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COMPENSATORY DAMAGES FROM THE VIEWPOINT OF THE COMPETITION LAW IN THE EUROPEAN UNION AND THE REPUBLIC OF NORTH MACEDONIA

In his paper the author first gives a brief review of the EU competition law development especially in terms of its enforcement. When speaking about enforcement, the importance of distinguishing between the private versus public enforcement is emphasized. Special focus is given to the legal framework preceding the adoption of the 2014 Damages Directive. The 2014 Damages Directive is analyzed in more details since it provides for legal possibility individual redress for infringement of the basic EU competition rules to be sought in front of the national courts of the Member States. The legal obstacles to private enforcement of the 2014 Damages Directive are elaborated in a separate part of the paper. Finally, short overview of the state of play of the existing relevant Macedonian legislation is given, including potential paths for its reform.

Key words: compensatory damages, competition law, private enforcement of competition law, public enforcement of competition law, competition law infringement

INTRODUCTION

Protection of the principle of free competition is one of the core principles on which the European Union is founded. The principle of free competition is treasured in the founding agreements of the EU. Hence, Articles 85 and 86 of the Rome

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Agreement explicitly prohibits agreements that restrict and impede free competition, as well as actions that abuse the dominant market position. These provisions are also transposed into the Treaty of Lisbon, as a consolidated version of the Treaty on the Functioning of the European Union and the Treaty on European Union.

However, in practice there are many cases where companies driven by the intention to generate more profits, often try to circumvent the quite strict rules of the free market protection. By doing this, those undertakings can cause harm either to the public or the private interest. Thus, one of the main roles of the EU competition law is to deal with such situations and provide for adequate redress to the victims of such anticompetitive behavior.

COMPETITION LAW WITHIN THE EUROPEAN UNION

The Treaty on the Functioning of the European Union (hereinafter: “TFEU”) as part of the Treaty of Lisbon, explicitly provides that the free movement of goods, services, persons and capital (known as the four freedoms of the EU) is ensured in the domestic market.¹ In this regard, the TFEU provides for a ban on any quantitative restriction on imports² and exports³ between Member States.

The main provisions for the prevention of unfair competition and antitrust law within the European Union are Articles 101 and 102 of the TFEU.

Article 101(1) of the TFEU prohibits any agreements between undertakings, decisions made by associations of undertakings, or concerted practices affecting trade between EU countries which could prevent, restrict or distort competition.

Any agreements or decisions prohibited pursuant to this Article shall be automatically void, unless it has not been proven that such agreements contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.⁴

Article 102 of the TFEU, on the other hand, prohibits abusive conduct by companies that have a dominant position on a particular market.⁵

Bearing in mind the specific nature of the European Union, the question arises as to which body is responsible for supervision i.e. the implementation of the

¹ Consolidated version of the Treaty on the Functioning of the European Union (TFEU), *Official Journal of the European Communities* 326, 2012, art 26.

² *Ibidem*, Article 34.

³ *Ibidem*, Article 35.

⁴ *Ibidem*, Article 101(3).

⁵ *Ibidem*, Article 102.

provisions of the applicable legal regulations. The exclusive power to implement and to enforce the competition law provisions is granted to the European Commission, specifically to the Directorate General for Competition.

What does private enforcement of EU competition law mean?

As mentioned above, the EU antitrust law refers to the prohibition of cartels and other restrictive agreements and the prohibition of abuse of a dominant position contained in TFEU.

The EEC Treaty, the EC Treaty and the TFEU for a long time have been silent on the question as of whether private rights of action for damages or injunctions must follow from a violation of the EU competition law rules.

Private enforcement refers to the use of Articles 101 and 102 TFEU in litigation between private parties in the courts of the EU Member States, as opposed to public enforcement which is conducted by competition authorities.

Three types of private enforcement can be distinguished: first, Articles 101 and 102 TFEU may be used as a “shield”, that is as a defense against a contractual claim for performance or for damages because of non-performance or against some other claim; second, Articles 101 and 102 TFEU may be used offensively, as a “sword”, as a basis for claims for injunctive relief, including interim relief⁶ and, third, Articles 101 and 102 TFEU may be used offensively, as a “sword”, as a basis for claims for damages.⁷

Private actions may be brought concerning alleged infringements that neither are nor have been the object of public enforcement proceedings (stand-alone actions⁸).

Private actions may also run in parallel with or follow upon public enforcement proceedings concerning the same alleged infringement (follow-on actions⁹).

⁶ A private party may bring a complaint concerning an alleged antitrust infringement before a competition authority and, while the authority is investigating the complaint or once the authority has opened proceedings with a view to adopting a prohibition decision, the complainant may in a private action request interim relief pending the outcome of the public enforcement proceedings. See: Wouter P. J. Wils, “Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future”, *World Competition: Law and Economics Review*, Vol. 40, No. 1, 2017, 3-46.

⁷ See: W. Wouter P. J. *Ibidem*.

