Croatia

Butorac Malnar, Vlatka

Source / Izvornik: **Implementation of the EU Damages Directive in Central and Eastern European Countries, 2017, 55 - 84**

Book chapter / Poglavlje u knjizi

Publication status / Verzija rada: **Published version / Objavljena verzija rada (izdavačev PDF)**

https://doi.org/10.7172/978-83-65402-53-0.2017.wwz.1

Permanent link / Trajna poveznica: https://urn.nsk.hr/urn:nbn:hr:118:574485

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Download date / Datum preuzimanja: **2025-01-08**

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Sveučilište u Rijeci
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Centre for Antitrust and Regulatory Studies

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

Edited by
Anna Piszcz

Warsaw 2017

University of Warsaw
Faculty of Management Press

Textbooks and Monographs

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

Centre for Antitrust and Regulatory Studies
University of Warsaw, Faculty of Management

Eightieth Publication of the Publishing Programme

Series: Textbooks and Monographs (24)

Series editor: Prof. Dr. Tadeusz Skoczny

CENTRE FOR ANTITRUST AND REGULATORY STUDIES (CARS)

www.cars.wz.uw.edu.pl

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CARS conducts cross and interdisciplinary academic research and development projects, provides consulting services as well as publishes books and periodicals, including the English language Yearbook of Antitrust and Regulatory Studies, YARS (www.yars.wz.uw.edu.pl) and the Polish language Antitrust and Regulation e-Quarterly, iKAR (in Polish: *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, www.ikar.wz.uw.edu.pl). Moreover, CARS organizes scientific conferences and workshops, offers Post-graduate studies (www.aris.wz.uw.edu.pl) and an Open PhD Seminar. CARS co-operates with scientific institutions in Poland and abroad as well as with the Polish competition authority and national regulators in the energy, telecommunications and railways sectors.

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Cover: Dariusz Kondefer

English adjustments: Ewelina D. Sage (OXON)

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ISBN: 978-83-65402-52-3
ISBN: 978-83-65402-53-0 (e-book)
DOI: 10.7172/978-83-65402-53-0.2017.wwz.1

Publisher
University of Warsaw
Faculty of Management Press
PL – 02-678 Warsaw, 1/3 Szturmowa St.
Tel. (+48) 22 55-34-164
E-mail: jjagodzinski@wz.uw.edu.pl
www.wz.uw.edu.pl

Layout
ELIPSA Publishing House
PL – 00-189 Warsaw, 15/198 Inflancka St.
Tel./faks (+48) 22 635-03-01; (+48) 22 635-17-85
E-mail: elipsa@elipsa.pl; www.elipsa.pl

Distribution
Księgarnia Wydziałowa Tomasz Biel
PL – 02-678 Warszawa, ul. Szturmowa 3
Tel. (+48) 22 822-90-42; faks (+48) 22 823-64-67
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Contents – summary

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Anna Piszcz*

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

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

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

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

2 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 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 2003 L 201, p. 60.

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

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

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

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Anton Petrov*

BULGARIA

I. Manner of implementing the Directive

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

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

2 Protection of Competition Act (*Закон за защита на конкуренцията*), promulgated in State Gazette no. 102 of 28.11.2008, in force as of 2.12.2008. This is the third version of the act, which was drafted with the assistance of the Italian competition authority (*Autorità garante della concorrenza e del mercato*) and EU financial support under the PHARE programme. Bulgaria introduced competition legislation in 1991 with the adoption of the first PCA (promulgated in State Gazette no. 39 of 17.05.1991, in force as of 20.05.1991). It was soon revised in line with modern EU competition law doctrine, which became the basis for the development of national antitrust and merger control rules, with the adoption of another PCA in 1998 (promulgated in State Gazette no. 52 of 8.05.1998, in force as of 11.05.1998). Ten years later, at the end of 2008, following Bulgaria's accession to the EU on 1.01.2007, the current third instalment of the PCA came into force, which further harmonized the procedure for antitrust enforcement and merger control in line with the changes which were introduced with Regulation 1/2003 and Regulation 139/2004.

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

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

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

The new PCA chapter on 'Liability for Damages' is divided into two sections. The first section contains general rules confirming the right of any party that has suffered damages as a result of violations committed under the PCA to seek indemnification from the tortfeasor, irrespective of the nature of the infringement. The second section contains detailed rules on liability for damages caused by antitrust violations committed under Chapter III 'Prohibited Agreements, Decisions and Concerted Practices' and Chapter IV 'Abuse of Monopoly and Dominant Position' of the PCA, as well as under Article 101 and Article 102 of the Treaty on the Functioning of the European Union ('TFEU').

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

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

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

Vlatka Butorac Malnar*

CROATIA

I. Manner of implementing the Directive

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

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

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

2 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.

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

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

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

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

[5] Article 69.a(2) CA.

[6] Article 69.a CA:

(1) The competent commercial courts shall decide on the claims for damages based on the infringements of this Act or Article 101 or 102 of the TFEU.

(2) The undertakings who have infringed the provisions of this Act or Article 101 or 102 of the TFEU shall be responsible for the compensation for damages resulting from the infringements concerned.

(3) When deciding on the compensation for damages referred to in paragraph (1) of this Article the competent commercial court shall particularly take into account the legally valid decision of the Agency on the basis of which an infringement of this Act or Article 101 or 102 of the TFEU has been established or the final decision of the European Commission in the case where the European Commission established the infringement of Article 101 or 102 of the TFEU. This is without prejudice to the rights and obligations under Article 267 of the TFEU.

(4) Where case relating to the establishment of the infringement of Article 101 or 102 of the TFEU is being dealt by the Agency or the European Commission, the competent commercial court may assess whether it is necessary to stay in its proceedings or to suspend the proceedings until the legally valid decision of the Agency or the final decision of the European Commission is made.

Michal Petr*

CZECH REPUBLIC

I. Introduction

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

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

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

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II. Implementation of the Directive

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

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

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

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

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

2 Act No. 98/2012 Coll., Civil Code.

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

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

Evelin Pärn-Lee*

ESTONIA

I. Introduction

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

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

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1 In charge of the harmonisation.

