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PRIVATE ENFORCEMENT OF COMPETITION LAW IN CROATIA – THE NEW ACT ON ACTIONS FOR DAMAGES FOR INFRINGEMENT OF COMPETITION LAW

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ABSTRACT

The aim of this article is to analyse the situation in the area of damage claims for the infringement of competition law in the Republic of Croatia. The new Act on actions for damages for infringements of competition law contains substantive and procedural rules governing actions for damages for infringements of the competition law provisions. The substantive rules concern the subject matter and scope of the application, the right to full compensation, the presumption that cartel infringements cause harm, joint and several liability of undertakings' that have caused the infringement through joint behavior, passing on overcharges, the effects of consensual settlements on subsequent actions for damages. The procedural rules consist of definitions and rules governing disclosure of evidence, especially the disclosure of evidence included in the file of a competition authority, the effect of the competition authorities' and the courts' final decisions, the limitation periods, postponement of the action for damages for up to two years due to consensual dispute resolution in respect of the claim. Special emphasis will be on certain rules that depart from our legal tradition. The author will attempt to indicate the problems resulting therefrom and offer possible clarifications.

Keywords: *Competition Law, Damage Claims, the European Union, the Republic of Croatia*

1. INTRODUCTION

There has been a lively debate on the possibilities of damage claims in the competition law in the last few years. There is a longstanding perception that private enforcement of competition rules is underdeveloped, uncertain and ineffective. In Europe private enforcement is seen as a mean of ensuring compensation for damages and also a deterrent mechanism for possible future infringements. The Directive on rules governing actions for damages for infringement of competition law ("Directive") is the first directive enacted in the field of competition law. It has been passed on 26 November 2014. The aim of the Directive is dual. The first one is to maximize the interaction between the private and public enforcement of competition law and the second concerns the full compensation for the competition law infringements (Lianos, 2015, p. 34). The aim of this article is to scrutinize the situation in the area of damage claims for the infringement of competition law in the Republic of Croatia. The area is still in the embryonic stage in most European countries as well as in Croatia. Croatian legislator had a choice to adopt a separate act or to implement the Directive in the existing acts. The first solution was chosen. It is also important to stress that unlike other EU countries, Croatia, has not been involved in the legislative process which led to the adoption of the Directive. This article will provide some insight into the Croatian rules on the damages claims, especially after the new Act on actions for damages for infringements of competition law ("Act") came into force. The Act contains both substantive and procedural rules governing actions for damages for infringements of the competition law provisions. Special emphasis will be on certain rules that depart from our legal tradition. The author will attempt to indicate the problems resulting therefrom and offer possible clarifications.

2. SUBJECT MATTER AND SCOPE OT THE ACT

Article 1 of the Act provides that it sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association. It should be stressed that according to our general law, we already have a rule of full compensation (Art. 1090 of the Civil Obligation Act). This Act sets out rules coordinating the enforcement of the competition rules by competition authorities and the enforcement of those rules in damages actions before competent commercial courts. The last provision is not a novelty, as the only one provision dealing with private enforcement before the Act, was the one giving the jurisdiction for the antitrust damages claims to commercial courts (Art. 34b(9) of the Civil Procedure Act). Article 3 enshrines familiar competition concepts and terms. It contains some definitions already known from the jurisprudence of the Court of Justice of the European Union ("CJEU"). This Act covers not only the infringement of provisions that regulate prohibited agreements and the abuse of dominant position but also the infringement of Art. 101 or 102 of the Treaty on the Functioning of the European Union ("TFEU"). This means that the infringement can be the infringement of Art. 101 or 102 of the TFEU and also of national competition law. According to the Act the "national competition law" means provisions of national law that predominantly pursue the same objective as Articles 101 and 102 and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003. The term court means the territorially competent commercial court and the High Commercial Court according to rules of organization and jurisdiction of courts. The right to compensation is recognized for any natural or legal person. Definition of action for damages plays a central role. An action can be brought by an alleged injured party. It also covers someone acting on behalf of one or more alleged injured parties and also natural or legal person that succeeded in the right of the alleged injured party. The last possibility encompasses collective actions by collective entity. Cartel is defined as an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behavior on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors. The later examples derive from the CJEU's case law.

