

Room for manoeuvre for Member States: Issues for decision on the occasion of the transposition of the Damages Directive

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ABSTRACT: Soon Member States will bring into force the laws, regulations and administrative provisions necessary to comply with the Damages Directive (2014/104/EU). Usually Member States do not seem willing to introduce a broader scope of the application of principles embodied in EU directives. For Member States, “copy-pasting” a directive’s content into a piece of national legislation is one of the simplest ways to implement a directive (another very simple one is implementation by reference; it is just referring the reader to the directive and should not be applied where the rules in a directive are not sufficiently precise, so it is not applied very often). Member States that work on the implementation of the Damages Directive either do it in a minimalist manner, mainly “copy-pasting” its content, or take the legislative opportunity to do something more and “tidy up” domestic provisions on the occasion of the transposition of the Directive. Some Member States have chosen that last option. The article attempts to highlight some of the considerations that may be of particular relevance in this process, with the aim of formulating some recommendations for national legislatures, even though implementation works are drawing to a close. First, some “spontaneous harmonisation” of a scope broader than that provided for in the Directive is recommended on the background of the material (substantive) scope of the Directive and its transposition. The other important considerations are addressed to the personal scope of the Directive and its transposition. Finally, the short review of some more detailed issues for decision on the occasion of the transposition of the Directive is offered. Considerations regarding the principle of civil liability, the use of collective redress mechanisms, minimum harmonisation clauses, institutional design of private enforcement of competition

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law, as well as incentives to voluntarily provide compensation to injured parties can be found therein.

KEYWORDS: competition rules, private enforcement, damages

I. Introduction

On 11 June 2013 the European Commission (hereinafter the Commission) adopted a package of measures to resolve the problem of the lack of efficient private enforcement of European Union (EU) competition law. In particular a proposal for a directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union¹ (hereafter, Directive or Damages Directive) accompanied by the Impact Assessment and its Executive Summary, a non-binding Communication² and a Practical Guide to the quantification of harm in competition infringements,³ as well as a horizontal Recommendation on collective redress,⁴ were adopted to meet the need for a coherent European approach to private enforcement of EU competition law. The proposal for the Directive was put forward to the Council and the European Parliament. All this paved the way to accelerated activities leading to the adoption of the Directive. After the vote at the 17 April 2014 Parliament's plenary session (this was the first time the European Parliament was involved in legislation on enforcing EU competition rules), the Council formally adopted the Directive on 10 November 2014. It was officially signed on 26 November 2014.⁵ As the first piece of legislation in

¹ Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM (2013) 404 final, 11.06.2013.

² Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07), OJ C 167/19, 13.06.2013.

³ Commission Staff Working Document – Practical guide “Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union”, C (2013) 3440, 11.06.2013.

⁴ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), OJ L 201/60, 26.07.2013.

⁵ 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 349/1, 5.12.2014.

the field of private competition enforcement, it should be highly valued for its historical importance (irrespective of its shortcomings).

This article relates mainly to problems which arise from the scope of the Directive and its transposition. Member States are obliged to bring into force laws, regulations and administrative provisions necessary to comply with the Directive by 27 December 2016 (Article 21 paragraph 1 sentence 1 of the Directive). The main argument submitted in the paper is that some “spontaneous harmonisation” of a scope broader than that provided for in the Directive might prove useful to the success of private enforcement of competition law in the EU Member States. It may also be considered an attempt to streamline procedures for private enforcement of competition law.

The above observations will be accounted for in particular on the background of the material (substantive) scope of the Directive and its transposition. It is true that the Directive is restricted in its scope which will be presented and discussed in the sections below. Specific questions for this discussion are incorporated in the very title of the Directive. Firstly, it refers to “actions for damages under national law”. Secondly, it refers to “infringements of the competition law provisions”. Thirdly, it refers to “competition law provisions of the Member States and of the European Union”. Next, the article proceeds with comments as to the personal scope of the Directive and its transposition. Finally, a short review of some more detailed issues for decision on the occasion of the transposition of the Directive is offered. Considerations regarding the principle of civil liability, the use of collective redress mechanisms, minimum harmonisation clauses, institutional design of private enforcement of competition law, as well as incentives to voluntarily provide compensation to injured parties can be found therein.

The point of the analysis is both normative and descriptive. The comparative method is employed to some extent (in particular Polish, Portuguese and Spanish proposals are taken into account), as the topic can benefit from being examined in the light of comparative evidence drawn from various Member States. Even though implementation works are drawing to a close, some recommendations for national legislatures will also be formulated.

II. Actions for damages under national law

The first set of challenging themes comes from the fact that for the EU decision-makers only focussing on what they have described as “actions for damages” has been a top priority in the design of the system of private

enforcement of EU competition law. The Directive does not offer a complete solution which would apply a full range of remedies. Is it probable that the EU decision-makers have not brought to an end what was initially intended as a full system? The answer is negative; all the measures used to enforce the competition rules other than actions for damages have always been overshadowed by the latter. However, to answer this question, it would be a good starting point to examine the documents of the European Commission relating to actions for damages.

It is worth noting first that it was the case law of the Court of Justice (hereafter, CJ or Court), in particular in the seminal *Courage/Crehan* case,⁶ that began to make way for the documents produced by the European Commission in an effort to address the challenges faced by the system of private enforcement of EU competition law. The right to antitrust damages open to any individual was the centrepiece of the CJ's rulings, established in *Courage/Crehan* and reaffirmed in *Manfredi*. Invoking the principle of effectiveness (the requirements of national law should not render the exercise of the EU rights practically impossible or excessively difficult), in 2001, in *Courage/Crehan*, the Court determined that "the practical effect of the prohibition laid down in Article [101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition".⁷ The Court confirmed that the right to damages is open to any individual later in 2006 in *Manfredi* case.⁸ Moreover, in both cases the Court made it clear that any third party may consider itself entitled to rely on the invalidity of a prohibited agreement⁹ (automatic nullity¹⁰).

The right to damages was truly a focus for the Court of Justice. Nevertheless, private enforcement of competition law, both EU and national, is about more than actions for damages and invalidity (nullity). This has been noticed and commented on by the European Commission in its Green Paper of 2005 – Damages actions for breach of the EC antitrust rules (hereinafter, the Green Paper).¹¹ In paragraph 1.1 of the Green Paper the Commission defined private enforcement as follows:

⁶ See Judgement of 20 September 2001, *Courage v. Crehan*, C-453/99, EU:C:2001:465.

⁷ *Ibid.*, paragraph 26.