2 The Estonian law-making process foresees three readings in the Parliament.

II. Manner of implementing the Directive in Estonia

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

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

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

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

6 Although the principle as such is provided in civil procedural law.

Peter Miskolczi Bodnár*

HUNGARY

I. Manner of implementing the Directive

1. General state of national law on damages

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

1.1. Possibility of private enforcement

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

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1 Proving culpability is a crucial part of the litigation. However, the burden of proof is not on the plaintiff, but on the party having caused the damage. The defendant has the possibility to prove that (s)he has not failed to meet the standards of behaviour that would generally be expected in the given situation.

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

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

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

Not only did Hungarian law offer compensatory damages for competition law infringement even before adopting the Green Paper[7] and the White

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

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

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

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

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

7 Green Paper of 19.12.2005, COM 672.

Julija Jerneva* **and Inese Druviete****

LATVIA

I. Manner of implementing the Directive

As of the date of this publication,[1] Latvia has only implemented the provisions of Article 17(2) of the Directive.[2] Even though the transposition was due by 27 December 2016, the rest of the provisions of the Directive remain not transposed into the Latvian legal system.

The relevant legal acts which specify the procedure for damages actions are the Latvian Competition Law (hereinafter, **Competition Law**) and the Latvian Civil Procedure Law[3] (hereinafter, **CPL**). Therefore, the Ministry of Economics has drafted new amendments to the Competition Law[4] (hereinafter, **Draft Competition Law**) as well as amendments to the CPL[5] (hereinafter, **Draft CPL** and collectively referred to as the **Amendments**). The Amendments were not, however, submitted to the Latvian Parliament (in Latvian: *Saeima*). As a result, the Amendments are not expected to be passed until autumn 2017, unless an expedited procedure is chosen.

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1 13.03.2017.

2 The latest amendments to the Latvian Competition Law (in Latvian: *Konkurences likums*), which implemented the Damages Directive in relation to the provisions of its Art. 17(2), were initiated on 25.05.2015 (preparation of the draft).

3 In Latvian: *Civilprocesa likums.*

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

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

Furthermore, given that historically amendments to the Competition Law attract the attention of many stakeholders, the debates in the Parliament are expected to last at least one-two months between each reading (the laws are normally passed in three readings), which may delay the adoption of the Amendments even further.

The Amendments are supplemented with an Annotation which explains the reasoning behind the Amendments and describes the intended application and interpretation thereof (hereinafter, Annotation).[6] The Amendments aspire to transpose the provisions of the Directive through amendments to six provisions of the Competition Law and seven provisions of the CPL.

II. Scope of the implementation

Latvia seems to have opted for the implementation of the entire scope of the Directive. The Draft Competition Law does not, however, go significantly beyond the clear requirements of the Directive.

First, the Amendments provide claimants with the right to claim full compensation (that is, compensation for actual loss, loss of profit, and payment of interest from the day when the harm occurred until the day when compensation is paid). By so doing, claimants are to be placed in the position in which they would have been had the infringement of competition law not been committed.[7]

Second, the Directive refers to 'infringements of the competition law provisions', but the provisions of the Directive are initially drafted to address the consequences of infringements of Article 101 or 102 TFEU or of respective national competition law provisions.[8] Neither the Directive nor the Draft Competition Law address the issue of compensation for harm caused by a failure to comply with other competition law provisions. Latvian law will go further and include a more general reference to a violation

6 Annotations, according to Latvian law, must always accompany draft laws and give reasons for the amendments to the relevant law, its intended application, and other relevant considerations. Annotations are customarily used by authorities and courts in order to clarify the intention of the legislature.

7 Part 2 of Art. 21 of the Draft Competition Law.

8 Art. 2(3) of the Directive provides that 'national competition law means provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union competition law (…)'.

Valentinas Mikelėnas* **and Rasa Zaščiurinskaitė****

LITHUANIA

I. Private enforcement in Lithuania before the implementation: *status quo*

Lithuanian law was familiar with private enforcement of competition law already before Lithuania's entry into the European Union in the year 2004. Private enforcement was governed by the Law on Competition of Lithuania (hereinafter, Law on Competition),[1] the Civil Code of Lithuania (hereinafter, Civil Code)[2] and the Code of Civil Procedure of Lithuania (hereinafter, Code of Civil Procedure).[3]

Specifically, the Law on Competition, adopted in 1999, established a general right for injured persons to bring a damages compensation claim before national court. However, before Lithuania's entry into the European

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1 23.03.1999, No VIII-1099 (O.G., 1999, No. 30-856; 2012, No. 42-2041) (with subsequent amendments).

2 18.07.2000, No VIII-1864 (O.G. 2000, No. 74-2262) (with subsequent amendments).

3 28.02.2002, No IX-743 (O.G. 2002, No. 36-1340) (with subsequent amendments).

Union, this right was limited only to those undertakings which were harmed by a competition law infringement.

Furthermore, the Civil Code, effective from 1 July 2001, established the principle of general delict (Article 6.263 of the Civil Code). In order to establish grounds for damages compensation, four cumulative elements of civil liability have to be established: (i) unlawfulness (infringement of competition law); (ii) damage; (iii) causal link between the infringement and the damage and; (iv) fault (rebuttable presumption applies) (Articles 6.246–6.248 of the Civil Code). Following the Civil Code, the court shall estimate the quantum of damages in case the claimant cannot prove their precise amount (Article 6.249(1) of the Civil Code). The Civil Code also established the principle of full compensation of damages (*restitutio in integrum*) (Article 6.263(2) of the Civil Code). Hence those, and certain other provisions equivalent to respective provisions under the Damages Directive, have already been introduced into Lithuanian law since 2001. In addition, agreements infringing competition law can be declared null and void by a court based on the norms of the Civil Code, whereas the Law on Competition also empowered courts to terminate the violation of competition law based on the claim of the injured person.[4]

Following the Code of Civil Procedure, the burden of proof of civil liability for the infringement of competition law was placed on the claimant (except for the fault which is presumed). While the Code on Civil Procedure does not define the standard of proof, it is generally accepted that a claim is proven if there are no reasonable doubts as to whether the available evidence is substantial, relevant or admissible. Such evidence must point to a reasonable conclusion of the existence of the circumstances in question (Laužikas, Mikelėnas and Nekrošius, 2003, p. 416[5]). Since 1 January 2015, new and more detailed rules related to collective redress under the Code of Civil Procedure came into effect following the European Commission Recommendation on Collective Redress adopted in 2013.[6]

Therefore, a certain legal framework and tools, both of substantive and procedural law, existed that applied to private enforcement in Lithuania before the implementation of the Damages Directive. However, private antitrust enforcement in Lithuania remains quite rare. There have only been up to 10 private enforcement cases since 2003 (both standalone and

4 However, this national report shall concentrate on antitrust damages claims only.

5 In Lithuanian.

6 Recommendation on common principles for injunctive and compensatory collective redress mechanisms concerning violations of rights granted under Union law, OJ L 201, 26.07.2013, p. 60.