⁸ Actions for damages that do not directly rely on a finding of infringement made in public enforcement proceedings are considered to be stand-alone actions for damages. Such stand-alone actions may however be related in a less direct way with public enforcement proceedings. See: *Ibidem*.

⁹ After a competition authority has concluded its proceedings with the finding of an infringement of Article 101 or Article 102 TFEU, private parties may bring an action for damages

Public vs. private enforcement of the competition law

In order to determine the relation between public and private enforcement, the role of the Regulation 1/2003 should be emphasized.¹⁰

Until 2004, the central role in enforcing the ‘antitrust’ rules - Articles 101 and 102 of TFEU was played by the Commission. The key objective of Regulation 1/2003, on the other side, was to allow a more decentralized enforcement system to emerge with the national courts of the individual Member States as well as national competition authorities participating more actively within it.

Number of factors have combined to preclude private actions from developing evenly across the EU.¹¹ For many years the Commission has taken the view that the EU situation is unsatisfactory and more needs to be done in order to harmonize national rules governing private enforcement and a culture of competition to be stimulated within the EU competition rules which will be best guaranteed through complementary public and private enforcement.

Public and private enforcement do not necessarily interact with each other, but the reality is that they often do. Regulation No 1/2003 laid down some rules concerning private enforcement, but did not make detailed provisions for all possible aspects.

As to the relationship between public and private enforcement, the case-law has emphasized the primary role of the European Commission, and thus of public enforcement, as resulting from Article 105 TFEU, and the correspondingly supplemental role of private enforcement. In particular, the European Commission as an administrative authority must act in the public i.e. EU interest in order to

in national court against the undertakings found to have committed the infringement so as to obtain compensation for the damage suffered as a result of that infringement. Follow-on actions for damages do have some additional deterrent effect in that the damages add a cost to the fines or other penalties imposed in the preceding public enforcement. See: *Ibidem*.

¹⁰ 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 (Text with EEA relevance), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003R0001>, 20.03.2022. It is important to note that the Regulation was passed before the entry into force of the TFEU in 2012, so the numbering in the text and title refers to Articles 81 and 82 of the Treaty of Rome, which should be adequately synchronized with the new numbering of Articles 101 and 102 of TFEU.

¹¹ Private actions, however, were growing rapidly in some Member States, particularly the UK, the Netherlands and Germany. See W. Wouter P. J., op. cit., 3-46 and Thomas Funke, Osborne Clarke, “The EU Damages Actions Directive, Getting the Deal Through - Private Antitrust Litigation”, 2016, available at: https://www.osborneclarke.com/media/filer_public/28/2a/282a0ac7-4563-4b77-afff-83c283d357cf/the_eu_damages_actions_directive.pdf, 20.03.2022.

determine the degree of priority to be applied to the various cases brought to its notice. Public enforcement is also superior because both more effective sanctions are available and the level of the sanctions can be better controlled.

Many systems rely heavily on public enforcement to protect society's interest in the efficient working of markets. Public enforcers, however, have limited resources which they may concentrate principally on ensuring that serious violations which cause wide-spread harm to consumer welfare are brought to an end and deterred. Accordingly, they are not able to eradicate and prevent all violations of the rules or to ensure compensation for victims. Private litigation, though, may consequently play a fundamental part in ensuring effective enforcement of the competition law rules. However, it should be bore in mind that private actions for damages are inevitably driven by the private gains and expenses of the parties concerned. Hence, these private interests will quite often diverge from the public interest.¹²

Because of the close connection between private and public enforcement and their ability to impact on each other, public enforcement authorities frequently take an interest in the development of private enforcement. Nowadays, a widely held view is that optimal enforcement requires public and private enforcement to be combined agreeably.¹³

Comparative aspects of public/private enforcement of competition law

Private actions in the USA for damages based on the antitrust provisions of the Sherman and Clayton Acts, are very common. Almost 95 % of antitrust cases in the United States are private actions.¹⁴ In the US, Congress made a policy choice when adopting the antitrust laws to encourage private litigants to participate in their enforcement.¹⁵ The US experience indicates that private actions can play an

¹² See: Alison Jones, "Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US", *Harmonising EU Competition Litigation: The New Directive and Beyond* (eds. M Bergström, M. Iacovides, M. Strand), Hart Publishing, 2016 and W. Wouter P. J., 3-46.

¹³ See: A. Jones, *op. cit.*

¹⁴ See: W. Wouter P. J., *op. cit.*

¹⁵ The Clayton Act itself encourages private enforcement of the antitrust laws by providing for: treble damages for those injured by reason of anything forbidden in the antitrust laws; injunctive relief against threatened loss or damage by a violation; the use of judgments entered against the defendant as prima facie evidence against that defendant; clear limitation periods; and successful plaintiffs (claimants) to recover costs, including reasonable attorney's fees, contrary to the ordinary rule in the US that each party bears its own attorney fees and costs. See: A. Jones, *op. cit.*

important role in the enforcement process and in ensuring that its compensatory, remediation and/or deterrence functions are achieved.¹⁶

It should be, therefore, pointed out that the 2014 Damages Directive has brought to an end a long discussion about the role of private actions, or at least private actions for damages, in the enforcement of Articles 101 and 102 TFEU. The US American conception of private actions for damages as an instrument for deterrence and punishment, and thus a substitute for public enforcement, has been clearly rejected by the Directive.