⁸ See Judgment of 13 July 2006, *Manfredi et al.*, C-295-298/04, EU:C:2006:461.

⁹ *Ibid.*, paragraphs 57-59.

¹⁰ Judgement of 20 September 2001, *Courage v. Crehan*, C-453/99, EU:C:2001:465, paragraph 22.

¹¹ COM(2005)672.

“Private enforcement (...) means application of antitrust law in civil disputes before national courts. Such application can take different forms. Article [101(2)] of the Treaty states that agreements or decisions prohibited by Article [101] are void. The Treaty rules can also be used in actions for injunctive relief. Also, damages awards can be awarded to those who have suffered a loss caused by an infringement of the antitrust rules. This Green Paper focuses on damages actions alone”.

On the one hand, the Commission was aware that the system of private enforcement of competition law is made up of a combination of remedies where in particular injunctive relief (where the plaintiff requests the court to order the infringer to stop the violation and/or remove its effects) goes hand in hand with compensatory relief (damages) and declaratory relief, that is the declaration of invalidity of an agreement, decision of association of undertakings or practice.¹² Invalidity of an agreement etc. is frequently invoked – as a shield and not a sword – by undertakings defending against claims (in case of abuses of a dominant position invalidity is not provided for in TFEU).

On the other hand, in the Green Paper the Commission chose a fragmented approach to harmonisation of private enforcement of EU competition law in Member States. The conscious choice of actions for damages and leaving other measures in their shade reflected the Commission’s belief in the key role played by such actions in the system of private enforcement of competition law.

In 2008, after a short hiatus, the Commission published the White Paper on damages actions for breach of the EC antitrust rules (hereinafter, the White Paper).¹³ Its scope was similar to that in the Green Paper; it focused on actions for damages alone. When it comes to other remedies, the White Paper did not even contain an explanation similar to the one provided in the Green Paper.

Consequently, the scope of the Damages Directive does not go beyond actions (claims) for damages. Nevertheless, according to Recital (5) of its Preamble: “Actions for damages are only one element of an effective system of private enforcement of infringements of competition law and

¹² S. Peyer mentions separately also interim remedies; see Sebastian Peyer, “Private antitrust litigation in Germany from 2005 to 2007: Empirical evidence”, *Journal of Competition Law & Economics* 8, 2 (2012): 350.

¹³ COM(2008)165.

are complemented by alternative avenues of redress (...). And what are “alternative avenues of redress”? If they are meant as alternative to compensatory redress, one could expect the latter to be followed by injunctive redress which seems to lie at the other end of the remedies spectrum (especially that it is a classification of redress applied in the Commission’s Recommendation on collective redress). A bit surprisingly, for the EU legislature “alternative avenues of redress” are synonymous with consensual dispute resolution (which receives a great deal of emphasis in the Directive in general) and public enforcement decisions that give parties an incentive to provide compensation. It seems fair to claim that ideally private and public enforcement system should be designed so that they complement each other¹⁴ or, to be more specific, that infringers should be first persuaded to compensate the injured parties voluntarily.¹⁵ The view cannot be accepted, however, that public enforcement decisions, which incentivise infringers, are an element of the system of private enforcement of competition law. Public enforcement decisions are still an element of public enforcement, no matter how much both parts of the enforcement system interact with each other. To sum up, Recital (5) seems to add little to the understanding of the concept of a system of private enforcement of competition law.¹⁶

The Directive only takes into account actions for damages as defined in Article 2(4). Action for damages means “an action under national law by which a claim for damages is brought before a national court (...)”. Further, according to Article 2(5) claim for damages means a claim for compensation for harm caused by an infringement of competition law. At the first glance, a range of claims e.g. claims for declaratory relief and injunctions are not included in the definition of the claim for damages. And how about

¹⁴ See e.g. Francis G. Jacobs, Thomas Deisenhofer, “Procedural aspects of the effective private anti-trust enforcement of EC competition rules: A community perspective”, in *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, ed. Claus-Dieter Ehlermann, Isabela Atanasiu (Oxford – Portland: Hart Publishing, 2003): 198; Assimakis P. Komninos, “The relationship between public and private enforcement: *quod Dei Deo, quod Caesaris Caesari*”, in *European Competition Law Annual 2011: Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, ed. Philip Lowe, Mel Marquis (Oxford – Portland: Hart Publishing, 2014): 141 *et seq.*; and Agata Jurkowska, “Antitrust private enforcement – Case of Poland”, *Yearbook of Antitrust and Regulatory Studies* 1, 1 (2008): 75.

¹⁵ Anna Piszcz, “Still-unpopular sanctions: Developments in private antitrust enforcement in Poland after the 2008 White Paper”, *Yearbook of Antitrust and Regulatory Studies* 5, 7 (2012): 76.

¹⁶ To find out more, see Anna Piszcz, “Piecemeal harmonisation through the Damages Directive? Remarks on what received too little attention in relation to private enforcement of EU competition law”, *Yearbook of Antitrust and Regulatory Studies* 8, 12 (2015): 85.

monetary claims other than claims for damages? Should they in principle be considered to be included in the definition of the claim for damages, or not?

The Directive seems to indicate the desirable interpretation of the term “compensation for harm” built on the principle of full compensation. Article 3 paragraph 2 of the Directive states as follows:

“Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest”.

In the light of the above, harm should be construed as a difference between the position of the injured party caused by the harming event (here, infringement of competition rules), and the position in which he would have been in, had there been no harming event. Compensation for harm should mean compensation for actual loss and for loss of profit, plus the payment of interest (attached to a damages award). The problem with this definition is that it is based upon another concept which has not received a definition in the Damages Directive, a concept of loss. As rightly observed by Havu,¹⁷ some elements of the Directive shall require national interpretation and inspiration from national legal tradition. The notion of loss seems to be one of these concepts. At least in those jurisdictions where loss, harm and compensation for harm are construed in a restrictive manner, claims for skimming-off of profits (ill-gotten gains) and return of unjust enrichment (restitution of undue payment) are not included in the definition of the claim for damages. Their function (goal) is not to compensate for harm suffered by the injured party but, respectively, to deprive an infringer of their illegal profits and to reverse the unjust enrichment.

Second, apart from the fact that a distinction between claims for damages and claims for restitution can be found in other areas of EU law which is shown in the wording of Article 5 paragraph 4 of the Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹⁸ (it refers to “a

¹⁷ Katri Havu, “Quasi-coherence by harmonisation of EU competition law-related damages actions?”, in *Coherence and Fragmentation in European Private Law*, ed. Pia Letto-Vanamo, Jan Smits (Munich: Sellier European Law Publishers, 2012), 32.