Anna Piszcz* **and Dominik Wolski****

POLAND

I. Manner of implementing the Directive

First, this report narrates the history of the works on the harmonisation of private antitrust enforcement in Poland, which commenced in 2015. The starting point for the works on the implementing Act was the formulation of the Assumptions behind the draft Act (hereinafter, Assumptions), a draft discussion paper on the proposed legal rules which, according to Polish law, must precede the actual draft Act. The first draft of the Assumptions was published in early December 2015 on the website of the Civil Law Codification Commission at the Ministry of Justice (hereinafter, CLCC).[1] However, the members of the CLCC were dismissed mid-December 2015 and the Minister of Justice announced plans to create a new Codification Commission of the Republic of Poland. After the dissolution of the CLCC, the Ministry of Justice continued the works on the implementation of the Damages Directive. The draft Assumptions, somewhat changed by the Ministry, were published and submitted for public consultation in March 2016. The Standing Committee of the Council of Ministers approved their

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1 In Polish available at: https://bip.ms.gov.pl/pl/dzialalnosc/komisje-kodyfikacyjne/komisja-kodyfikacyjna-prawa-cywilnego/ (all Internet references in this article were last visited on 9.03.2017).

final version in June 2016,[2] and instructed the Minister of Justice to draft the Act. The Assumptions were the baseline for the works on the draft Act. The draft Act, named the draft Act on Claims for Damages for Infringements of Competition Law (hereinafter, ACD), was published and submitted for public consultation in November 2016.[3] It was subsequently approved by the Council of Ministers and sent to the lower chamber of the Parliament (*Sejm*) on 8 March 2017. The ACD is at the moment (9 March 2017) going through the consecutive steps of the Polish legislative process in the Parliament. In this phase, it will be read three times in the *Sejm*; the adopted Act will then be examined by the higher chamber of the Polish Parliament (*Senat*), followed by another vote in the *Sejm* on the resolution of the *Senat*. If the Act is ultimately adopted by the *Sejm*, it will subsequently be sent to the President of the Republic of Poland for signing. If the Polish President signs it, the Act will be published in the Journal of Laws. It seems, therefore, that there is still a long way to go from where Polish legislative works currently are, to the actual implementation of the Directive.

The ACD consists of 39 articles. The first 31 articles set out the rules governing claims and actions for damages under national law for competition law infringements – both rules required by the Damages Directive and some additional ones. Next, the ACD is going to amend the general provision of the Civil Code[4] relating to the limitation period for tort-based compensation claims. The ACD is also going to amend the 1993 *Act on combating unfair competition*,[5] so as to avoid possible overlaps and/or a conjunction of rules. In addition, the ACD is going to contribute to the 2007 Act on Competition and Consumer Protection[6] so as to protect the files of the Polish competition authority[7] in accordance with the requirements of the Damages Directive. The final part of the ACD contains relevant transitional provisions and a rule on the entry into force of its provisions, namely the 14-day period after its publication when its applicability is suspended (*vacatio legis*).

2 In Polish at: https://legislacja.rcl.gov.pl/projekt/12283303.

3 In Polish at: https://legislacja.rcl.gov.pl/projekt/12292051.

4 The 1964 Civil Code (*Kodeks cywilny*), consolidated version Journal of Laws 2016 item 380 as amended.

5 Consolidated version Journal of Laws 2003 No. 153, item 1503 as amended.

6 Consolidated version Journal of Laws 2017 item 229.

7 The President of the Office of Competition and Consumer Protection, in Polish *Prezes Urzędu Ochrony Konkurencji i Konsumentów*, hereinafter also as the UOKiK President.

Valentin Mircea*

ROMANIA

I. Manner of implementing the Directive

Since the enactment of the first Romanian competition law (Law 21/1996), this contained a specific provision stressing the right of victims of competition law infringements to obtain compensation for the damages which they have incurred. '*Apart from the sanctions applied in accordance with this law, the right of a physical and legal persons to obtain full compensation for the damages created through an anticompetitive act prohibited by this law remains reserved*'.

This rule, which merely re-states the principle of torts liability, was supplemented in 2010 and 2011 with several specific provisions, aimed at creating a specific framework for the private enforcement of competition rules. The new provisions regarded: passing-on of overcharges; statute of limitation; standing of consumer associations in actions for damages; access to the file of the competition authority; and single (instead of joint and several) liability of leniency applicants. These provisions were inspired by the debates and the works of the European Commission,[1] since the European Court of Justice gave force to the right to compensation of private victims of antitrust infringements. At the time of its enactment, the legal framework provided by Romanian law was among the most advanced in the European Union. Private litigation cases started to appear after 2011,

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1 The 'Green Paper' of 2005 and the 'White Paper' which followed in 2008.

although most ended up being finalized with out-of-court settlements. Up to now, there is only one case, decided by the Bucharest Court of Appeal, in which a private plaintiff obtained the recovery of damages from a state-owned former monopoly. The latter was previously found to have abused its position in the market for postal deliveries by the Romanian Competition Council.[2] The decision of the Court of Appeal is currently under review by the High Court of Justice.[3]

The draft recently presented by the Romanian government differs from the Draft Law which was circulated with the stakeholders and submitted to public consultations in the second half of 2016. The intention seems to be at the moment to implement Directive[4] through an emergency government ordinance (hereinafter, EGO), since the implementation deadline had already passed and the European Commission initiated formal infringement procedures against Romania. It has to be said, however, that the implementation of the Directive does not qualify, as a matter of principle, for the use of a legal instrument such as an EGO. For this reason, this report will refer to the Draft Law rather than the draft EGO. If adopted through an EGO, the legal provisions implementing the Directive may be subject to a significant review in the Parliament, which will be eventually called to approve the EGO, with any amendments it may deem necessary.