Legislative history concerning damage claims facilitation

As mentioned above, the basic framework for the Commission's implementation of Articles 101 and 102 TFEU is set out in Regulation 1/2003 on the implementation of the competition rules set out in Articles 101 and 102 TFEU. These rules have been supplemented by Regulation 773/2004 concerning the implementation of the Commission's procedures in accordance with Article 101 TFEU.¹⁷ In accordance with the Regulations, the Commission has a wide range of measures that it can take to prevent anti-competitive activities.

In December 2005, the European Commission published a Green Paper,¹⁸ in which it opened a discussion for a number of possible measures to facilitate damage claims for breach of EU antitrust law. Among the possible measures put up for discussion in the Green Paper was clearly inspired by the US American example and tried to introduce the double damages for cartel infringements.

In April 2008, the European Commission published a White Paper on damages actions for breach of the EU antitrust rules, which contained proposed measures focusing on the compensation function of private actions for damages and the

¹⁶ Statistical evidence in the US illustrates that, although private antitrust actions rose dramatically though the 1950s, 1960s and 1970s, the number peaked in 1977. Since then it has fallen from its peak. Although the number of cases did begin to rise again for a while (mirroring perhaps increased government focus on cartel activity), after 2008 it has fallen again A. Jones, *op. cit.*

¹⁷ 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, Official Journal L 123, 2004. In this Regulation, too, the numbering in the text and title refers to Articles 81 and 82 of the Treaty of Rome, which correspond to Articles 101 and 102 of the TFEU.

¹⁸ European Commission, Green Paper on Damages actions for breach of EC antitrust rules, COM(2005)672 of 19 December 2005, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52005DC0672>, 20.03.2022.

preservation of strong public enforcement.¹⁹ The primary objective of the White Paper was to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules. According to the Commission, due to the lack of an efficient mechanism, the injured persons fail to receive compensation amounting to several billion euros annually.²⁰ Full compensation is, therefore, the first and foremost guiding principle.²¹

On 30 June 2008, Commission Regulation (EC) No 622/2008 was adopted amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases.

In June 2013, the European Commission adopted a proposal for a Directive of the European Parliament and of the Council on actions for damages.²² The Proposal was designed to facilitate damage claims by removing the main obstacles to full compensation for victims of antitrust violations and ensuring that private and public enforcement operate harmoniously together.

Communication from the Commission followed on 13 June 2013 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.²³

Following the European Commission's legislative proposal, the European Parliament and the Council of the European Union adopted Directive 2014/104 in November 2014 (hereafter also: "the 2014 Damages Directive").²⁴

Finally, in the post – adoption era of the 2014 Damages Directive, the Commission undertook several actions. To provide guidance on specific issues of private

¹⁹ Available at: https://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf, 25.03.2022.

²⁰ White Paper on Damages actions for breach of the EC antitrust rules, op. cit, pp. 21.

²¹ See: Christian Kersting, "Perspectives for Private Enforcement in European Antitrust Law (Perspektiven der privaten Rechtsdurchsetzung im Kartellrecht)", *Zeitschrift für Wettbewerbsrecht (ZWeR) - Journal of Competition Law*, Vol. 38, No. 3, 2008, 252-271.

²² European Commission, Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013)404 of 11 June 2013, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52013PC0404>, 02.04.2022.

²³ Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52013XC0613%2804%29>, 02.04.2022..

²⁴ Available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32014L0104>, 12.04.2022.

enforcement, the Commission has adopted two communications, namely the Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser²⁵ and the Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law.²⁶ These Communications are non-binding and do not alter existing rules under EU law or the laws of the Member States. Their goal is, however, to be a source of inspiration, in particular for national courts that deal with damages actions for infringements of EU competition law.

BRIEF REVIEW OF THE 2014 DAMAGES DIRECTIVE

The Commission's policy to encourage private enforcement dates back to the reform of public enforcement as set out in Council Regulation 1/2003.

For a number of years, the Commission exercised tight control over enforcement and national courts were excluded from playing a significant role in antitrust cases. However, it was not clear to what extent the rights Articles 101 and 102 are conferred upon individuals.²⁷

Until the adoption of the 2014 Damages Directive, no EU legislation specifically addressed private rights of action for damages. Rather, such rights derive from the jurisprudence of the European Court of Justice which has developed only in a gradual and piecemeal fashion. The "full compensation for damage" principle was established by the EU Court of Justice in the *Courage* case in *Crehan*.²⁸

Since *Courage* arose from a dispute between the contracting parties to an agreement contrary to Article 101 TFEU, it could have been argued that only contracting parties, not third parties, were entitled to compensation. The scope of the

²⁵ Communication from the Commission – Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser, C/2019/4899, OJ C 267, 9.8.2019, p. 4–43, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019XC0809%2801%29>, 12.04.2022.

