of agency agreements which is subjected to an assessment based on competition rules. In the following discussion, participants focused on differences in defining agency agreements in Polish and EU law as well as on the difference between the definition of agency agreements provided by competition and civil law.

#### **4.4. Guest lectures**

In 2013, CARS organized three guest lectures. On 1 March 2013, Eduardo Pereira (STR Holding, Managing Director & Chief Legal Officer) delivered a speech entitled ‘International Upstream Investments: Legal Framework’. On 22 May 2013, Zbigniew Grycan (the President of the supervisory board of the company ‘Grycan - Lody od Pokoleń’) delivered a speech on ‘How to achieve success on a competitive market?’ The 3<sup>rd</sup> guest lecture was delivered by Professor Andrzej Wróbel, Judge of the Polish Constitutional Tribunal, during the ceremony for the CARS Award 2012 which took place on 6 June 2013. The lecture focused on ‘EU freedoms and fundamental rights after the Lisbon Treaty’.

### **5. Open PhD Seminar**

#### **5.1. ‘Competition and financial stability in the banking industry. The interplay between sector regulation and competition policy’**

The 16<sup>th</sup> meeting of the CARS Open PhD Seminar took place on 24 October 2013. Wojciech Podlasin, PhD candidate (Faculty of Management, University of Warsaw) presented therein the concept of his PhD thesis dedicated to the relations between competition on markets for financial services and the financial stability of banks. Key problems pointed out by the speaker concerned the need for an active role of banking sector regulation in supporting competition on the market for financial services. The speaker considered also the role of competition policy measures as an effective complement for prudential regulation. Noted was also the possibility of coordinating the regulation of the banking sector and competition policy in order to improve consumer welfare and increase the stability of the financial system. Problems

raised by the speaker were discussed by Professor Marcin Olszak (European Centre, University of Warsaw), the Director of the Legal Department of the Polish Financial Supervision Authority.

### **5.2. 'Protection of collective consumer interests – the prohibition of practices infringing the collective interests of consumers'**

The 17<sup>th</sup> CARS Open PhD Seminar was held on 12 December 2013. Izabela Wesołowska, PhD candidate from the Faculty of Law, University of Łódź, presented therein the concept of her PhD thesis dedicated to the protection of the collective interests of consumers. The speaker raised the problem of the compatibility of Polish rules on collective interests of consumers with Directive 2009/22/EC as well as with international and constitutional standards. The speaker considered also the effectiveness of the protection system of collective consumer interests and the question of safeguarding the protection of such interests by the President of the Office of Competition and Consumer Protection. The presentation was discussed by Professor Bożena Popowska (Faculty of Law, Adam Mickiewicz University in Poznań) and Professor Kazimierz Strzyczkowski (Faculty of Law, University of Łódź).

### **5.3. 'Single economic unit in Polish and European competition law'**

This Open PhD Seminar took place on 10 March 2014. The presentation given by Piotr Semeniuk, as well as the following discussion, was dedicated to key aspects related to the concept of a single economic unit in Polish and European competition law. This issue plays a crucial role at different stages of competition law application. It is related to notions of 'control' and 'corporate group' in merger control rules, it leads to the exemption of some types of agreements (e.g. agency agreements, employee agreements and others agreements 'within the framework' of a single economic unit) from the rules on restrictive agreements, and it can be related to assigning responsibility for a competition law infringement.

## **6. Student Regulatory Workshops**

On the basis of a student initiative, a series of Student Regulatory Workshops took place at CARS between February and May 2014. The workshops attracted 24 students from the Faculty of Law, Faculty of Economics and the Faculty of Management. During the workshops, students were able to meet specialists in sector specific regulation relating to telecommunications, audiovisual media, rail and air transport, energy, financial services and the pharmaceutical sector. Participating students were divided into groups of no larger than 12 and had the meetings had a primarily discursive character.

## **7. Agreement between CARS and the Office of Competition and Consumer Protection**

In order to continue expanding the network of agreements concluded by CARS with public authorities responsible for competition protection and sector specific regulation, CARS signed on 5 May 2014 a cooperation agreement with the Office of Competition and Consumer Protection. The agreement envisages extensive cooperation in terms of research, publications and organization of conferences between CARS and Polish National Competition Authority.