3. THE RIGHT TO COMPENSATION

Since the Directive is not a full harmonization directive the member states are free to introduce stricter rules so long as those rules do not conflict with the principles of the Directive. The injured party who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm. Our legislator introduced a more extensive rule. Damage shall imply a loss of person's assets (pure economic loss), halting of assets increase (loss of profit) and violation of privacy rights (non-material damage) plus the payment of interest (Art. 5). Our Act covers material and non-material damages. Interest is due from the time when the harm occurred until the time when the compensation is paid. This is in line with our general tort principles. Non-material damage is not limited. Regarding the non-material damage, it will be interesting to see how the infringement of competition law can affect personal rights. The Directive refers to the recovery of actual loss and loss of profit plus the payment of interest. Our legislator introduced more ways for compensation than the Directive. It can also be seen from our general rule stating that a legal person has a right for a fair money compensation for non-material damages. In the event of the violation of personality rights, an injured party may request a disclosure of the judgement or its modification at the expenses of

the defendant, or the court can order a just pecuniary compensation. According to our general rule a person who has caused damage to another shall compensate it unless it has proven that the damage had not occurred as a result of his fault. Lack of duty of care shall be presumed (Art. 1045 of the Civil Obligation Act). Here we are speaking of the presumed fault. The Directive requires strict liability. So an Act states that the infringer that caused harm by infringement of competition law shall be liable for damage caused regardless of fault (Art. 5). Strict liability rule requires the harm or likehood of the harm to be determined (Lianos, Davis, Nebbia, p. 34). It is argued that it can lead to unjust situations. The undertaking is always obliged to compensate for the full harm. Taking into the account the nature of harmful acts committed as competition law infringements and the characteristic of the torfeasor as an undertaking, the highest possible level of care is required. If we left the standard of presumed fault, there would be a possibility for the infringer to be exculpated by proving that the undertaking applied a high standard of care. In order to facilitate the position of injured party in the case of cartel infringement, there is a presumption that cartel infringements cause harm unless the infringer rebuts that presumption. Competition law infringements cover not only damage on assets or infringement of personal rights but also the state of market. Surprisingly the Directive left the issue of causation, thus leaving it to the national general tort law provisions. According to our legal thinking the cause must be a typical cause, one which regularly causes certain harmful consequences. There has to be shown an unbroken causal link. The causal link must connect all three elements: the harmful act, the distortion of competition and the harm to the given victim. There is one situation that helps the position of the claimant in the case of cartel infringement. The Act says that damage caused in relation with an infringement of competition law in the form of cartel, shall be considered as resulting from that cartel unless it has been proved that the cartel has not caused the damage. It is a presumption of causality.

4. EVIDENCE AND INFORMATION ASYMMETRY

The Act has precise rules on the disclosure of evidence necessary for issuing damage claims and special provision of disclosure of evidence included in the file of a competition authority. Before the Act, the claimants had two possibilities to obtain the necessary documents: either to use the provisions of the Competition Act or the Act on the right of access to public information with very limited reaches. Now the situation is changed in favour of possible claimants. There is a general rule with some conditions to fulfil. The claimant has to present a reasoned justification in order for the national court to be able to order the disclosure of specified items of evidence. Articles 5 to 8 deal with different aspects of the disclosure of evidence. The disclosure of evidence has to be supported by plausible claim. The claimant has to present reasonably available facts and evidence sufficient to support the plausibility of its claim for damages. It is a safeguard clause. When we speak about competition we speak about business secrets. Special question concerns the disclosure of confidential information. There is an explicit rule granting to national judges the power to order documents containing confidential documents. This is seen an improvement as until now, we did not have precise rules on the preservation of confidential information. It is important to note that pre-existing documents that are contained in the file of competition authority may be disclosed at any time. In order to tackle the situation of information asymmetry in collecting evidence, we have articles giving competence to national courts to order disclosure of evidence from parties of the proceedings and from third parties. The national courts have a power to order the defendant or a third party to disclose relevant evidence which lies in their control, provided that the claimant has presented a reasoned justification. It is interesting to note that the Directive speaks of the categories of evidence. Our legal tradition doesn't distinguish categories of evidence so the Act addresses "the relevant evidence". Where relevant evidence is not within the control of the