¹⁸ OJ L 12, 16.01.2001.

civil claim for damages or restitution”), there is also the important issue of a practical nature which makes the author support the view that claims for damages should be construed narrowly and not include any and all monetary claims. Article 3 paragraph 3 of the Directive prohibits overcompensation for the claimant (“Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages”). The assumption that claims for damages mean all monetary claims irrespective of their function would cause Member States to rule out measures which are not loss-based, seek to disgorge (repay) unlawful profits and may in fact exceed the “impoverishment” of the claimant against the above prohibition of overcompensation. Those who seem to be afraid of this broad interpretation of the notion of claims for damages assess the Directive’s approach as “somewhat simplistic”.¹⁹ It is submitted that such interpretation resulting in a lack of remedies which are popular in many Member States is against the EU objective to ensure the full effect of Articles 101 and 102 TFEU and the proper functioning of the internal market for undertakings and consumers. In Recital (54) of the Preamble of the Directive it is declared that “[i]n accordance with the principle of proportionality, (...), this Directive does not go beyond what is necessary in order to achieve those objectives”. It remains regretful that the EU legislature considers private enforcement actions other than actions for damages as going beyond what is necessary in order to achieve the above-mentioned objectives of the European Union.

Clearly the above is an area which needs further research; but even without it we can expect that in some instances of disputes, claims may extend well beyond claims for damages to e.g. claims for injunctions and/or claims for return of unjust enrichment. We need to be mindful of potential problems that can arise through overlaps or conjunctions of rules applied in such cases. Claims for damages will benefit from pro-plaintiff (pro-claimant) solutions such as rules on disclosure of evidence, rules on effect of national decisions or rules on limitation periods. Why should not they be applied to all types of private enforcement claims? The application of two different sets of procedural and substantive rules in the same case may be extremely difficult for national courts. Should they in case of a follow-on

¹⁹ Euan Burrows and Alina Fazal, “The likely impact of the EU Damages Directive”, in *Competition Litigation 2017*, International Comparative Legal Guides, London, retrieved from: <http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2017/1-the-likely-impact-of-the-eu-damages-directive>.

action for damages rely on the binding effect of a final decision of a national competition authority or of a review court (Article 9 paragraph 1 of the Directive) and for accompanying claims conduct regular evidentiary proceedings? What if the plaintiff claims the return of unjust enrichment (or injunction) and damages in symbolic amount? Should this ease the procedural burden on his part?

In Member States which experience predominance of other private enforcement actions over claims for damages,²⁰ an increase in the effectiveness of private enforcement can probably not be achieved thanks to the Directive and its focus on damages actions. The above problem may be solved by the introduction of the same set of rules for private enforcement actions other than actions for damages. However, legislatures seem to overlook how challenging it will be for judges to make decisions on the application of different sets of procedural and substantive rules in the same case involving various claims.

Poland, inevitably confronted with this problem and its possible solution, does not seem willing to introduce such broader scope of the application of principles embodied in the Directive and limits it to actions for damages.²¹ The possibility of the introduction of a comprehensive range of solutions that would refer to remedies other than only actions for damages was not even discussed extensively during the legislative works of the Polish government (Ministry of Justice).

A similar approach can be found in the Portuguese “Preliminary draft proposal for a law transposing the Private Enforcement Directive”²² (hereinafter, the Portuguese draft proposal). According to its Article 1 paragraph 1 it “lays down rules on actions for damages brought as a result of competition law infringements”.

²⁰ In 2012 S. Peyer published an empirical report on private antitrust litigation in Germany from 2005 to 2007 (*ibid.*, *supra* note 12). It shows that claimants invoked the nullity of a contract in 22.8 percent of all 368 proceedings on the grounds of competition law violations, permanent injunctions were sought in 13.9 percent of cases and interim injunctions – in 13.6 percent of cases. Claimants requested damages payments or a declaration thereof in 11.4 percent of cases. Almost 7.9 percent of the litigated cases dealt with unjust enrichment claims. To find out more, take a look at pp. 348-349.

²¹ The draft Act on claims for damages for infringements of the competition law provisions of 10 November 2016, hereinafter, the Polish draft Act; available in Polish at: <https://legislacja.rcl.gov.pl/projekt/12292051> (22.11.2016).

²² Autoridade da Concorrência. “Unofficial translation into English.”, http://www.concorrencia.pt/vEN/News_Events/Noticias/Documents/ENGLISH%20VERSION%20-%20proposal%20for%20a%20law%20transposing%20the%20Damages%20Directive.pdf.

III. Infringements of the competition law provisions

According to Article 2(1) of the Damages Directive “infringement of competition law” means infringement of Articles 101 or 102 TFEU or of national competition law. Furthermore, 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 pursuant to Article 3(1) of Regulation (EC) No 1/2003 (...)”.

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 similar national provisions) and abuses of a dominant position (Article 102 TFEU and similar national provisions). Judicial protection of competition may be sought by private enforcers (private parties) not only for the above-mentioned areas covered by the Directive. With this in mind, this section of the paper reflects on the possible developing and harmonising role of the Directive in relation to national rules governing areas of competition protection other than the above.

First, protection against anticompetitive concentrations of undertakings is as much competition protection as protection against the above-mentioned agreements, decisions, practices and abuses, even though it pursues a predominantly different objective to Articles 101 and 102 TFEU. In practice undertakings may be confronted not only with public enforcement in this area but also with private merger litigation. However, the definition of “infringement of competition law” contained in Article 2(1) implies that mergers are not covered by the Directive.²³

Second, the next area covers cases under Article 106 TFEU. Article 106 TFEU lays down a prohibition on Member States enacting or maintaining in force measures relating to public undertakings and undertakings entrusted with special or exclusive rights contrary to the rules contained in the Treaties. A significant number of CJ’s rulings allow national courts to enforce Article 106 TFEU at national level, providing them with guidance on how to interpret the provision. Cases under Article 106 TFEU fall outside of the scope of the Damages Directive unless Article 106 TFEU is applied in conjunction with Articles 101 or 102 TFEU. In the latter case,

²³ See also Frank Wijckmans, et al., *The EU Private Damages Directive – Practical Insights. Minutes of the Closed Workshop 2015* (Cambridge – Antwerp – Portland: Intersentia, 2015), 8.

Recital (3) of the Preamble of the Directive, which refers to the full effectiveness of Articles 101 and 102 TFEU, confirms that “[t]he right to compensation in Union law applies equally to infringements of Articles 101 and 102 TFEU by public undertakings and by undertakings entrusted with special or exclusive rights by Member States within the meaning of Article 106 TFEU”.