Warsaw, 2015

*Agata Jurkowska-Gomulka  
Tadeusz Skoczny*



# REVIEWERS OF YARS IN 2015

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**Ondrej Blazo** (PhD, Comenius University in Bratislava, Slovakia)  
**Nina Bučan Gutta** (PhD, Radboud University, Netherlands)  
**Mateusz Choledecki** (PhD, Adam Mickiewicz University in Poznań, Poland)  
**Andrej Fatur** (PhD, Law Firm Fatur, Ljubljana, Slovenia)  
**Miguel Sousa Ferro** (Prof., University of Lisbon, Portugal)  
**Vano Gogelia** (Senior Associate, Ernst & Young, Georgia)  
**Jaunius Gumbis** (Doc. Dr., Faculty of Law, Vilnius University, Lithuania)  
**Marius Juonys** (PhD, lecturer, Faculty of Law, Vilnius University, Partner of Valiunas Ellex, Lithuania)  
**Mirta Kapural** (Dr.sc., Croatian Competition Agency)  
**Konrad Kohutek** (Dr. Hab., Prof. of Andrzej Frycz-Modrzewski Cracow Academy, Poland)  
**Krystyna Kowalik-Bańczyk** (Dr. Hab., Prof. of Polish Academy of Sciences, Warsaw, Poland)  
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**Daniela Lukáčová** (Antimonopoly Office of the Slovak Republic, Slovakia)  
**Dina Lurje** (Competition Council of the Republic of Lithuania, Vilnius University)  
**Jurgita Malinauskaite** (PhD, Brunel University London, United Kingdom)  
**Marek Martyniszyn** (PhD, Queen's University Belfast, United Kingdom)  
**Solomon Menabdishvili** (Tbilisi State University, Georgia)  
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**Barry Rodger** (Prof., University of Strathclyde, United Kingdom)  
**Karin Sein** (PhD, University of Tartu, Estonia)  
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**Maciej Szpunar** (Advocate General at the Court of Justice of the European Union, Dr. Hab., Prof. of University of Silesia in Katowice, Poland)  
**Evelina Uogintaite** (Competition Council of the Republic of Lithuania)

**Steven Van Uytsel** (Prof., Kyushu University, Japan)

**Vigita Vebraite** (PhD, Vilnius University, Lithuania)

**Louis Visscher** (Prof., Rotterdam Institute of Law and Economics, Netherlands)

**Bojana Vrcek** (PhD, European Commission, DG Comp)

# ARTICLES IN YARS 2008–2015

## YEARBOOK OF ANTITRUST AND REGULATORY STUDIES VOL. 2015, 8(11)

ZURAB GVELESIANI, **Need for Competition Law – Universal or the First World Problem? Discussing the case of Georgia**

RAJMUNDAS MOJSEJEVAS, **Developments of Private Enforcement of Competition Law in Lithuania**

MACIEJ GAC, **Individuals and the Enforcement of Competition Law – Recent Development of Private Enforcement Doctrine in Polish and European Antitrust Law**

MARCIN KULESZA, **Leniency – the Polish Programme and the Semi-formal Harmonisation in the EU by the European Competition Network**

ORHAN ÇEKU, **Competition Law in Kosovo: Problems and Challenges**

ERMAL NAZIFI, PETRINA BROKA, **10 Years of Albanian Competition Law in Review**

EWA M. KWIATKOWSKA, **Economic Determinants of Regulatory Decisions in the Telecommunications sector in Poland**