II. Competent courts

De lege lata, actions for the recovery of damages caused by competition law infringements may be brought before the lower courts ('judecătorie'). This is not the most favourable situation, given the relative lack of experience of judges of the lower courts, and the complex technical aspects often emerging in actions for damages based on competition law infringements. The Draft Law which is currently proposed by the government of Romania, proposes to assign first-instance competences to decide on such cases solely to the Bucharest Tribunal, the latter being a higher court with judges

2 The decision, in Romanian, may be found at: http://www.consiliulconcurentei.ro/uploads/docs/items/id2940/decizia_nr52_din_16122010_publicare.pdf

3 Details available at: http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/?ms_code=rom

4 Reference to the 'Directive' means throughout this text, to Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

Ondrej Blažo*

SLOVAKIA

I. Manner of implementing the Directive

1. Early-history of private enforcement in Slovakia

The implementation of the Damages Directive is not the first attempt to regulate procedural or substantive rules that can, at least partially, fall within the concept of private enforcement of competition law. The original text of Article 42 of Act No. 136/2001 Coll. on Protection of Economic Competition and Amending Act of the Slovak National Council No. 347/1990 Coll. on Organization of Ministries and Other Central Bodies of State Administration of the Slovak Republic as Amended (hereinafter, APEC) stipulated that 'consumers, whose rights were violated by a prohibited restriction of competition, can submit a claim to the court for the infringer to cease such behaviour and repair the illegal state. A legal person empowered to protect consumer rights can lodge the same claim'. The title of this provision was quite misleading: 'Civil Disputes from Prohibited Restrictions of Competition'. Reading the title of the said provision literally could have led to the argument that Article 42 APEC represents *numerus clausus* of possible civil claims. Furthermore, this provision referred to 'civil law disputes' and, due to the dichotomy of Slovak civil law, to civil law *stricto sensu* centred on the Civil Code (*Občiansky zákonník*), as well as to commercial law governed primarily by the Commercial Code (*Obchodný zákonník*). Hence, it was not clear to which claims it referred to.

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Currently, there is no doubt that damages caused by competition infringements are covered by the rules of the Commercial Code[1] – particularly its Article 373 et seq. – irrespective of whether the injured party is an undertaking or not. Compared to rules on liability for damages under the Civil Code[2] (general system), liability under the Commercial Code is based on principles of strict liability. Therefore, the real purpose of the provision of Article 42 APEC became unclear due to its quite limited content (a form of injunction and *restitutio in integrum* order) without any reference to damages claims. A possible involvement of consumer associations, as actively legitimated claimants, represents, therefore, the only measure different from those enshrined in the Commercial Code and reflects the first form of possible collective redress. Nevertheless, this provision has never been used as the basis for a successful court dispute, and there is no final meritorious judgment dealing with a case under the previous wording of Article 42 APEC.

2. Awaiting the Damages Directive

By Amendment 2014 of the APEC,[3] the provision of Article 42 was completely replaced by a new provision regarding liability for damages caused by a competition law infringement. This regulation was introduced while the Damages Directive was being drafted, thus inspiration by the draft of the Directive is evident. Amendment 2014 laid down a specific regime, and a modification of joint and several liability of leniency applicants was introduced:

- a party to the competition restricting agreement which fulfilled the conditions for the participation in the leniency programme is not obliged to pay damages if the damages could be paid by other parties of the same competition restricting agreement;
- a party to the competition restricting agreement which fulfilled the conditions for the participation in the leniency programme is excluded from the obligation to settle with those other participants of the competition restricting agreement which paid damages;

1 Act No. 513/1991 Coll. Commercial Code as amended.

2 Act No. 40/1964 Coll. Civil Code as amended.

3 Act No. 151/2014 Coll. amending act No. 136/2001 Coll. on protection of economic competition and amending act of the Slovak National Council No 347/1990 Coll. on organization of ministries of other central bodies of state administration of the Slovak Republic as amended as amended and amending certain other acts.

Ana Vlahek* **and Klemen Podobnik****

SLOVENIA

I. Introduction

This national report aims to present the regime of private antitrust enforcement in the Republic of Slovenia *before* and *after* the implementation of the new Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union that was to be implemented by the Member States by 27 December 2016.[1] Individual provisions of the directive and their corresponding provisions in Slovenian (draft) legislation will be analysed testing thereby whether a correct, coherent and substantively adequate transfer of the directive into Slovenian law has been made. The report will assess both currently valid as well as planned provisions of the relevant legislation through the lens of the new directive. An in-depth analysis of the focal issues of the final proposal of amendments to the Slovenian Prevention of Restriction of Competition Act will be provided, revealing the most problematic issues of the new regime and dilemmas that have arisen in transposing the directive into the Slovenian system of civil law.[2]

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1 OJ EU L 349, 5.12.2014.

2 The report is based on the following articles and monographs (or parts within): Fatur, Podobnik and Vlahek, 2016; Vlahek, 2016b, p. 547–590, 620–621; Vlahek, 2016a, p. 375–428; Vlahek and Lutman, 2017, p. 41–70, 135–136.

II. Method of implementing the Directive

In Slovenia, the directive will be implemented by way of adopting a law amending the existent Prevention of Restriction of Competition Act (Sl. *Zakon o preprečevanju omejevanja konkurence*, hereinafter, ZPOmK-1) of 2008.[3] This will be the ninth amendment to the ZPOmK-1[4] and it will take the form of a new Act Amending and Supplementing the Prevention of Restriction of Competition Act (Sl. *Zakon o spremembah in dopolnitvah Zakona o preprečevanju omejevanja konkurence*, hereinafter, ZPOmK-1G)). The focal part of the amending act comprises of a new Part VI titled 'Certain rules of private enforcement of breaches of competition law' encompassing Articles 62 and 62a – 62o that will be inserted into the ZPOmK-1 replacing the existent Part VI titled 'Court Proceedings' and its Article 62.