Third, Article 2(1) of the Damages Directive excludes by definition practices in the sphere of state aid (Article 107 TFEU and following), even though national courts play an important role in protecting third parties and competitors against unlawful state aid.²⁴ The rules established by the Directive do not apply to the enforcement of state aid law by national courts.

Fourth, the next area to be put on the list covers protection against abuses of economic dependence or abuses of bargaining power which can overlap with traditional rules about unfair competition or antitrust rules. Its model can differ significantly from Member State to Member State but in some of them legal protection against abuses of this type exists and it forms part of competition protection.

Fifth, no discussion of competition protection would be complete without mentioning protection against unfair competition. The pursuit of remedies against unfair competition may be seen as an element of competition protection interrelated with antitrust as prevention of restrictive (anticompetitive) business practices, even though the focus of the former on protection against unfairness means in practice combining different objectives in the one system.

Since the Directive focuses exclusively on private enforcement of prohibitions of agreements, decisions by associations of undertakings or concerted practices and abuses of a dominant position, the question arises whether it would not be more beneficial to introduce the set of rules provided for in the Directive also with regard to the pursuit of remedies (claims for damages and/or other measures) against infringements other than those referred to in the Directive.

For instance, the Portuguese draft proposal is, to some extent, a positive answer to this question. According to its Article 2(k), infringement of competition law means “an infringement of the provisions laid down in Articles 9, 11 and 12 of Law No. 19/2012 of 8 May 2012,²⁵ of equivalent pro-

²⁴ *Ibid.*, 8.

²⁵ Autoridade da Concorrência. “Unofficial translation into English”, http://www.concorrenca.pt/vEN/News_Events/Noticias/Documents/Lei19_2012_En.pdf.

visions of other Member States and/or of Articles 101 and 102 of the Treaty on the Functioning of the European Union”. Article 9 of Law No. 19/2012 lays down a prohibition of anticompetitive agreements, concerted practices and decisions by associations of undertakings, Article 11 outlaws abuses of a dominant position, whereas Article 12 prohibits abuses of economic dependence.

Interesting findings can also be found from an analysis of Spanish developments. The Spanish draft of the Act transposing the Directive (hereinafter, the Spanish draft Act)²⁶ goes beyond collusive behaviour and abuses of a dominant position and includes unfair competition acts covered by the scope of the Competition Protection Act No. 15/2007 of 3 July 2007 (unfair competition acts distorting free competition, see Article 3),²⁷ even though Unfair Competition Act No. 3/1991 of 10 January 1991²⁸ contains specific provisions on claims for damages of victims of unfair competition acts.

Drafters of the Polish draft Act transposing the Directive, by contrast, have not decided to go beyond the two types of infringements covered by the Directive. It is worth mentioning that the Polish Parliament is currently proceeding with a draft Act on counteracting unfair abuses of bargaining power in trade in agricultural products and foodstuffs.²⁹ The prohibition and its enforcement are going to be constructed according to the similar scheme as in place for the prohibitions of anticompetitive agreements and abuses of a dominant position.

The enlargement of the scope of transposing provisions compared to the scope of the Directive is justified if it is intended to ensure the most effective protection possible. It is a matter for national legislatures, while respecting the principles of effectiveness and equivalence. It is submitted that such

²⁶ See Propuesta de Ley de la sección especial para la trasposición de la Directiva 2014/104/UE, del Parlamento Europeo y del Consejo, de 26 de Noviembre de 2014, relativa a determinadas normas por las que se rigen las acciones por daños en virtud del derecho nacional, por infracciones del derecho de la competencia de los Estados Miembros y de la Unión Europea. Available at: http://www.mjusticia.gob.es/cs/Satellite/Portal/1292427769696?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadername2=Grupo&blobheadervalue1=attachment%3B+filename%3DPropuesta_de_Ley_de_la_Seccion_Especial_para_la_Trasposicion_de_la_Directiva_2014_104_UE__del_Parla.PDF&blobheadervalue2=Docs_CGC_Secciones+especializadas.

²⁷ Ley No. 15/2007, de 3 de julio de 2007, de defensa de la competencia. Available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=220927#LinkTarget_440.

²⁸ Ley No. 3/1991, de 10 de enero de 1991, de competencia desleal. Available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=267675.

²⁹ In Polish available at: <http://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?nr=790>.

enlargement of the scope of transposing provisions will be substantiated in those instances where the enforced prohibition is regulated assuming the same (or very similar) pattern as for the prohibitions covered by the scope of the Directive. Uniform rules are beneficial for the practical functioning of justice: for both judges and lawyers representing parties.

IV. Competition law provisions of the Member States and of the European Union

As has been explained above, Article 2(1) of the Damages Directive defines “infringement of competition law” as infringement of Articles 101 or 102 TFEU or of national competition law. But despite this sounding relatively simple and broad, the meaning of “competition law” under the Directive is very limited. It even seems slightly misleading to speak of “the competition law provisions of the Member States” in the title of the Directive. Article 2(3) of the Damages Directive defines national competition law as “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 pursuant to Article 3(1) of Regulation (EC) No 1/2003, excluding provisions of national law which impose criminal penalties on natural persons, except to the extent that such criminal penalties are the means whereby competition rules applying to undertakings are enforced”.

Furthermore, Recital (10) of the Preamble states as follows: “This Directive should not affect actions for damages in respect of infringements of national competition law which do not affect trade between Member States within the meaning of Articles 101 or 102 TFEU”. It is justified to say that modelling national legal frameworks on the Damages Directive with regard to matters of infringements without effect on EU trade is not obligatory. The Directive does not require Member States to take pattern from the Directive; albeit they are free to do so. However, in the author’s opinion it is a necessity.

In its analysis,³⁰ the Cartel Damage Claims (CDC) group, well-known for its concentration of combined actions for damages in antitrust cases, rightly made the following recommendation to national legislatures:

³⁰ CDC Cartel Damage Claims, “Implementation of Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union into national law”, 2, <http://www.concorrenzia.pt/vPT/>

“National legislators should adopt a unique set of provisions for all anti-trust infringements, irrespective of whether the infringement concerns EU or national law. Such unique set not only prevents difficulties and uncertainties stemming from separate provisions which are applicable in parallel, but in particular prevents an inland discrimination in cases which are not governed by Articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU)”.