**YEARBOOK OF ANTITRUST AND REGULATORY STUDIES**  
**VOL. 2014, 7(10)**

- ELSBETH BEUMER, **The Interaction between EU Competition Law Procedures and Fundamental Rights Protection: the Case of the Right to Be Heard**
- PIERLUIGI CONGEDO, **The “Regulatory Authority Dixit” Defence in European Competition Law Enforcement**
- ANTON DINEV, **The Effects of Antitrust Enforcement Decisions in the EU**
- SHUYA HAYASHI, **A Study on the 2013 Amendment to the Antimonopoly Act of Japan – Procedural Fairness under the Japanese Antimonopoly Act**
- MARIATERESA MAGGIOLINO, **Plausibility, Facts and Economics in Antitrust Law**
- MARTA MICHAŁEK, **Fishing Expeditions and Subsequent Electronic Searches in the Light of the Principle of Proportionality of Inspections in Competition Law Cases in Europe**
- KASTURI MOODALIYAR, **Access to Leniency Documents: Should Cartel Leniency Applicants Pay the Price for Damages?**
- LORENZO PACE, **The Parent-subsidiary Relationship in EU Antitrust Law and the AEG Telefunken Presumption: Between the Effectiveness of Competition Law and the Protection of Fundamental Rights**
- SOFIA OLIVEIRA PAIS, ANNA PISZCZ, **Package on Actions for Damages Based on Breaches of EU Competition Rules: Can One Size Fit All?**
- EWELINA D. SAGE, **Increasing Use of “Negotiated” Instruments of European Competition Law Enforcement towards Foreign Companies**
- KSENIYA SMYRNOVA, **Enforcement of Competition Rules in the Association Agreement between the EU & Ukraine**
- SIH YULIANA WAHYUNINGTYAS, **Challenges in Combating Cartels, 14 Years after the Enactment of Indonesian Competition Law**

## **YEARBOOK OF ANTITRUST AND REGULATORY STUDIES**

### **VOL. 2013, 7(9)**

- JOSEF BEJČEK, European Courts as Value-Harmonizing “Motors of Integration”**  
**KATI CSERES, Accession to the EU’s Competition Law Regime: A Law and Governance Approach**  
**ALEXANDR SVETLICINII, Enforcement of EU Competition Rules in Estonia: Substantive Convergence and Procedural Divergence**  
**RIMANTAS ANTANAS STANIKUNAS, ARUNAS BURINSKAS, The Impact of EU Competition Rules on Lithuanian Competition Law**  
**ONDREJ BLAŽO, Twenty Years of Harmonisation and Still Divergent: Development of Slovak Competition Law**  
**BARBORA KRÁLIČKOVÁ, Ten Years in the European Union – Selected Remarks Related to the Harmonisation of Slovak Competition Law with EU Competition Law**  
**KRYSTYNA KOWALIK-BAŃCZYK, Ways of Harmonising Polish Competition Law with the Competition Law of the EU**  
**ANNA LASZCZYK, Forgotten Issues When Talking about the More Economic Approach to Competition Law in Poland**  
**PIOTR SITAREK, The Impact of EU Law on a National Competition Authority’s Leniency Programme – the Case of Poland**

## **YEARBOOK OF ANTITRUST AND REGULATORY STUDIES**

### **VOL. 2013, 6(8)**

- ALEXANDR SVETLICINII, Expanding the Definitions of ‘Undertaking’ and ‘Economic Activity’: Application of Competition Rules to the Actions of State Institutions in Bosnia and Herzegovina**  
**DUSAN POPOVIC, Competition Law Enforcement in Times of Crisis: the Case of Serbia**  
**CSONGOR ISTVÁN NAGY, A Chicago-School Island in the Ordo-liberal Sea? The Hungarian Competition Office’s Relaxed Treatment of Abuse of Dominant Position Cases**  
**MAJA BRKAN, TANJA BRATINA, Private Enforcement of Competition Law in Slovenia: A New Field to Be Developed by Slovenian Courts**  
**AGATA JURKOWSKA-GOMUŁKA, Private Enforcement of Competition Law in Polish Courts: The Story of an (Almost) Lost Hope for Development**  
**KARIN SEIN, Private Enforcement of Competition Law – the Case of Estonia**