The implementation process of the directive in Slovenia is in its final stage. A final draft proposal of the implementation provisions of 16 November 2016[5] was being refined by the Ministry of Economic Development and Technology (Directorate for Internal Market, Sector for the Protection of Consumers and Competition) until the end of February 2017, after it received comments to various draft proposals of 2016 by the European Commission and the interested stakeholders in Slovenia, i.e. the industry, law professors, judges, the Slovenian Bar Association, the Slovenian Competition Protection Agency, the Ministry of Justice et al. The official public consultation on the ZPOmK-1G took place between 15 June 2016 and 15 July 2016 after the first draft proposal of 6 June 2016 was published on the web pages of the Ministry of Economic Development and Technology[6] and on the e-governance web pages.[7] After receiving initial comments to the first draft proposal, the ministry started refining the text of the ZPOmK-1G and forwarded a new version of the text to all those who had submitted comments to the first draft proposal of 6 June 2016. On 5 September 2016, a public consultation on the ZPOmK-1G addressing the issues of private enforcement and the implementation of the directive was held at the Ministry. On the basis of the comments received there,

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

4 For a historical background of Slovenian competition law and the substance of the amendments to the ZPOmK-1, see Fatur, Podobnik and Vlahek, 2016, p. 27–32.

5 EVA 2016-2130-0075. Not available online.

6 Available in Slovene only: <http://www.mgrt.gov.si/si/zakonodaja_in_dokumenti/notranji_trg/predlogi_predpisov/sektor_za_varstvo_potrosnikov_in_konkurence/> (5.03.2017).

7 <https://e-uprava.gov.si/drzava-in-druzba/e-demokracija.html> (6.03.2017).

Anna Piszcz*

Quo vadis CEE? Summary

I. Introductory remarks

The Latin phrase *Quo vadis* in the title of this summary is, unsurprisingly, intended to reflect the question of where we, Central and Eastern Europe, are going regarding the implementation of the EU Damages Directive. More precisely even, whether the 'routes' taken by the legal drafters and/or legislatures of CEE countries implementing the EU Damages Directive correspond very closely to the model provided by the Directive or, to the contrary, are the CEE legislatures and/or drafters using the opportunities to do something different than only to copy and paste the Directive. Are the already existing provisions, plus the newly introduced ones, compliant with the Directive? If yes, further amendments to national legal frameworks are most probably not necessary at this stage at all, or maybe it is necessary to introduce only a few amendments. If not, what further improvements are necessary?

II. *Status quo* of the works on the implementation

The national reports narrated, first of all, the history of the works on the implementation of the EU Damages Directive in CEE countries. It is a truth acknowledged by the Authors that as of early March 2017, only three out of the eleven CEE countries (Hungary, Lithuania and Slovakia) had national provisions transposing the EU Damages Directive into their

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laws already in force. At that time, Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Poland, Romania and Slovenia were all still awaiting the transposition of the Directive. Irrespective of how remote the time of the transposition is, the majority of the Authors had to use draft provisions as the basis for their national reports. The first chapters of the national reports answered therefore not the question of 'where we go' but rather, the question of 'how we go'. The answer is certainly, 'too slowly'.

III. Scope of the implementation

In subsequent chapters of the national reports, the Authors paid close attention to the scope of the implementation of the Directive, which is quintessential from the perspective of the question asked in the title of this summary. First, it seemed common knowledge that it would not be reasonable for Member States to have double standards with respect to the two different types of infringements – prohibited practices with and without EU effect. As expected, the national reports say that, reasonably, all the CEE countries chose to broaden the scope of the implementation going beyond only infringements with EU effect. Did the EU use a back door wanting to harmonise also national legal frameworks governing actions for damages for infringements of the competition law provisions without EU effect?

Second, the legal drafters and/or legislatures of CEE countries have not proven overly creative regarding the scope of the remedies to which the harmonised rules are going to be applied. All CEE countries are going to apply the harmonised rules only to claims for damages. Slovenia seems to be the only one that tried, at some stage of the legislative works, to broaden the scope of the implementing rules to all possible civil claims; however, the final draft has ultimately restricted their scope to claims for damages only.

So if in those two areas the CEE countries chose 'minimal' implementation in line with the Damages Directive, what about the types of infringements to which the harmonised rules are going to be applied? In the majority of the CEE countries these cover only: (1) agreements, decisions by associations of undertakings or concerted practices and (2) abuses of a dominant position. But it is not the same with Latvia, Hungary and Bulgaria. The new Latvian law is going to be expanded to include also unfair competition practices. Since Latvian Competition Law prohibits also unfair competition practices and the new provisions are going to contain a more general reference to

violations of any provision of the said Latvian statute, the implemented provisions will be broadened to encompass also unfair competition practices. Interestingly, the approach to this question in Bulgaria and Hungary is a bit different. In Bulgaria, the broadened implementation with regard to unfair competition practices is going to regard only the right to full compensation. In Hungary, some of the new rules (Chapter XIV/B of the Competition Act) relate to a very specific type of prohibited practices, that is the unfair manipulation of business decisions.

As to the personal scope of the implementation of the Directive, the CEE countries chose 'minimal' implementation in line with the Damages Directive. They have never followed one pattern as regards the liability of a parent company for infringements of competition law committed by a subsidiary. The concept of a 'single economic entity' has been defined in legal provisions (Croatia) or adopted in jurisprudence (Bulgaria and Slovenia). In some CEE countries, legislation provides for the liability of a parent company for the obligations of its subsidiaries – public (Hungary) or private (Lithuania). The 'own fault' of a parent company is assessed, for example whether it gave instruction to a subsidiary (Croatia, Bulgaria, Lithuania). In some countries however, there is only the concept of a 'single legal entity', rather than the concept of a 'single economic entity' (Poland, Hungary). That might have been about to change. Passing legislation to regulate the civil liability of a parent company for competition law infringements of its subsidiaries would, without any doubt, be a move welcomed by scholars and practitioners. But, as the national reports say, this is not going to take place.