In this suggestion a great deal of reason can be found. It does not seem reasonable for Member States to have double standards with respect to two different types of infringements (those with and those without possible effect on EU trade), as this would make private enforcement of competition law even more difficult for national judges (who would need to switch from one framework to another) and parties. In case of single standard they can engage in proceedings, without being exposed to two different types of legal framework separated by a boundary in the form of the effect on EU trade (especially given that this boundary is not always easy to be drawn by national enforcers).

But that is not the only reason. This view is inseparable from the principle of equivalence embodied in Article 4 (second sentence) of the Directive. In accordance with the principle of equivalence, national rules and procedures relating to actions for damages resulting from infringements of Articles 101 or 102 TFEU shall not be less favourable to the alleged injured parties than those governing similar actions for damages resulting from infringements of national competition law. In practice, maintaining the previous set of rules regarding infringements of national law without effect on EU trade would result in the necessity of checking by a Member State whether those rules are less or more or equally favourable to alleged injured parties. This, in turn, would not always be an easy task and might pose some dilemmas.

The published drafts reveal that Member States do not limit the scope of transposed solutions exclusively to infringements with effect on EU trade. Portugal and Spain are likely to have uniform sets of provisions for all anti-trust infringements, both those with and those without effect on EU trade. Polish drafters have taken a similar approach which followed necessarily

from the Assumptions behind the Polish draft Act³¹. Also British³² documents indicate an intent to introduce provisions of this type.

V. Personal scope of the Directive and its transposition

In Article 2(2) of the Directive “infringer” is defined as “an undertaking or association of undertakings which has committed an infringement of competition law”. So, “undertaking” and “association of undertakings” are two important concepts in order to understand better the personal scope of the Directive. However, the Directive does not provide for autonomous definitions thereof. Would the introduction of such autonomous definitions be substantiated? Is there a need for it?

In the absence of autonomous definitions, Wijckmans, Visser, Jaques and Noël advocate interpreting both concepts for purposes of cases of civil liability pursued in accordance with the Directive in the same way as in the context of Articles 101 and 102 TFEU.³³ The authors argue that these are not neutral concepts. They have been developed in the case law of the EU Courts and the Directive links the concept of infringement by an undertaking or association of undertakings to the civil liability of that same undertaking or association of undertakings. Although it is difficult to say definitely, enforcers should apply rules stipulated in the Directive, using the interpretation of both concepts developed in the context of Articles 101 and 102 TFEU. Their interpretation should not lead to the radically different understanding of “undertaking” and “association of undertakings” for purposes of private enforcement of EU competition rules.

The above assumption raises several issues. Should all those aspects of the concepts of “undertaking” and “association of undertakings” which are part of the public enforcement of competition law automatically apply to the Directive? Should only selected aspects of those concepts automatically apply to the Directive? To respond, the short review of those aspects is needed.

First, for the purposes of the public enforcement of EU competition law by the Commission, not only a single legal entity but also a single economic

³¹ The Assumptions behind the draft Act on claims for damages for infringements of the competition law provisions of 1 December 2015; available in Polish at: <https://bip.ms.gov.pl/pl/dzialalnosc/komisje-kodyfikacyjne/komisja-kodyfikacyjna-prawa-cywilnego>.

³² Detailed information regarding the transposition is available at: <https://www.gov.uk/government/consultations/damages-for-breaches-of-competition-law-implementing-the-eu-directive>.

³³ Wijckmans, *et al.*, *op. cit.*, 8.

entity is viewed as an undertaking. This lets the provisions of EU competition law be applied to corporate groups and to the relationship between a subsidiary company and a parent company even if the parent company has not been directly involved in the infringement of EU competition law. The broader concept of undertaking may be crucial for effective enforcement of competition law in certain circumstances, e.g. where subsidiaries directly involved in the infringement are insolvent. However, this solution proves to be absent even from some national systems of public enforcement of competition rules, including the Polish system, or to need clarification as not explicitly provided for in the law. Therefore, a significant theme to be addressed by national lawmakers is the need (if any) to introduce the legal basis for the civil liability of the parent company for its subsidiaries (and, if needed, for its liability for fines imposed by public enforcers).

The above has been addressed by drafters of the Portuguese draft proposal who proposed Article 3 paragraphs 2 and 3 to read as follows:

“2. When the undertaking in question includes a number of legal entities, actions by one legal entity shall also be attributable to the legal entity or entities exercising decisive influence over it, inter alia, under the terms of Article 36(3)(a) to (c) of Law No. 19/2012 of 8 May.

3. Unless proven otherwise, it shall be presumed that a legal entity exercises decisive influence over another when it holds 90% or more of its share capital”.

Decisive influence is defined according to strict criteria. However, also EU Courts link decisive influence to “nearly 100% ownership”.³⁴

Drafters of the Spanish draft Act likewise propose to adopt, in Article 71 paragraph 2 of the Competition Protection Act, the principle of the liability of the parent company for its subsidiaries.

On the contrary, Polish drafters have opted so far for maintaining the lack of similar principle both in terms of private and public enforcement of national competition law and do not seem eager to modify this at the very last minute of legislative works, although they cannot be unaware of scholars’

³⁴ See Judgement of 16 November 2000, *Stora Kopparbergs Bergslags AB v. Commission*, C-286/98 P, EU:C:2000:630; Judgment of 10 September 2009, *Akzo Nobel NV and Others v. Commission*, C-97/08 P, EU:C:2009:536.

efforts to convey the shift (at least in the area of public enforcement).³⁵ It will be impossible (or hardly possible) to develop this principle in Poland also through case law, especially given that national courts still seem to resist the idea that the liability could be attributed to the parent company on the basis of the existing Polish legal framework for public enforcement of national competition law.³⁶ But above all, the Polish approach may result in an inland discrimination in antitrust cases which are not governed by Articles 101 or 102 TFEU.

There is yet another important thing that needs to be pointed out: the liability of successors. The general concept of legal succession allows, as a rule, liability to survive the existence of the undertaking. In addition, the theory of “economic succession” is an essential part of the personal scope of public enforcement of EU competition law. EU Courts made it clear that under EU law economic succession is covered to a broad extent and liability is transferred to the legal entity that acquired the relevant business that was involved in the infringement of competition law.³⁷ In this context, one of the most significant issues related to private enforcement of competition law is whether this theory should be automatically applied to the liability provided for in the Directive. As indicated by Wijckmans, Visser, Jaques and Noël, the Directive does not necessarily encompass the notion of economic succession and in order to have this interpretation issue resolved, a preliminary ruling of CJ will most likely be needed.³⁸ On the other hand, Member States may resolve it in their legislation in a manner similar to the one examined above in case of the civil liability of the parent company.