²⁶ Communication from the Commission Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law 2020/C 242/01, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0722%2801%29>, 15.04.2022.

²⁷ A. Jones, op. cit.

²⁸ *Courage Ltd. v. Bernard Crehan and Bernard Crehan v. Courage Ltd. and others*, Case C453 / 99, dated 20.09.20011, available at : [http://curia.europa.eu/juris/showPdf.jsf?jsessionid=D50325B8E7183F5E7E155662BDF70391?text=&docid=46604&pageIndex=0&dcdeng=en first & part = 1 & cid = 68474](http://curia.europa.eu/juris/showPdf.jsf?jsessionid=D50325B8E7183F5E7E155662BDF70391?text=&docid=46604&pageIndex=0&dcdeng=en%20first%20part%20=1&cid=68474), 11.04.2022.

right to compensation was then clarified in *Manfredi*²⁹, which held that also third parties could claim compensation for the harm they suffered from an agreement or practice prohibited by Article 101 TFEU.³⁰

Subject matter and scope of the 2014 Damages Directive. - This 2014 Damages Directive introduced common provisions in substantive and procedural law applicable to antitrust claims made before Member States' courts whose cause of action lies in the breach of Article 101 or 102 TFEU.

As apparent from its Article 1 and Article 2(1) and (3), the 2014 Damages Directive covers actions for damages relating not only to infringements of Articles 101 and 102 TFEU but also to parallel infringements of similar provisions of national competition law. The 2014 Damages Directive covers only actions for damages, and no other forms of private enforcement.

Full compensation, but no punishment. - Reflecting the case law of the Court of Justice, Article 3(1) and (2) of the 2014 Damages Directive confirms that any natural or legal person who has suffered harm caused by an infringement of anti-trust law is entitled to full compensation of that harm, covering compensation for actual loss and for loss of profit, plus the payment of interest.

According to Article 3(3) of the 2014 Damages Directive full compensation shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.³¹

Passing-on of overcharges. - In line with the 2014 Damages Directive general focus on compensation and the rejection of the US American conception of private actions as an instrument of deterrence and punishment, Articles 12 to 14 of the 2014 Damages Directive provide that defendants must be able to invoke the

²⁹ *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, C-295/04, dated 13.07. 2006, available at: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=56474&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=69506>, 11.04.2022.

³⁰ See: Carlo Petrucci, "Subsidiarity in Directive 2014/104 EU on damages actions for breach of EU competition law", *European Public Law*, Vol. 23, No. 2, 2017, 395–421.

³¹ In its 2007 judgment in *Devenish etc. v Vitamin cartel lists*, the English High Court already held that the principle of *ne bis in idem*, which is a fundamental principle of EU law, precludes the award of exemplary or punitive damages in an action for damages following a fining decision by the European Commission, even if the fine has been commuted to zero as a result of the application of the European Commission's Leniency Notice. The principle of *ne bis in idem* would appear to preclude equally the award of exemplary or punitive damages in an action for damages following a decision of a competition authority of an EU Member State under Articles 101 or 102 EU. W. Wouter P. J., *op. cit.*

passing-on defense, that indirect purchasers also have a right to full compensation, and that at any level of the supply chain overcompensation must be avoided.

Determining the minimum limitation periods. - Until the entry into force of the 2014 Damages Directive, the limitation periods varied drastically between Member States. The 2014 Damages Directive stipulates that the limitation periods for bringing actions for damages are at least five years.³² Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know: (a) of the behavior and the fact that it constitutes an infringement of competition law; (b) of the fact that the infringement of competition law caused harm to it; and (c) the identity of the infringer.³³ Finally, Member States shall ensure that a limitation period is suspended or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.³⁴

Joint and several liability. - Pursuant to the 2014 Damages Directive's provisions (Article 11), infringers of competition law through joint behavior are jointly and severally liable for the harm. Injured parties have the right to require full compensation from any infringer. The 2014 Damages Directive however provides for three exceptions to the general rules on joint and several liability: for undertaking or person that has been granted immunity from fines under a leniency programme (immunity recipient), for small or medium-sized enterprises (SMEs) with market share in the relevant market below 5 % at any time during the infringement and the third exception relates to the situation where an injured party has reached a consensual settlement with one of the co-infringers.

Binding effect of public enforcement decisions. - An infringement of Articles 101 or 102 TFEU or of corresponding provisions of national competition law found by a final decision of a national competition authority or by a court reviewing the decision of the national competition authority must be deemed to be undeniably established for the purposes of an action for damages brought before a court in the same EU Member State (Article 9 of the 2014 Damages Directive). Where the action for damages is brought in another EU Member State, the finding of infringement must constitute at least prima facie evidence.