IV. Competent courts

The national reports focus next on the issue of competent national courts before which the right to compensation is enforced. The Directive does not provide for any specific organizational model of private enforcement of competition law. Therefore, Member States have plenty of options. Some CEE countries are going to be characterised by having only one court competent to hear actions for antitrust damages. These include Lithuania (Vilnius Regional Court as the court of 1st instance and the Court of Appeal of Lithuania as the court of 2nd instance) and Latvia (Riga city Latgale district court as the court of 1st instance and Riga Regional court as the court of 2nd instance). Out of the three countries that implemented the Directive already (Hungary, Lithuania, Slovakia), Slovakia decided

to have only one court competent to hear actions for antitrust damages (District Court Bratislava II as the court of 1st instance and the Regional Court in Bratislava as the court of 2nd instance). In Croatia, actions for antitrust damages are heard by specialised commercial courts. Some CEE countries are going to be characterised by the competence of regional courts irrespective of the amount of the claim (Czech Republic, Hungary, Poland, Croatia). However, if we take a closer look at the composition of the judicial panel, it turns out that those cases are usually heard by a single judge only (Czech Republic, Hungary, Croatia, Poland). In Bulgaria, general courts – district or provincial (regional) – are competent depending on the amount of the claim. Interestingly, Bulgarian courts limit their own competence and consider stand-alone actions inadmissible. Regrettably, in the majority of the CEE countries, courts described by the Authors as non-specialised remain competent to hear actions for antitrust damages.

V. Substantive law issues

Further, the national reports contain an overview of relevant substantive law issues.

Examined first in the national reports are developments of the rules governing limitation periods for bringing actions for antitrust damages. The new provisions or draft provisions correspond in principle to Article 10 of the Directive. It is interesting, however, that some countries have difficulties with the transposition of the conditions relating to the beginning of the limitation period. Namely, according to the Slovenian draft, the limitation period shall begin to run when, *inter alia*, the claimant knows, or can reasonably be expected to know, of the behaviour of the infringer constituting an infringement of competition law. By contrast, the Directive mentions 'the fact that the behaviour constitutes an infringement' (Article 10(2)(a) of the Directive). Furthermore, the Slovenian draft requires that the claimant knows, or can reasonably be expected to know, of the harm caused by the infringement of competition law, while the Directive refers to 'the fact that the infringement of competition law caused harm' to the claimant (Article 10(2)(b) of the Directive). Second, the Hungarian provisions mention 'damage caused by infringement' rather than the content of the Directive. Third, the Czech draft mentions the person liable to pay the damages, where the Directive requires knowledge of the identity of the infringer (Article 10(2)(c) of the Directive).

In almost all CEE countries, the limitation periods for bringing actions for damages shall be five years (period *a tempore scientiae*). Latvia, unlike the majority of CEE countries, is going to retain the longer 10-year limitation period resulting from its civil law, which is compliant with the minimum harmonisation clause contained in Article 10(3) of the Directive. A significant shortcoming of the Latvian draft Competition Act is, however, that it does not deal with the issue of the conflict between civil law and commercial law provisions on limitation periods. In the latter case, the limitation period is three years and the application of this provision to cases where a commercial transaction exists between the infringer and the person that has suffered harm caused by an infringement of competition law would be contrary to the requirements of Article 10(3) of the Directive. There is one thing in common between the above approaches in Latvia and Slovakia. Also in Slovakia, provisions on limitation periods exist both in civil law and commercial law. In the latter case, a general limitation period exists that shall start to run when the injured party knows or can reasonably be expected to know of the harm suffered and the identity of the person liable for damages. Aside from that, there is also a rule according to which the limitation period shall anyways expire not later than 10 years from the end of the injurious behaviour that caused the harm (an absolute limitation period or a period *a tempore facti*). Under the Slovak law, it is ambiguous if this absolute limitation period shall be applicable to actions for antitrust damages between undertakings, or if it shall be excluded. It is worth mentioning that absolute limitation periods have been proposed also in Poland and Slovenia (10 years) as well as in Croatia (15 years).

Second, the national reports analyse the type of liability of the infringer as well as joint and several liability of co-infringers. Recital (11) sentence 5 of the Directive states that where Member States provide conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and the Directive. This provision is not such as to discourage CEE countries from maintaining a fault-based model of liability in private antitrust enforcement. To put it simply, the majority of them have opted for a fault-based model of liability (Bulgaria, Latvia, Lithuania, Poland, Romania, Slovenia), in some cases accompanied by the presumption of fault (Czech Republic, Hungary, Lithuania, Poland). Only Croatia and Slovakia differ in this respect in that they have done something completely different and chosen strict liability.

The next pages of the national reports are devoted to the principle of joint and several civil liability of competition law infringers. As a rule, CEE countries do not need to introduce this principle, as embodied in Article 11(1) of the Directive, since – as the national reports assert – they already have it in their laws with regard to competition law infringements. The focus is then on the transposition of the details contained in Article 11(2)–(6) of the Directive. Whether it has anything to do with the ambiguity of some of the provisions of Article 11, or with the fact that it seems to contain some mistakes, but certain CEE countries tend to supplement and correct the transposed provisions. For example, Article 11(2) regarding small or medium-sized enterprises (SMEs) refers to their definitions contained in a piece of 'soft' law, namely *Commission Recommendation 2003/361/EC*. Slovakia corrected this reference so that now it refers to *Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty*.[1] The drafters of the new Slovenian rules, instead of making a reference to 'soft' or binding law, copied the definitions into the draft law transposing the Directive. Both countries realized that micro enterprises are missing from Article 11(2) of the Directive, and so they made efforts aimed at correcting this in their national transposing provisions. The Hungarian legislature added to the elements of the definition of SMEs that the infringing enterprise must be a SME during the whole duration of the unlawful behaviour, in order to take advantage of the analysed provision. Article 11(2) states that the infringer is liable only to its own direct and indirect purchasers. Direct and indirect providers are missing from this paragraph, so when drafting their national transposing provisions, the Czech Republic and Poland filled this gap. When transposing Article 11(2)(b), the drafters of the new Slovenian rules, replaced the word 'irretrievably' with 'undoubtedly'. Moreover, Slovakian, Czech, Estonian and Slovenian legal drafters copied into national provisions related to SMEs the provision of Article 11(4)(b) of the Directive relevant to immunity recipients, even though this is not so provided in the Directive. On the other hand, the Croatian standpoint is that adding such provisions is impermissible, since SMEs have received preferential treatment in the Directive. Interestingly, Croatian draft law transposing the Directive sets out exemplary objective criteria for determining the relative share of co-infringers in the entire harm caused by the infringement. Such determination shall be based upon all the circumstances of a case, such as market share, turnover, role in