³⁵ Piotr Semeniuk, *Koncepcja jednego organizmu gospodarczego w prawie ochrony konkurencji* (Warszawa: Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego (2015).

³⁶ See judgement of the Court of Competition and Consumer Protection of 13 December 2013, XVII AmA 173/10: “An issue inextricably linked to the concept of the undertaking in EU law is the application of a principle that for purposes of competition rules two separate legal entities may be considered one undertaking, if relations between them (e.g. parent company – subsidiary) justify treating them as a single economic entity (single economic unit). The definition of an entrepreneur in the Act on competition and consumer protection does not provide for such a possibility. In general, it links the concept of an entrepreneur to single entities, even if there are capital or actual links between them that in fact cause these entities to pursue a common economic goal (...)”.

³⁷ See Judgements of 8 July 1999, *Commission v Anic Partecipazioni SpA*, C-49/92 P, EU:C:1999:356; Judgment of 7 January 2004, *Aalborg Portland A/S and Others v Commission*, joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6; Judgment of 11 December 2007, *SpA and Others*, C-280/06 ETI, EU:C:2007:775.

³⁸ Wijckmans, et al., *op. cit.*, 10.

But the problems related to the personal scope of the Directive and its transposition do not end there. Another type of liability within public enforcement of competition law is the liability of members of an association of undertakings for an infringement committed by the latter. Council Regulation (EC) No. 1/2003³⁹ lays down the conditions on which the Commission may require payment of the fine from the members of the association of undertakings where the association which committed the infringement is not solvent. As a consequence, more effective recovery of fines is ensured. Similar solutions are absent from some Member States' legal systems, including Poland. The Directive does not introduce any solution with regard to the potential civil liability of members of an association of undertakings. Importantly, Member States may take this legislative opportunity to address the need for safeguards for those who will claim damages for competition infringements committed by associations of undertakings.

VI. Some more details

Where else has some room to manoeuvre been given to Member States transposing the Damages Directive to national laws?

1. The principle of civil liability

First, Member States can decide on the principle of civil liability, since the Directive does not introduce fault requirements.⁴⁰ It does not contain any rules regarding the principle of liability, other than that national law must follow the principles of effectiveness and equivalence. The Preamble of the Directive only briefly mentions in Recital (11) sentence 4 that: "Where Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive".

Any rules on civil liability, including the concept of fault, do not result from other EU legislation. Not surprisingly, one of the issues discussed in this context has been whether liability for infringements of EU competition law before Member States' courts should be based on negligent or

³⁹ Council Regulation (EC) No. 1/2003 of 16.12.2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003: 1-25.

⁴⁰ See also Folkert Wilman *Private Enforcement of EU Law before National Courts: The EU Legislative Framework* (Cheltenham – Northampton: Edward Elgar Publishing, 2015), 222.

intentional infringements, or whether it should be shaped as more restrictive liability, that is, strict, objective or even an absolute one.⁴¹

The question of how the principle of civil liability should be shaped has sparked heated debates during legislative works in Poland.⁴² The Assumptions behind the Polish draft Act adopted a kind of “objective” liability, based on a breach of competition law (unlawfulness) that make no reference to fault, neither intentional nor one committed negligently. However, it was not an absolute liability – far from it. Proponents of fault-based tort liability, including Wolski, convinced the drafters and, eventually, the Polish draft Act provides for fault-based tort liability. At the same time, however, it introduces the reversed burden of proof of fault. This, if adopted into law, will result in the defendant having to prove that there was no fault (even negligence) on his part in the infringement. In order to avoid liability.

However, Wolski’s paper failed to convince fully his opponents. The proponents of liability based on unlawfulness have had strong arguments to support their position. Under Polish law four principles of liability are distinguished: principle of fault, principle of risk, principle of equity and principle of unlawfulness. They exist in various combinations with the burden of proof and presumptions. Machnikowski explains that the choice is about whether to introduce liability based on unlawfulness or whether to maintain fault-based tort liability.⁴³ He believes that administrative liability for fines for competition law infringements is based on fault and this does not influence the choice of the principle of civil liability. Machnikowski questions the view that there should be coherence between principles of these two types of liability. He adds their primary functions are different: the former has a penal function and the latter – compensatory function. He also claims that the principle of liability should be selected according to the criterion

⁴¹ See Dominik Wolski, “The principle of liability in private antitrust enforcement in selected European States in light of the implementation of the Damages Directive into the Polish legal system”, *Yearbook of Antitrust and Regulatory Studies* 9, 14 (2016): 69-95.

⁴² See *ibid.*; Dominik Wolski, “Zasada i przesłanki odpowiedzialności odszkodowawczej, ustalenie wysokości szkody, przerzucanie nadmiernych obciążeń”, in *Dochodzenie przed sądem polskim roszczeń odszkodowawczych z tytułu naruszenia reguł konkurencji*, ed. Anna Piszcz, Dominik Wolski (Warszawa: Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, 2016), 39 *et seq.* With him disagrees Piotr Machnikowski, “Review: Anna Piszcz, Dominik Wolski (red.), *Dochodzenie przed sądem polskim roszczeń odszkodowawczych z tytułu naruszenia reguł konkurencji*”, *Internetowy Kwartalnik Antymonopolowy i Regulacyjny* 5, 5 (2016): 151-153.

⁴³ Machnikowski, *op. cit.*, 152.

of economic efficiency of both principles. He argues that liability based on unlawfulness is likely to serve better not only injured parties (facilitating evidentiary proceedings provided that the plaintiff does not need to prove fault of the infringer), but also the economy as a whole.⁴⁴ It would be fair to say that the Polish drafters have proposed something in-between in the form of fault-based tort liability with the reversed burden of proof of fault.

2. The use of collective redress mechanisms

Second, 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 without any doubt that Member States are not required to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU. At the same time Recital (7) of the Preamble of the Recommendation on collective redress 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 Recommendation on collective redress and Recital (13) of the Preamble of the Directive prompted Pais to conclude 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.”⁴⁵ It has been also argued by Cauffman and Philipsen that in the absence of some form of collective action, indirect purchasers’ claims are unlikely to increase.⁴⁶

Recital (13) seems to contradict the Commission’s emphasis on collective redress. This may result in that collective private enforcement of

⁴⁴ *Ibid.*, 153.

⁴⁵ Sofia Oliveira Pais, “Practical private enforcement: Perspectives from Portugal”, in *Harmonising EU Competition Litigation: The New Directive and Beyond. Swedish Studies in European Law*, ed. Maria Bergström, Marios Iacovides, Magnus Strand (Oxford – Portland: Hart Publishing), 201.