³² 2014 Damages Directive, Article 10(3).

³³ 2014 Damages Directive, Article 10(2).

³⁴ T. Funke, O. Clarke, op. cit., 2.

Disclosure of evidence. - In damages actions where the infringement was an object of public enforcement proceedings, the competition authority's file is an obvious location for potentially relevant evidence.³⁵ Competition authorities are thus an obvious addressee of disclosure orders. Hence, upon request of claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts must be able to order the defendant or a third party to disclose relevant evidence which lies in their control (Article 5 of the 2014 Damages Directive). The disclosure of evidence must be limited to that which is proportionate. Disclosure of evidence containing confidential information must be possible where relevant to the action for damages, but such information must be effectively protected.³⁶

Article 6 of the 2014 Damages Directive stipulates additional rules for requests concerning the disclosure of evidence included in the file of a competition authority. The rules in Article 6 of the 2014 Damages Directive also constitute a concrete example of the Directive's goal to strike the right balance between public and private enforcement. They essentially introduce a three level system of protection for documents included in the file of a competition authority: the so-called black list documents [Article 6(6)]; the so-called grey list documents [Article 6(5)] and the so-called white list documents [Article 6(9)].³⁷

Protection of leniency statements and settlement submissions. - Although the Court of Justice of the EU on two occasions, first in *Pfleiderer*³⁸ and subsequently in *Donau Chemie*³⁹ determined that such documents are not exempted from the obligation to deliver, however, the 2014 Damages Directive adopted a contrary position by which such statements and agreements are subject to protection.⁴⁰

³⁵ The principle of disclosure of evidence has its roots in Anglo-Saxon law, but in recent years it has become more common in the legislation of the continental legal systems, especially in proceedings where there is inequality between the parties.

³⁶ 2014 Damages Directive, Article 5(4).

³⁷ The Commission Staff Working Document on 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.

³⁸ *Pfleiderer AG v Bundeskartellamt*, Case C-360/09, dated 14.06.2011, available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-360/09>, 15.04.2022.

³⁹ *Bundeswettbewerbshilfebehörde v Donau Chemie AG and Others*, Case C-536/11 of 06.06.2013, available at: <http://curia.europa.eu/juris/liste.jsf?num=C-536/11&language=EN>, 15.04.2022.

⁴⁰ See: C. Petrucci, *op.cit.*

Article 6(6) of the 2014 Damages Directive provides that national courts can never order any party or third party (including competition authorities) to disclose leniency statements or settlement submissions. Article 7(1) of the Directive adds that leniency statements and settlement submissions cannot be used in actions for damages if they have been obtained solely through access to the file of a competition authority.

Temporary protection of information from public enforcement proceedings. - The practical effect of this temporary protection of information from public enforcement proceedings is to discourage actions for damages that run in parallel with public enforcement proceedings, and to encourage instead follow-on actions that only take place after the closure of the competition authority's proceedings.

Waiting until after the closure of the public enforcement proceedings should not be too problematic for damages claimants, because Article 10(4) of the 2014 Damages Directive provides for the suspension of limitation periods during public enforcement proceedings and until one year after the termination of those proceedings.

Article 6(5) of the 2014 Damages Directive provides that, until the competition authority has closed its proceedings, national courts cannot order disclosure of (a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority and (b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings.

Article 7(2) of the 2014 Damages Directive adds that, until the competition authority has closed its proceedings, such information cannot be used in actions for damages if it has been obtained solely through access to the file of a competition authority.

Encouragement of consensual dispute resolution. - Recital 48 of the Directive reads as follows: "Achieving a 'once-and-for-all' settlement for defendants is desirable in order to reduce uncertainty for infringers and injured parties. Therefore, infringers and injured parties should be encouraged to agree on compensating for the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as out of court settlements (including those were a judge can declare a settlement binding), arbitration, mediation and conciliation".

In- or out-of-court settlements between parties should further be promoted because precise damages calculation would not be needed in such cases.⁴¹

⁴¹ See: Lena Hornkohl, "The Presumption of Harm in EU Private Enforcement of Competition Law – Effectiveness vs Overcompensation", *EU and Comparative Law issues and challenges Series (ECLIC)*, Vol. 5, 2021, 29–59

The impact of Directive 2014/104 on the practice of private enforcement. - In the first years following the entry into application of Council Regulation (EC) No 1/2003, most of the private enforcement EU antitrust law actions were used as a defense or their offensive use to obtain injunctive relief, sometimes combined with an additional claim for damages. These cases were mostly stand-alone cases.⁴²

The argument presented by the Commission was that Member States had been slow to reform their system of private enforcement in order to ensure the victims' right to antitrust compensation. *Courage and Crehan* case was issued in September 2001 and in 2013 the Commission noticed that many Member States did not yet have effective rules on private enforcement. (CP 2017) The protection given to EU rights is heavily dependent on the procedural, evidential, and substantive rules governing civil litigation applicable in each particular Member State and how EU law – in particular the principles of equivalence and effectiveness – is considered to constrain their operation.⁴³

The current legal framework of private enforcement is not the result of a 'market approach' to policy-making, but rather it is an outcome of a wide consultation process with the expert stakeholders who should be affected by private enforcement.