## YEARBOOK OF ANTITRUST AND REGULATORY STUDIES

### VOL. 2012, 5(7)

- JASMINKA PECOTIĆ KAUFMAN, **How to Facilitate Damage Claims? Private Enforcement of Competition Rules in Croatia – Domestic and EU Law Perspective**
- ANNA PISZCZ, **Still-unpopular Sanctions: Developments in Private Antitrust Enforcement in Poland After the 2008 White Paper**
- ONDREJ BLAZO, **What Do Limitation Periods for Sanctions in Antitrust Matters Really Limit?**
- SILVIA ŠRAMELOVÁ, ANDREA ŠUPÁKOVÁ, **Development of the Judicial Review of the Decisions of the Antimonopoly Office of the Slovak Republic**
- DILYARA BAKHTIEVA, KAMIL KILJAŃSKI, **Universal Service Obligation and Loyalty Effects: An Agent-Based Modelling Approach**
- MAGDALENA OLENDER-SKOREK, **To Regulate Or Not to Regulate? – Economic Approach to Indefeasible Right of Use (IRU)**

## YEARBOOK OF ANTITRUST AND REGULATORY STUDIES

### VOL. 2012, 5(6)

- MAŁOZATA KRÓL-BOGOMILSKA, **Standards of Entrepreneur Rights in Competition Proceedings a Matter of Administrative or Criminal Law?**
- ANNA BŁACHNIO-PARZYCH, **The Nature of Responsibility of an Undertaking in Antitrust Proceedings and the Concept of ‘Criminal Charge’ in the Jurisprudence of the European Court of Human Rights**
- ALEKSANDER STAWICKI, **Competence of Common Courts in Poland in Competition Matters**
- RAFAŁ STANKIEWICZ, **The Scope of Application of the Provisions of the Administrative Procedure Code in Competition Enforcement Proceedings**
- MACIEJ BERNATT, **Can the Right To Be Heard Be Respected without Access to Information about the Proceedings? Deficiencies of National Competition Procedure**
- PRZEMYSŁAW ROSIAK, **The *ne bis in idem* Principle in Proceedings Related to Anti-Competitive Agreements in EU Competition Law**
- MATEUSZ BŁACHUCKI, SONIA JÓZWIAK, **Exchange of Information and Evidence between Competition Authorities and Entrepreneurs’ Rights**
- INGA KAWKA, **Rights of an Undertaking in Proceedings Regarding Commitment Decisions under Article 9 of Regulation No. 1/2003**
- BARTOSZ TURNO, AGATA ZAWŁOCKA-TURNO, **Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is It Time for a Substantial Change?**
- KRYSTYNA KOWALIK-BAŃCZYK, **Procedural Autonomy of Member States and the EU Rights of Defence in Antitrust Proceedings**
- MARIUSZ BARAN, ADAM DONIEC, **EU Courts’ Jurisdiction over and Review of Decisions Imposing Fines in EU Competition Law**
- JAN SZCZODROWSKI, **Standard of Judicial Review of Merger Decisions Concerning Oligopolistic Markets**

## **YEARBOOK OF ANTITRUST AND REGULATORY STUDIES**

### **VOL. 2011, 4(5)**

- ANNA FORMALCZYK, **Competition Protection and Philip Kotler's Strategic Recommendations**  
ANTONI BOLECKI, **Polish Antitrust Experience with Hub-and-Spoke Conspiracies**  
MACIEJ BERNATT, **The Powers of Inspection of Polish Competition Authority. The Question of Proportionality**  
KONRAD STOLARSKI, **Fines for Failure to Cooperate within Antitrust Proceedings – the Ultimate Weapon for Antitrust Authorities?**  
ŁUKASZ GRZEJDZIAK, **Mr Hoefner, Mr Elser, Please Welcome to Poland. Some Comments on the Polish Healthcare System Reform from the Perspective of State Aid Law**  
MARLENA WACH, **Polish Telecom Regulator's Decisions Regarding Mobile Termination Rates and the Standpoint of the European Commission**  
MICHAŁ WOLAŃSKI, **Estimation of Losses Due to the Existence of Monopolies in Urban Bus Transport in Poland**