⁴⁶ Caroline Cauffman and Niels Philipsen, “Who does what in competition law: Harmonizing the rules on damages for infringements of the EU competition rules?”, *Maastricht European Private Law Institute Working Paper No. 2014/19* (2014): 27, https://www.researchgate.net/profile/Caroline_Cauffman/publication/268130794_Who_Does_What_in_Competition_Law_Harmonizing_the_Rules_on_Damages_for_Infringements_of_the_EU_Competition_Rules/links/5461ee240cf27487b453a5da.pdf?origin=publication_list.

competition law will not be given the traction needed to ensure better enforcement thereof.

The key choices are whether to allow collective private enforcement of competition law and, if so, whether to allow opt-in or opt-out forms of actions. Under the opt-in regime, the claimant must take action to be included in the group of claimants, whereas in the opt-out model claimants are automatically included in the class unless they expressly exclude themselves. Opt-in mechanisms have been criticised as being less effective and accordingly a major part of the debate in the EU has been whether an opt-out system should be adopted.⁴⁷ On the other hand, the opt-out scheme is not recommended by the European Commission in the Recommendation.

In Poland the Directive is likely to be implemented in a minimalist manner and provisions on collective redress mechanisms (opt-in system) are not going to be changed on the occasion of the transposition of the Directive.

Unlike Poland, Portugal, known for its “popular action”,⁴⁸ addresses collective redress in the Portuguese draft proposal (Article 19). It, *inter alia*, lists organisations which have standing to bring collective actions for anti-trust damages, that is associations and foundations whose aim is consumer protection as well as associations of undertakings whose members are injured by the infringement of competition law in question, even if their statutory object does not include the protection of the competitive process. The Portuguese “popular action” is based on an opt-out system which is similar to the newest amendments of collective redress mechanisms in the UK.

The use of collective redress mechanisms in private enforcement of competition law should not lead, however, to the creation of a specific body of rules significantly differing from those related to individual harm; according to the experts, collective enforcement could be integrated and certainly should be coordinated with the general body of principles regarding liability.⁴⁹ Too many differences between them would cause enforcers to face many practical problems.

⁴⁷ Barry Rodger and Angus Macculloch, *Competition Law and Policy in the EU and UK* (London – New York: Routledge, 2015).

⁴⁸ Pais, *op. cit.*, 198-200.

⁴⁹ Hans W. Micklitz and Fabrizio Cafaggi, Introduction to *European Private Law after the Common Frame of Reference*, ed. Hans W. Micklitz, Fabrizio Cafaggi (Edward Cheltenham – Northampton: Elgar Publishing, 2010), xl.

3. Minimum harmonisation clauses

Third, Member States can choose between regulatory options resulting from various minimum harmonisation clauses contained in the Directive.

E.g. the general rule on access to documents contained in the Directive is a “minimum harmonisation” rule, as it sets only the minimum standard and permits Member States to implement wider disclosure of evidence, provided the principle of proportionality is observed.⁵⁰ Article 5 paragraph 8 of the Directive stipulates that “[w]ithout prejudice to paragraphs 4 and 7 and to Article 6, this Article shall not prevent Member States from maintaining or introducing rules which would lead to wider disclosure of evidence”. This emphasis on the possibility of allowing wider disclosure of evidence by national legislatures seems entirely appropriate, especially given that, as Butorac Malnar rightly argues, Articles 5 and 6 of the Directive might have a narrowing down effect when it comes to the rights of private claimants.⁵¹ First, the implementation of the Directive will place the judge in a position of a protector of the effectiveness of public enforcement of competition law and not mainly an evaluator of the relevance of the documents in terms of their value in establishing the facts of the case.⁵² Second, a narrowing down effect can be seen in the rule of Article 6 paragraph 10 according to which Member States shall ensure that national courts request the disclosure from a competition authority of evidence included in its file only where no party or third party is reasonably able to provide that evidence. Having said that, however, it seems that a “wider disclosure” clause cannot be used to introduce rules allowing to request the disclosure from a competition authority of evidence included in its file in other situations, because Article 5 paragraph 8 of the Directive must be applied “without prejudice to”, *inter alia*, entire Article 6 of the Directive.

Another example of a minimum harmonisation clause is provided for in Article 10 paragraph 3 of the Damages Directive in relation to limitation periods (“at least five years”). The relevant limitation period for bringing actions for damages shall be five years or Member States can opt for a longer limitation period if they prefer. For instance, the UK introduced the uniform six-year limitation period for claims for damages resulting from

⁵⁰ Vlatka Butorac Malnar, “Access to documents in antitrust litigation – EU and Croatian perspective”, *Yearbook of Antitrust and Regulatory Studies* 8, 12 (2015): 144.

⁵¹ *Ibid.*, 155.

⁵² See *ibid.*

infringements of competition law.⁵³ Polish drafters have had no intention of introducing a limitation period longer than the minimum compatible with the requirements of the Directive. The current three-year limitation period is going to be extended to a five-year limitation period for claims for damages resulting from infringements of competition law. Also Portuguese drafters presented a proposal of a five-year limitation period.

Also in case of the effect of national decisions taken in another Member State, national provisions may exceed the minimum requirement of Article 9 paragraph 2 of the Directive. The 2013 proposal for the Directive provided for uniform effect of national decisions, irrespective of whether in a given or another Member State. However, after works in the Council, Article 9 introduced a double standard in two separate paragraphs. This led to the coining of new terms; paragraph 1 concerns the non-cross-border effect and paragraph 2 – the cross-border effect of national decisions. Article 9 paragraph 1 provides for an irrefutable (absolute) presumption of an infringement, whereas paragraph 2 contains the minimum harmonisation clause embodied in words “at least *prima facie* evidence”. Member States are willingly making use of this clause. Spain plans to have identical effect for both decisions taken in Spain and national decisions taken in another Member State. The Portuguese draft proposal provides for an irrefutable presumption of the existence, nature and material, personal, temporal and territorial scope of the infringement for the purpose of bringing an action for damages in case of decisions of the Portuguese competition authority, and, on the other hand, a rebuttable presumption thereof in case of decisions of national competition authorities of other Member States. Interestingly, Poland has not opted for a rebuttable presumption in case of decisions of the second type. No implementing provision has been proposed, as the drafters believe “*prima facie* evidence” is already in the Polish Civil Procedure Code.⁵⁴

4. Institutional design of private enforcement of competition law

Fourth, Member States can decide on the institutional (“technical”) design of private enforcement of competition law. It must be placed on national courts within the meaning of Article 2(9) of the Directive.