While the Court of Justice recognized the existence of compensation of anti-trust victims as one of the main goals of private enforcement, the Commission took the initiative to implement it in such a way as to make private enforcement consistent with the Commission's enforcement action. The Commission was entitled to take such an initiative given that competition policy was one of the exclusive competences of the EU.⁴⁴ That clearly meant that the principle of subsidiarity did

⁴² In the last few years, in Germany, the Netherlands and the UK, practically every infringement decision of the European Commission or of the national competition authority already appears to have triggered follow-on actions for damages. See: W. Wouter P. J., *op. cit.*

⁴³ At the time, in the absence of EU harmonising measures, multiple questions, related to how national claims should be framed within different legal systems. For example: how causation can be established and damages calculated, whether national courts are required (or permitted) to award 'punitive' damages, whether other national rules governing the claim comply with EU law, are there specialist competition law tribunals or courts exist or not, the speed of litigation and individual national rules governing access to information and evidence, litigation costs especially where claimants have not suffered much loss individually, follow-on actions, mechanisms for collective redress, etc. A. Jones, *op. cit.* and C. Petrucci, *op. cit.*

⁴⁴ On these presumptions, the Commission decided how best to pursue compensation and deterrence by detecting the problem to be addressed (antitrust victims remained largely uncompensated), the sources of the problem (inadequacy of the national procedural framework in relation to the peculiarities of antitrust damages actions) and the extent of the problem (quantification of antitrust losses suffered by antitrust victims). See: C. Petrucci, *op. cit.*

not apply.⁴⁵ However, a distinction should be made between a certain policy, which may be an exclusive competence of the Union, and its enforcement aimed at implementing the relevant rules.

Nonetheless, analysis of potential applicability of the subsidiarity principle when it comes to the 2014 Damages Directive is still useful, given that it will result in important changes of domestic substantive and procedural law for damages actions.

One of the main arguments why subsidiarity principle in private competition law enforcement should be taken in deeper consideration is that diversity of legal systems can lead to forum shopping. Competition law practitioners have recognized that forum shopping has become an inherent part of competition litigation.⁴⁶

Quantification of harm. - Quantification of harm is a challenge in EU private enforcement of competition law. The 2014 Damages Directive gives claimants who have suffered harm caused by an infringement of competition law a right to full compensation, while avoiding overcompensation.⁴⁷

However, quantification of harm in competition cases is more complex since it entails entire market structures to be reconstructed. Consequently, proving and quantifying antitrust harm is generally very fact-intensive and costly. While competition authorities impose fines based on firms' turnover – which does not require them to engage in an analysis of the exact harms created by the competition law offense – courts cannot take a similar path. They must engage in fact-based economic analysis of the effects of the conduct on plaintiffs. Calculating such damages might raise significant difficulties.⁴⁸

Article 17(2) of the 2014 Damages Directive introduces a general rebuttable presumption that cartel infringements cause harm. The presumption only covers

⁴⁵ The principles of subsidiarity and proportionality govern the exercise of the EU's competences. In areas in which the EU does not have exclusive competence, the principle of subsidiarity seeks to safeguard the ability of the Member States to take decisions and action and authorizes intervention by the Union when the objectives of an action cannot be sufficiently achieved by the Member States, but can be better achieved at Union level, 'by reason of the scale and effects of the proposed action'. See: C. Petrucci, op. cit.

⁴⁶ Forum shopping gives rise to a number of undesirable consequences. The first is the risk of minimization of liability. If a company has business operations in different Member States and is going to face multiple lawsuits, it will attempt to seize a court in a jurisdiction whose legal system would reduce liability compared to other countries in which it could equally be sued and incur higher liability. See: C. Petrucci, op. cit.

⁴⁷ See: L. Hornkohl, op. cit.

⁴⁸ See: Michal Gal, Rivi Dahan, "Legal Obstacles to Private Enforcement of Competition Law", *Markets and Competition Law Review*, Vol. 3, No. 2, 2019 and L. Hornkohl, op. cit.

cartels as defined in Article 2(14) of the 2014 Damages Directive. Harm in the sense of Article 17(2) of the 2014 Damages Directive includes both the actual loss and the loss of profit. The presumption includes the causal relationship between that harm and the cartel infringement, which is itself determined by Member State law subject to the principles of effectiveness and equivalence.⁴⁹

When it comes to damages estimation, in comparative literature several options can be encountered: illicit gains and damages estimation, unjust enrichment and restitution, non-contractual damage especially in case of indirect purchaser, etc.

As mentioned above, the Commission already provided Guidelines for damages calculation, but those only contain various methods of calculation.