## **YEARBOOK OF ANTITRUST AND REGULATORY STUDIES**

### **VOL. 2011, 4(4)**

#### **ARTICLES**

- BARTŁOMIEJ NOWAK, **Paweł Grzejszczak, Poland's Energy Security in the Context of the EU's Common Energy Policy. The Case of the Gas Sector**  
ALEKSANDER STAWICKI, **The Autonomy of Sector-Specific Regulation – Is It Still Worth Protecting? Further Thoughts on the Parallel Application of Competition Law and Regulatory Instruments**  
FILIP M. ELŻANOWSKI, **The Duties of the President of the Polish Energy Regulatory Office in the Context of the Implementing the Third Energy Package**  
MARZENA CZARNECKA, TOMASZ OGŁÓDEK, **The Energy Tariff System and Development of Competition in the Scope of Polish Energy Law**  
MARIA MORDWA, **The Obligation of Strategic Gas Storage Introduced in Poland as an Example of a Public Service Obligation Relating to Supply Security: A Question of Compliance with European Law**  
MARCIN STOCZKIEWICZ, **The Emission Trading Scheme in Polish law. Selected Problems Related to the Scope of Derogation from the Auctioning General Rule in Poland**  
JANUSZ LEWANDOWSKI, **Cutting Emissions in the Energy Sector: a Technological and Regulatory Perspective**  
ANDRZEJ T. SZABLEWSKI, **The Need for Revaluation of the Model Structure for Electricity Liberalization**  
TADEUSZ SKOCZNY, **Consolidation of the Polish Electricity Sector. Perspective of Preventive Control of Concentrations**

**YEARBOOK OF ANTITRUST AND REGULATORY STUDIES**  
**VOL. 2010, 3(3)**

- DAWID MIĄSIK, *Solvents to the Rescue – a Historical Outline of the Impact of EU Law on the Application of Polish Competition Law by Polish Courts*
- MARCIN KOLASIŃSKI, *Influence of General Principles of Community Law on the Polish Antitrust Procedure*
- MACIEJ BERNATT, *Right to Be Heard or Protection of Confidential Information? Competing Guarantees of Procedural Fairness in Proceedings Before the Polish Competition Authority*
- TOMASZ KOZIEŁ, *Commitments decisions under the Polish Competition Act – Enforcement Practice and Future Perspectives*
- KONRAD KOHUTEK, *Impact of the New Approach to Article 102 TFEU on the Enforcement of the Polish Prohibition of Dominant Position Abuse*
- JAROSŁAW SROCZYŃSKI, *Permissibility of Exclusive Transactions: Few Remarks in the Context of Media Rights Exploitation*
- EWELINA D. SAGE, *Who Controls Polish Transmission Masts? At the Intersection of Antitrust and Regulation*
- MARCIN KRÓL, *Liberalization without a Regulator. The Rail Freight Transport Market in Poland in the Years 1996-2009*

**YEARBOOK OF ANTITRUST AND REGULATORY STUDIES**  
**VOL. 2009 2(2)**

- OLEŚ ANDRIYCHUK, *Does Competition Matter? An Attempt of Analytical ‘Unbundling’ of Competition from Consumer Welfare*
- ANNA FORMALCZYK, *Economic Approach to Counteracting Cartels*
- RAJMUND MOLSKI, *Polish Antitrust Law in its Fight Against Cartels – Awaiting a Breakthrough*
- PAWEŁ PODRECKI, *Civil Law Actions in the Context of Competition Restricting Practices under Polish Law*
- EWELINA RUMAK, PIOTR SITAREK, *Polish Leniency Programme and its Intersection with Private Enforcement of Competition Law*
- KATARZYNA TOSZA, *Payment Card Systems as an Example of Two-sided Markets – a Challenge for Antitrust Authorities*
- BARTŁOMIEJ NOWAK, *Challenges of Liberalisation. The Case of Polish Electricity and Gas Sectors*
- MARCIN KRÓL, *Benefits and Costs of Vertical Separation in Network Industries. The Case of Railway Transport in the European Environment*

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**YEARBOOK OF ANTITRUST AND REGULATORY STUDIES**  
**VOL. 2008, 1(1)**

**ARTICLES**

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VOL. 2015, 8(12)

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