defendant, but is included in the file of a competition authority, it may be required by a national court to disclose the relevant evidence provided that it cannot reasonably be obtained from another party or from the third party. The court has to safeguard the effectiveness of the public enforcement of competition law. Here the Court has a lot of discretion. There is the so-called grey list of categories of evidence, whose disclosure can be ordered by national court only after a competition authority has closed its proceedings by adopting a decision. It is important to note that there is an absolute ban on the disclosure of leniency statements and settlement submissions (Art. 9). It applies to all leniency statements (immunity from fines or a reduction of fines). The last statement is of little importance for Croatia, as according to available data there has been only one leniency submission notwithstanding the legislative act (see Regulation on the method of setting fines). When we speak about leniency we speak about the cartels. The most efficient tool to detect cartel are leniency statements. Without according protection for the applicants detecting cartels, there would not be any incentive to go to Commission or to the national agency. Evidence obtained solely through access to the file of a competition authority can be used in an action for damages only by the natural or legal person who obtained the evidence or the person succeeding to that person's right, including the person that acquired that person's claim. There are also "sufficiently deterrent penalties" for the parties to the proceedings, but also against third parties that do not comply with a disclosure order of a national court.

5. LIMITATION PERIODS

There is a precise stipulation of when periods start to run. Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know of the infringement of competition law, damage and the identity of the infringer. Croatian Law changed the limitation period comparing to our general rules. Now the period for bringing action for the infringement of competition law is five instead of three years. There is precise stipulation of when periods start to run. Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know of the infringement of competition law, damage and the identity of the infringer. There are certain conditions to satisfy: the claimant must be aware of the behaviour and of the fact that such behaviour amounts to an infringement of completion law provisions. Possible difficulties could be with the start of the limitation period because sometimes it is difficult to establish precisely when the infringement has ceased. The limitation period is interrupted, if a competition authority takes action for the purpose of investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates and for the duration of consensual dispute resolution process, but only with regard to those parties that are involved in the process. The period for bringing actions shall expire within 15 years from the date the infringement of competition law has ceased.

6. EFFECTS OF NATIONAL DECISIONS

The infringement of competition law found by a final decision of the Agency or in the administrative dispute before the High Administrative Court against the decisions of the Agency is deemed to be irrefutably established for the purposes of an action for damages brought before the courts (Art. 11). This is full proof that the infringement has occurred. Where the final decision is rendered in another state, the situation is little bit different. In this case the infringement decision has to be assessed along with any other evidence adduced by the parties. Article 11 says that where the infringement of Article 101 and/or Article 102 is found by final decision taken in another Member State, it is also deemed to be established for the purpose of actions for damages, unless proven to the contrary. The national courts have discretion and it is a presumption that the national court will look into details at the facts and reach its own conclusions on the issue of infringement. Here we have a binding proof of the infringement

established by our Agency or the Commercial court. It will be seen how much weigh will be given to decisions adopted by other member states. These are the effects of final infringement decisions adopted by the Agency or the national review courts in the framework of subsequent actions for damages before national courts. The idea is to prevent a situation where the finding of an infringement would be re-litigated in subsequent actions for damages (Recital of the Directive, para. 34). The claimants do not have to prove the scope of the infringement again and can concentrate to the causation and the quantum of damages.

7. JOINT AND SEVERAL LIABILITY

The undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law. The consequence is that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated. It means that it can address claim to the most solvent undertaking.

Immunity recipient is fully protected except in one situation. It will be responsible to its direct and indirect purchasers and to other injured parties only where full compensation cannot be obtained from other undertakings that were involved in the same infringement of competition law. A co-infringer should have the right to obtain a contribution from other co-infringers if it has paid more compensation than its share. The determination of that share is a relative responsibility of a given infringer, and the relevant criteria could be a turnover, market share, or a role in the cartel. An infringer may recover a contribution from any other infringer, the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement of competition law. The amount of contribution of an infringer which has been granted immunity from fines under a leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.