[1] OJ L 187, 26.06.2014, p. 1.

the cartel or other infringement etc. The proposed provision is going to codify Recital 37 of the preamble of the Directive. Last, in Hungarian law, the scope of the liability of the immunity recipient has been extended as a result of the transposition of the Directive, since Hungary previously had rules restricting their liability inspired by the European Commission's White Paper of 2008.

Next, the national reports grasp the crucial issues of quantification of harm. All CEE countries either drafted a rebuttable presumption following Article 17(2) of the Directive or had such rules beforehand (Czech Republic, Hungary). The scope of the presumption is different in various countries. In the majority of CEE countries, the presumption is limited only to cartels. On the other hand, the scope of the Polish draft includes both types of infringements covered by the Directive (anticompetitive agreements, decisions by associations of undertakings or concerted practices and abuses of a dominant position). The Romanian draft covers anticompetitive agreements, decisions by associations of undertakings or concerted practices. Hungary, from 2009, has a rebuttable presumption that a cartel results in a price increase of 10%. It is not a presumption of 'some' harm but a presumption of harm in a given amount. The same solution can be found in the Latvian draft. This type of provisions may raise doubts as to their conformity with Recital (47) sentence 3 of the Preamble of the Directive ('This presumption should not cover the concrete amount of harm'). CEE countries already had provisions giving their courts the power to estimate the amount of harm sustained. However, some of them are going to introduce *leges speciales* to their general principles (Czech Republic, Croatia). Out of the three countries that implemented the Directive already (Hungary, Lithuania, Slovakia), Slovakia is in this group and discrepancies between the national law and the Directive have not been avoided here. The Directive allows for the estimation of harm if it is practically impossible or excessively difficult to precisely quantify the harm. Slovak law allows for such estimation where it is absolutely impossible or disproportionally difficult to precisely quantify the harm.

As to interest, even though the solution contained in Recital (12) of the Preamble of the Directive, whereby interest is due from the time when the harm occurred, was so far uncommon in CEE countries, most of them decided to introduce it. However, Estonian drafters proposed that interest is due from the time when the injured person filed a claim for damages. According to the Polish draft, if the basis of calculating damages are prices from a date other than the date of calculating damages, the party injured by the infringement of competition law can also claim interest for the period

from the day the prices of which were the basis of calculating damages to the day when the claim for damages is due.

Rules on passing-on of overcharges (Articles 12–16 of the Directive) seem the least problematic when it comes to substantive law issues. The laws of the majority of CEE countries have already embodied general rules regarding this topic and detailed rules on this issue were transposed to their national draft statutes quite literally.

VI. Procedural issues

With respect to procedural issues, the transposition of the effect of national decisions does not seem to be subject to difficulties, but only with regard to the effect of infringement decisions adopted in individual Member States by their own competition authorities (non-cross-border effect of such decisions). CEE countries unanimously opt for the binding effect of this type of decisions ('irrefutably' establishing an infringement) in compliance with the maximum harmonisation clause contained in Article 9(1) of the Directive. However, even here there are some differences between the choices of particular CEE countries with regard to the scope of the concept of 'decision'. For example, in Bulgarian draft provisions contain the binding effect of not only 'positive' decisions (infringement decisions) but also 'negative decisions' where the NCA has not ruled that a party is in breach of competition law. Interestingly, the same approach was taken by Hungary but only before the transposition of the Directive. In Romania, the draft provisions on the binding effect of decisions cover not only administrative decisions by its NCA, but also earlier civil court decisions rendered in a private litigation case involving the same plaintiff and the same infringement.

A much more visible diversity can be found with regard to a cross-border effect of national decisions referred to in Article 9(2) of the Directive, constituting a minimum harmonisation clause ('at least *prima facie* evidence'). None of the CEE countries chose to provide them with the same standard of effect as in the case of non-cross-border effect of their own decisions. The majority opted for a rebuttable presumption (Croatia, Czech Republic, Latvia, Romania, Slovakia, Slovenia). In Slovakia, however, there are serious doubts regarding the interpretation of the adopted provision whereby the final decision on a competition infringement issued in another Member State is considered evidence of the infringement unless it is proven otherwise in the court proceedings on damages claims. Furthermore, in Lithuania, circumstances indicated in decisions of NCAs of other Members

States shall be considered fully proven until and unless they are contradicted by other relevant evidence, except for witness evidence (as a rule). Estonian drafters plan to retain a rule according to which it is allowed to present decisions of NCAs of other Members States as evidence. Polish drafters proposed not to change its procedural rules at all, claiming that they already contain the concept of *prima facie* evidence in the form of the so-called factual presumption. Last, Bulgaria disregarded Article 9(2) of the Directive and no special effect is going to be accorded to decisions of NCAs of other Members States when presented before Bulgarian courts.