Unfortunately, the recent Collective Consumer Redress Directive does not include competition law in its scope.⁵⁰ Thus, collective competition redress remains in the hands of Member States, which, as already mentioned, could give rise to forum shopping.

Commission Report on the implementation of the 2014 Damages Directive. - According to Article 20 (1) of the 2014 Damages Directive, the Commission should have reviewed the Directive and should have submitted a report thereon to the European Parliament and the Council by 27 December 2020.

Hence, on 14 December 2020 the Commission published the Commission staff working Document on 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.⁵¹

By the first half of 2018, all of the Member States had implemented the Directive.

⁴⁹ Again, just like with the presumption of harm itself, one has to take recourse to the principle of effectiveness. To avoid making cartel damages claims practically impossible or excessively difficult for claimants, a presumption that transactions within the scope of a cartel actually affected the claimant will be helpful due to the reversal of the burden of proof. In many cases, claimants faced considerable difficulties because they were unable to prove that a concrete transaction was affected by a cartel due to a lack of relevant information. See: L. Hornkohl, op. cit.

⁵⁰ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020L1828&rid=10>, 27.04.2022.

⁵¹ Available at: https://ec.europa.eu/competition/antitrust/actionsdamages/report_on_damages_directive_implementation.pdf, 27.04.2022.

Since the adoption of the Damages Directive, the Court of Justice of the European Union (hereafter “CJEU”) continued to play a crucial role in shaping the framework for private enforcement in the EU. In a series of references for a preliminary ruling made by national courts, the CJEU has clarified important legal questions in this field. Some of the key clarifications in this regard relate to the cases Cogeco Communications.⁵² The CJEU’s judgment in Cogeco contributes to ensuring that victims of infringements of EU competition law have sufficient time to lodge their claims. In *Skanska Industrial Solutions and Others*, the CJEU rendered a landmark judgment.⁵³ This case concerned a cartel for which the Finnish Supreme Administrative Court had fined seven Finnish asphalt companies and which triggered damages actions against successors of the legal entities that took part in the collusion.

In light of the goals of the 2014 Damages Directive, which were to facilitate damages actions for EU competition law infringements and to strike the right balance between public and private enforcement, the Commission in its Report drew a positive conclusion as regards the consistent implementation of the rules of the Directive across the EU.

DAMAGES COMPENSATION FOR INFRINGEMENT
OF FREE COMPETITION PRINCIPLE IN THE
REPUBLIC OF NORTH MACEDONIA

Unlike the EU legislation, the Macedonian legislator did not yet make specific steps to make normative amendments in the Competition Law. The free competition principle is primarily rooted in the Constitution of the Republic of North Macedonia.⁵⁴ In addition to the Constitution, the main source legislative piece that regulates the competition law aspects is the Law on Protection of Competition (hereinafter: LPC).⁵⁵ Significant part of the EU primary and secondary competition law sources have been successfully transposed in the national legislation as part of

⁵² C-637/17 – Cogeco Communications, ECLI:EU:C:2019:263. In this case, the CJEU answered important questions on the temporal application of the 2014 Damages Directive and the relationship between Article 102 TFEU and national rules on limitation periods.

⁵³ C-724/17 – Skanska Industrial Solutions and Others, ECLI:EU:C:2019:204.

⁵⁴ Constitution of the Republic of North Macedonia, Article 55 reads: “Freedom of the market and entrepreneurship are guaranteed. The Republic ensures equal legal position of all subjects on the market. The Republic takes measures against the monopoly position and the monopolistic behavior on the market. Freedom of the market and enterprise may be restricted by law solely for the defense of the Republic, the conservation of nature, the environment or human health.”

⁵⁵ Law on Protection of Competition, *Official Gazette of the Republic of Macedonia*, No. 145/2010, No. 136/11, 41/14, 53/16 and 83/18.

the process of harmonization with the EU *acquis*.⁵⁶ The main authority in relation to the supervision of the implementation of the LPC is the Commission for Protection of Competition (hereinafter CPC).⁵⁷

However, despite this formal harmonization, until now Macedonian legislator did not implemented provisions related to the possibility of compensation for damages by injured parties in anticompetitive actions by companies.

Regarding the compensation for the damage caused, the Law on Protection of Competition contains a general provision which stipulates that if the damage is caused by any action that constitutes an offense under the LPC, the person who will suffer damage may seek compensation in accordance with the law.⁵⁸

In Macedonian legislation, as a *lex generalis* in terms of damage regulations appears the Law on Obligations,⁵⁹ and in relation to the procedural aspects for compensation of damages the provisions of the Law on Civil Procedure⁶⁰ apply. However, the provisions of these laws are more of a general nature, that are not relevant for exercising the specific right to compensation in situations where individuals were harmed by competition law provisions infringement. The lack of special rules in this respect in the LPC inevitably deter the harmed parties from initiating court proceedings. Due to this fact, it is recommended to implement a system of specific rules in the foreseeable future that will enable proper damage compensation for persons who are harmed by anticompetitive practices.