8. THE PASSING-ON OF OVERCHARGES AND THE RIGHT TO FULL COMPENSATION

The question of passing-on the overcharges is one of the most complex and discussed questions of the Directive. The overcharge is defined as the difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law (Art. 2 para 20 of the Directive). It can be invoked by the defendant, but the defendant may try to claim that the direct purchaser did not experience any harm because it passed the overcharge on (Wijkmans, Visser, Jaques, Noël, 2016, p. 59). The principle is that the indirect purchasers, consumers included, are entitled to compensation by the infringer for the harm suffered. The defendant in an action for damages can invoke as a defense against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. There can be difficulties for follow-on claimants to prove the extent of harm caused. The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure of evidence from the claimant or from third parties (Art. 15). The burden of proof is placed on the one that does not have the necessary evidence. There is a rebuttable presumption that the indirect purchaser has shown the existence of passing-on of an overcharge to him if certain conditions are met (Art. 15 para 3). This paragraph shall not apply where the defendant can demonstrate credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the indirect purchaser (Art. 15 para 4). In assessing whether the burden of proof is satisfied, the court may take due account of actions for damages that are related to the same infringement, but are brought by claimants from other levels in the supply chain, judgements resulting from the previous situation and any relevant information in the public domain purchaser (Art. 15 para 5).

9. QUANTIFICATION OF HARM

To ease the position of the victims of the cartel the Act has a rebuttable presumption with regard to the presence of harm resulting from the cartel. The infringing undertaking can try to prove that the cartel did not cause harm. It is interesting to note there is no such presumption concerning damages caused by the abuse of a dominant position. There is an interesting ruling of mutual cooperation between the courts and national competition agencies. A national competition authority may, upon request of a national court, assist the national court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate. In order to help national courts, the Commission published Guidance on the quantification of harm (Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the TFEU).

10. CONSENSUAL SETTLEMENTS

The Act as well as Directive promotes the "once for-all settlement" in order to reduce uncertainty for infringers and injured parties. One of the methods are consensual dispute resolution mechanisms such as arbitration, mediation and conciliation (Lianos, Davis, Nebbia, 2015, p.60). The limitation period for bringing an action for damages will be suspended for the duration of any consensual dispute resolution process. The suspension will apply only with regard to those parties that are or that were involved or represented in the consensual dispute resolution. The period may last for up to two years. Following the consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement of competition law inflicted upon the injured party. Any remaining claim of the settling injured party shall be exercised only against non-settling co-infringers. Non-settling co-infringers shall not be permitted to recover contribution for the remaining claim from the settling co-infringer. Where the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party, the settling injured party may exercise the remaining claim against the settling co-infringer. The last possibility may be expressly excluded under the terms of the consensual settlement (Art. 18).

11. CONSLUSION

The new Act on action on damages for the infringements of competition is seen as a mean to reduce the shortcomings of private enforcement and to promote the damage claims. Even before the Act, Croatia had full functioning damage actions provisions. Generally speaking, our rules are already very well aligned with the rules of the Directive. The problem is that in Croatia there is a shortage of commercial courts' jurisprudence on damage actions for infringement of the competition law provisions. A person that has suffered damage of infringement of competition law has two options. It can continue with follow-on actions or it can initiate stand-alone actions. Stand-alone action concerns the situation where an infringement is claimed independently of a competition authority's decision. Follow - on basis is a more convenient situation, where claim relies on a prior decision by a competition authority finding liability and the court does not have to struggle with founding a competition law infringement.

Beside the positive impact of the Act on future damage claims there are still a lot of questions that need to be clarified. Expected problems could be with the concept of objective liability that departs from our legal tradition. The Act does not contain rules dealing with the admissibility of economic evidence, causation and quantification of harm.

The issue of litigation costs is left to national procedural law. The Act left the question of collective redress mechanisms. It will be seen whether there will be increased litigation following the Act.

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