⁵³ For more see Sarah Smith and Sam Szlezinger, “Putting flesh on the Damages Directive – Some recent developments in the UK”, *The Strategic View* (n.d.), <http://www.strategicview.co.uk/strategic-view/competition-litigation/the-strategic-view-competition-litigation-2016/putting-flesh-on-the-damages-directive-some-recent-developments-in-the-uk>.

⁵⁴ But see Piszcz, in Sofia Pais and Anna Piszcz, *op. cit.*, 232-233.

While making a choice of the competent court, national legislatures should take into account whether or not a given court (sort of courts) is effective and accessible. Due to the complexity and the specific subject matter of antitrust damage actions the constitution of specialised courts or chambers with knowledge in competition law and economics is recommended.⁵⁵

In Poland, regional courts as courts of first instance are going to have authority over actions for damages related to infringements of competition law. At first glance it seems that the Polish legislature could have provided more generous conditions for access to justice for injured parties if it had charged district courts and not regional courts with jurisdiction in such proceedings in the first instance. District courts are located closer to the people throughout the country whereas regional courts cover quite extensive territories. However, jurisdiction of regional courts means that cases are decided by a panel of three professional judges. Their superior experience and expertise are likely to allow them to handle such difficult cases better than a single professional judge at a district court. It is worth adding that regional courts are also competent in unfair competition cases and group cases.

On the other hand, the Polish legislature has not decided to devote resources of the specialist Regional Court of Warsaw – the Court of Competition and Consumer Protection (SOKiK) to private enforcement of competition law. SOKiK remains only a review court within the meaning of Article 2(10) of the Directive, i.e. it is a national court that is empowered by ordinary means of appeal to review decisions of a national competition authority. If the Polish legislature decided the opposite, the access to private enforcement would be very narrow in geographical terms, since SOKiK is the only such court in the whole country.⁵⁶

However, the opposite solution seems to have been offered in Portugal. Article 112 of the Law on the Organisation of the Judicial System Amendments, which regards jurisdiction of the specialised Competition, Regulation and Supervision Court, is going to be amended so that in paragraph 3 it stipulates the Court's jurisdiction to hear actions for damages in

⁵⁵ For more details see CDC Cartel Damage Claims, *op. cit.*, *supra* note 30, 20.

⁵⁶ Even though after 17 April 2016 it is going to have more and more free resources, as it has been deprived of jurisdiction over standard forms of agreements concluded with consumers (which usually meant thousands of cases per year); see Paulina Korycińska-Rządca, "Review of the new Polish model of abstract control of standard forms of agreements concluded with consumers", *Yearbook of Antitrust and Regulatory Studies* 9, 14 (2016).

which the claim is based solely on infringements of competition law, actions for the exercise of the right of contribution between co-infringers, and requests for access to evidence relating to such actions, and in paragraph 4 it states that the Court shall also have jurisdiction to hear any other action in which the claim is based solely on an infringement of Articles 9, 11 or 12 of Law No. 19/2012 of 8 May 2012 and/or Articles 101 or 102 TFEU. This seems similar, to some extent, to the newest solutions adopted in the UK where the specialist Competition Appeal Tribunal (CAT) hears and decides claims for damages and other monetary claims (including collective claims), applications for injunctions and to approve collective settlements under the Competition Act 1998. It was not possible before the amendments introduced by the Consumer Rights Act 2015, when CAT used to have limited jurisdiction. The extended remit of CAT has been widely expected,⁵⁷ even though it hears and decides appeals on the merits in respect of decisions made under the Competition Act 1998 by the Competition and Markets Authority and the regulators in numerous sectors.

5. Incentives to provide compensation

Last but not least, as has been already noted, the Directive supports public enforcement decisions that give parties an incentive to provide compensation. Member States can introduce legal framework within the area of public enforcement that incentivise infringers. In this context, in particular voluntary compensation schemes are worth mentioning. One of the main advantages of the submission of claims to an authority operating the voluntary compensation scheme, so far as injured parties are concerned, is the ability to enforce a claim without being forced to seek the defendant in a court.

Even if it only addressed some of the issues and was limited in its extent, it would be advisable to include a voluntary compensation scheme in the system of enforcement of competition law like the British legislature did.⁵⁸ However, it should be remembered that a voluntary compensation scheme is able to incentivise infringers to compensate provided that the robust system of enforcement is in place.

⁵⁷ Peyer, *op. cit.*

⁵⁸ See Competition and Markets Authority. "Guidance on the approval of voluntary redress schemes for infringements of competition law." https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/453925/Voluntary_redress_schemes_guidance.pdf.

VII. Concluding thoughts

Is private enforcement of EU competition law (and also private enforcement of national competition law) merely a name by which to identify actions for damages? Or is there more to it than that, with numerous avenues open to injured parties? Absolutely, at least according to Recital (5) of the Damages Directive. The system of private enforcement of competition law is made up of a range of remedies from compensatory relief (damages) and declaratory relief to injunctive relief. In an increasingly complex legal system it would be better if those remedies could be governed by the same harmonious set of principles instead of the set made up of mainly procedural rules from two or more different models of private enforcement with different principles at their centres. Is there a way to build such a set of principles other than another Directive? There may be, but it will be challenging work, to say the least. Because of the limited scope of the Directive, the coexistence of harmonised national rules for damages actions in their present limited format alongside differing national rules for other remedies may prove unsatisfactory.

Moreover, differing national rules will most probably amount to differing standards of protection against competition law infringements between Member States. Their aim is to ensure that the competition protection is raised to the highest possible level and to guarantee the maintenance thereof.

It is for national legislatures to conduct a kind of “weighing exercise”, i.e., to weigh arguments in favour of maintaining status quo and arguments in favour of spontaneous harmonisation of a scope broader than that provided for in the Directive. In case of many provisions, the latter is likely to be more effective than the former. Legal framework for remedies other than damages actions, provisions regarding some infringements of competition law other than Articles 101-102 TFEU and their national equivalents, infringements of competition law without EU effect, provisions regarding personal scope of liability, are among these, as can be seen in this paper.

National drafters and legislatures should consider work on the wider impact of the Damages Directive going beyond full implementation of the Directive. Comprehensive works on private enforcement of both EU and national competition laws require a conduct of a wider review of relevant legislation. The upshot is that many of the procedures and remedies should now be subject to rigorous scrutiny. The Directive provides a good opportunity to “tidy up” and strengthen domestic provisions on the occasion of its transposition. This may enable courts dealing with antitrust claims to

proceed with greater certainty and speed up private enforcement of prohibitions against anticompetitive practices.

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