Regarding disclosure of evidence, CEE countries have, as a rule, established or are going to establish the same principles as the Directive (Articles 5–8 of the Directive). However, the Czech provisions will allow for pre-trial discovery, whereas the Directive prescribes disclosure of evidence only after the proceedings concerning damages are initiated. Article 5(2) of the Directive requires Member States to ensure that national courts are able to order the disclosure of specified items of evidence or relevant categories of evidence. The last concept seems to generate doubts in CEE countries. The Croatian draft provisions make it possible for the parties to obtain court-assisted disclosure of specified or specifiable evidences; the drafters of these provisions believe that the latter will be considered equivalent to 'relevant categories of evidence'. On the other hand, the Czech Republic has not drafted any provisions on this concept at all but proposed the usage of the minimum harmonisation clause of the Directive (Article 5(8)) that allows for maintaining or introducing rules which would lead to wider disclosure of evidence than provided for in the Directive. Another unique Czech solution refers to the obligation of the claimant requesting evidence disclosure to pay an up-front guarantee of up to 4,000 Eur and a limitation, in the case of damages claims, regarding the abuse of disclosed evidence. Rules on the disclosure of evidence need some 'muscle behind them', therefore CEE countries introduce sanctions for failure to comply with those rules, including fines. It seems that if undertakings or their representatives risk a fine, it can prevent such behaviour. At least in some CEE countries, the planned or introduced fines seem a sufficiently deterrent: in Croatia – up to 1% of the annual turnover, in Romania – from 0.1% to 1% of the annual turnover, in the Czech Republic – up to 1% of the annual turnover or 400,000 Eur (and joint and several liability for the fine), in Bulgaria – up to 250,000 Eur, in Hungary – up to 160,000 Eur, in Slovenia – up to 50,000 Eur. By contrast, in Lithuania such fines may only reach up to 10,000 Eur, in Estonia – 3,200 Eur, in Slovakia – 800 Eur or 2,000 Eur (in case of repeated infringements) and in Latvia – 40 Eur (!).

As to standing to sue, that is who is entitled to apply for judicial proceedings, in CEE countries, as a rule, general rules apply. The standing to sue does not suffer from any material limitations, except in Bulgaria where stand-alone actions have not been permissible so far. Even though the Directive does not require Member States to provide for the standing of 'someone acting on behalf of one or more alleged injured parties' (Article 2(4) of the Directive), some CEE countries already have such solutions (Romania, Hungary) or plan to introduce them (Poland).

The legal bases for collective private enforcement of competition law in CEE countries exist in only three CEE countries – Bulgaria, Lithuania and Poland. The transposition of the Directive has not been used in any of them as an opportunity to make amendments to the existing solutions. None of the remaining CEE countries decided to introduce a legal framework for collective private enforcement of competition law alongside the transposition of the Directive. In Slovenia, however, a draft law on collective redress is being prepared.

VII. Consensual dispute resolution

As a rule, provisions on consensual dispute resolution in antitrust enforcement (Articles 18–19 of the Directive) were, or are going to be transposed into national laws of CEE countries without substantial changes to the text of the Directive. Most of them already have provisions on the suspension of limitation for the duration of any consensual dispute resolution process, or are going to introduce them. The Czech Republic is the exception here – there is no such provision under Czech law. However, in the case of Slovenia and Poland, their legal drafters have not regarded all possible types of out-of-court dispute resolution as consensual dispute resolution which would suspend the limitation period – only the existent formalized types of consensual dispute resolution qualify as such. The majority of CEE countries either already have, or intend to introduce a rule whereby their NCAs may consider compensation paid as a result of a consensual settlement, and prior to its decision imposing a fine, to be a mitigating factor with respect to setting the amount of such fine (Article 18(3) of the Directive). This does not refer to Croatian draft provisions but their drafters do not see this omission as a particular problem; most consensual settlements will follow a prior infringement decision and the application of this rule will most likely be quite uncommon. Last, Slovakian law differs

with regard to its equivalent of Article 19(1) of the Directive – where the Directive excludes from the claim the whole 'share' of the settling infringer, Slovak law excludes only the extent to which the injured party was satisfied.

VIII. Conclusions

To sum this up, it seems that in many instances CEE countries introduced, or are going to introduce the changes required by the Damages Directive. They have conducted a more or less intensive scrutiny of legal areas such as civil law, procedural law and competition law. However, at the same time, they have also added further complications to an already quite complex and inefficient systems of competition law enforcement. The system of competition law enforcement is becoming a more highly regulated and codified field in CEE countries. It is very unlikely that after the amendments claimants will find redress much easier, cheaper and quicker. After making the above comparisons, I believe that the solutions used in the neighbouring countries may be described a 'patchwork'. At the point of departure, the national solution of CEE countries represented a puzzle that posed difficulties when being harmonised according to the EU model. Not very much has changed after the harmonisations works. However, this is so largely also because the EU model is imperfect to some extent.

The Authors of the national reports seem partly optimistic and partly pessimistic as to the future of private antitrust enforcement in CEE countries. Admittedly, some of the rules of the Directive will contribute to the improvement of tools available to claimants and authorities. For example, limitation periods will be more reasonable and will suffice to allow injured parties to bring actions, even follow-on actions. Access to evidence will probably be better. On the other hand, some areas of private antitrust enforcement have been omitted by the Directive and/or the legal drafters and/or legislatures of CEE countries, which may result in that pursuing claims will not become much easier at all. For example, no incentives for consumers were introduced, in particular to initiate collective actions. It does not seem likely that any of the CEE countries could become the 'target' of forum shopping, with their respective legal frameworks for private antitrust enforcement. It remains to be seen whether and how the new rules will be applied in practice and how their deficiencies will be overcome by national courts.

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Dochodzenie przed sądem polskim roszczeń odszkodowawczych z tytułu naruszenia reguł konkurencji [*Pursuing damages for competition law infringements before Polish courts*]. Pod redakcją Anny Piszcz i Dominika Wolskiego, Warszawa 2016.

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(...) I consider the publication of the book very valuable. All analyses are deep, thorough and well structured. They will serve as a gold mine of information for all those who are interested in private enforcement of competition law, be it legislators, judges, practitioners and academics. The comparative dimension of the book will allow readers to evaluate each statements and solutions in the light of the legislative choices and judicial practice of other countries. The publication of the book will certainly contribute to the development of this kind of competition law enforcement in Central and Eastern Europe.

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All CEE (EU-) countries have recently been facing common need for implementation of the Damages Directive. These countries share something more common than geographical proximity and neighbourhood only. Their legal history and tradition and so called path-depenence often resemble, too. It is therefore important and useful to compare the starting positions of these countries, main problems accompanying the process of implementation and to discuss the possibilities how to solve and overcome the difficulties and obstacles connected therewith. The book contributes without any doubts to achieving this goal.

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ISBN 978-83-65402-52-3