CONCLUSION

The functioning of the single market and ensuring the free movement of goods, services, labor and capital within the EU is impossible without an efficient and effective system for protecting the principle of free competition. Therefore, the construction of mechanisms to ensure the protection of the free functioning of

⁵⁶ In 2012, at the proposal of the Commission for Protection of Competition, the Government of the Republic of Macedonia adopted nine decrees in accordance with the Law on Protection of Competition, which in fact represented a transposition of the current EU directives and regulations relating to the protection of free competition. List of regulations, available at : <http://kzk.gov.mk/category/uredbi/>.

⁵⁷ LPC, Article 6.

⁵⁸ LPC, Article 58.

⁵⁹ Law on Obligations, Official Gazette of the Republic of Macedonia, No. 18/2001, 4/2002, 5/2003, 84/2008, 81/2009, 161/2009 and 123/2013 and *Official Gazette of the Republic of North Macedonia*, No. 215/2021.

⁶⁰ Law on Litigation Procedure, *Official Gazette of the Republic of Macedonia*, No. 79/2005, 110/2008, 83/2009, 116/2010 and 124/2015.

the single market is one of the core priorities of the European Union. To this end, a number of initiatives have been taken over the past decade to strengthen the role of national competition agencies and to provide consumers with appropriate compensation in detecting anticompetitive actions.

The 2014 Damages Directive was the first step forward taken by the EU in terms of increasing the protection level against acts that harm the free market, including private rights of action for damages that follow from a violation of the EU competition law rules. In this way, decentralization of competencies was ensured by which the national competition authorities were granted with more power.

Although it seems that it is too early to deliberate about any specific benefits from the transposition of the 2014 Damages Directive and other EU legislative pieces, it is expected that in the years to come the number of detected and sanctioned cartels by national competition authorities will increase.

Unlike the EU contemporary trends, in Macedonian legislation there are still no specific amendments which will improve the substantive, procedural and institutional aspects of the competition law. At the moment there is an ongoing EBRD sponsored Project related to the technical cooperation to the commission for the protection of competition in North Macedonia which can be used as an inducement more comprehensive reforms to be undertaken in order Macedonian competition law to be further aligned with the respective EU *acquis*.

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NAKNADA ŠTETE IZ PERSPEKTIVE PRAVA KONKURENCIJE EVROPSKE UNIJE I REPUBLIKE SEVERNE MAKEDONIJE

Rezime

Na početku rada dat je kratak pregled razvoja prava konkurencije EU, naročito u pogledu njegove primene. Kad je reč o izvršenju, u radu je naglašen značaj razlikovanja privatnog i javnog izvršenja. Poseban akcenat je stavljen na pravni okvir koji je prethodio usvajanju Direktive o naknadi štete iz 2014. godine. Ova direktiva je detaljnije analizirana jer omogućava da se individualno pretrpljena šteta za povredu osnovnih pravila konkurencije EU traži pred nacionalnim sudovima država članica. Pravne prepreke privatnom izvršenju Direktive obrađene su u posebnom delu rada. Konačno, dat je kratak pregled stanja relevantnih pravila makedonskog zakonodavstva, uključujući predloge za njegovu reformu.

Cljučne reči: naknada štete, pravo konkurencije, privatno izvršenje zakona o konkurenciji, javno izvršenje zakona o konkurenciji, povreda prava konkurencije

Bibliography

- Funke T., Clarke O., “The EU Damages Actions Directive, Getting the Deal Through - Private Antitrust Litigation”, 2016, https://www.osborneclarke.com/media/filer_public/28/2a/282a0ac7-4563-4b77-aff-83c283d357cf/the_eu_damages_actions_directive.pdf.
- Gal M., Dahan R., “Legal Obstacles to Private Enforcement of Competition Law”, *Markets and Competition Law Review*, Vol. 3, No. 2, 2019.
- Hornkohl L., “The Presumption of Harm in EU Private Enforcement of Competition Law – Effectiveness vs Overcompensation”, *EU and Comparative Law issues and challenges Series (ECLIC)*, Vol. 5, 2021.
- Jones A., “Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US”, *Harmonising EU Competition Litigation: The New Directive and Beyond* (eds. M Bergström, M Iacovides, M Strand), Hart Publishing, 2016.
- Kersting C., “Perspectives for Private Enforcement in European Antitrust Law (Perspektiven der privaten Rechtsdurchsetzung im Kartellrecht)”, *Zeitschrift für Wettbewerbsrecht (ZWeR) - Journal of Competition Law*, Vol. 38, No. 3, 2008.
- Petrucci C., “Subsidiarity in Directive 2014/104 EU on damages actions for breach of EU competition law”, *European Public Law*, Vol. 23, No. 2, 2017.
- Wils W.P.J., “Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future”, *World Competition: Law and Economics Review*, Vol. 40, No. 1, 2017.

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