PRIVATE ENFORCEMENT OF EU COMPETITION LAW UNDER DIRECTIVE 2014/104/EU ON ANTITRUST DAMAGES ACTIONS*

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Competition law rules can be enforced in two principal ways – either through public enforcement, which in the EU is the task of national competition authorities and the European Commission or through private enforcement, which relies on private initiatives of private entities damaged by certain competition law infringements. While public enforcement works well, private enforcement (with a few notable exceptions) has been lacking in its efficiency due to the high initial investment required to pursue such damages, lack of court practice which would make the potential outcomes less uncertain, difficulties in the collection of information on the infringement, reluctance of many national courts to take on such cases, and difficulties in quantifying damages, to name a few.

The “European antitrust community” – as such defined by Giuseppe Tesauro – has long awaited the adoption of Directive 2014/104 EU on antitrust damages actions.² In a context of growing awareness by the antitrust community of the complementarity between public and private antitrust enforcement in order to reach an effective application of the competition rules – the expectations mainly regarded the cooperation mechanisms between the Commission and National Competition Authorities on the one hand, and The National Courts, on the other hand.

1. The link between public and private enforcement in antitrust cases

The public enforcement of EU antitrust rules³ is carried out by the Commission and national competition authorities (NCAs) using the powers provided by Council Regulation (EC) No 1/2003.⁴ Besides, the case-law of the Court of Justice of the European Union (hereinafter, CJEU) also confirmed that any citizen or business who suffers harm as a result of a breach of EC antitrust rules must be able to claim reparation from the party who caused the damage.

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³ Article 101 TFEU on anticompetitive agreements between undertakings and Article 102 TFEU prohibiting abuse by undertakings of a dominant position.
⁴ Directive 2014/104/EU, recitals 1 and 2.
Case-law on the right to compensation

The first step was the *Courage judgment*\(^5\) handed down by the CJEU. With that judgment, the CJEU first recognized the principle according to which a party who complains of harm arising from an infringement of competition law is entitled to compensation for the harm thus suffered, even if the injured and the infringing parties are linked by a contractual relationship within the sphere of which the alleged harm arose. The CJEU confirmed this right in a number of cases in recent years.\(^6\)

The *Courage judgment* is significant for at least two reasons: first, it overcomes the principle of *nemo auditur propriam turpitudinem allegans*, since the claim for damages may be legitimate regardless of the preexistence of a contractual relationship between the infringing and the injured parties – a relationship considered irrelevant. In this regard, civil liability represents a tool of general scope, and is therefore suitable to meet a need for protection even in terms of correcting, from the outside, the rules created within the contractual environment. Second, resorting to a framework of tortious liability enhances the position of the judge, who is now called upon to perform a leading role in the application of the rules of fair competition.

However, this right of victims to compensation could not be exercised in an effective way in the practice. The European Commission concluded that this failure is largely due to various legal and procedural hurdles in the Member States’ rules governing actions for antitrust damages before national courts.

The Directive 2014/104/EU aims to remove these practical obstacles to compensation for all victims of infringements of EU antitrust law. The Directive applies to all damages actions, whether individual or collective, which are available in the Member States. The new legal act is a sort of “microsystem” rules of law about civil liability that makes it easier for victims of antitrust violation to claim compensation, as a consequence of anticompetitive behaviors, in breach of antitrust rules.\(^7\)

Recital 6 of the Directive provides that: “To ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules.” For this reason the renewed system has been defined as a “two pillars” one. However, this option appears satisfactory only if limited to a transition phase, in which private enforcement lacks of a full implementation in all the Member States; but nevertheless it should avoided to create a system which is based on a mere parallelism between public and private enforcement and which operate independently and interact only in exceptional circumstances, with the consequence of reducing the effectiveness of both of them.\(^8\) On the contrary, an optimal solution shall be grounded on the

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6 See for example, Manfredi and Others, C-295/04, EU: C: 2012: 461; Pfleiderer C-360/09, EU:C:2011:389, DonauChemie and Others, C-536/11, EU:C:2013:366; Kone and Others, C-557/12, EU: C: 2014: 1317.
principle of cooperation between courts and NCAs, as already stated by Regulation EC 1/2003, in a context of complementarity between public and private enforcement which may ultimately only reinforce the effectiveness of antitrust rules.\(^9\)

2. Main changes brought by the Directive

Along with a wide palette of changes that the Damages Directive is bringing about, some examples include establishing individual responsibility of each infringement participant for the entire harm caused to victims, sets of detailed rules for discovery of information and quantification of damages, a rebuttable presumption stating that cartel infringements cause harm, special rules regarding the statute of limitation directed towards providing an adequate period for filing claims, as well as provisions stimulating settlements and alternative dispute resolution. Prospective claimants will also not have to wait for the competition authorities to establish an infringement (follow-on actions), but will be able to sue for damages independently of public enforcement proceedings.

The principal intended and likely effect of Directive 2014/104 on the practice of private enforcement is an increase in the number of (purely compensatory) follow-on actions for damages. Significant change as to the frequency of stand-alone actions for damages was not intended by the legislator and is most unlikely to result from the Directive.\(^{10}\)

Directive 104/2014 is designed to establish certain common standards in national proceedings, although it is not comprehensive in its scope.\(^{11}\) Parties will have easier access to evidence they need in actions for damages in the antitrust field. In particular, if a party needs documents that are in the hands of other parties or third parties to prove a claim or a defense, it may obtain a court order for the disclosure of those documents. Disclosure of categories of evidence, described as precisely and narrowly as possible, will also be possible. The judge will have to ensure that disclosure orders are proportionate and that confidential information is duly protected.

Similarly as a Commission infringement decision, a final infringement decision of a national competition authority will constitute full proof before civil courts in the same Member State that the infringement occurred. Before courts of other Member States, it will constitute at least prima facie evidence of the infringement.

Clear limitation period rules are established so that victims have sufficient time to bring an action. In particular, victims will have at least 5 years to bring damages claims, starting from the moment when they had the possibility to discover that they suffered harm from an infringement. This period will be suspended or interrupted if a competition authority starts infringement proceedings, so that victims can decide to

wait until the public proceedings are over. Once a competition authority's infringement decision becomes final, victims will have at least 1 year to bring damages actions.\footnote{Ioannis Lianos, Peter Davis, Paolisa Nebbia (2015), \textit{Damages Claims for the Infringement of EU Competition Law}, Oxford University Press, 2015, pp. 350.}

The Directive clarifies the legal consequences of 'passing on'. Direct customers of an infringer sometimes offset the increased price they paid by raising the prices they charge to their own customers (indirect customers). When this occurs, the infringer can reduce compensation to direct customers by the amount they passed on to indirect customers. Compensation for that amount is in fact owed to indirect customers, who in the end suffered from the price increase. However, since it is difficult for indirect customers to prove that they suffered this pass-on, the Directive facilitates their claims by establishing a rebuttable presumption that they suffered some level of overcharge harm, to be estimated by the judge.

The Directive contains provisions to avoid that claims by both direct and indirect purchasers lead to overcompensation. Claims concerning harm resulting from loss of profit are not affected by the Directive's passing-on rules. It is clarified that victims are entitled to full compensation for the harm suffered, which covers compensation for actual loss and for loss of profit, plus payment of interest from the time the harm occurred until compensation is paid.

The Directive establishes a rebuttable presumption that cartels cause harm. This will facilitate compensation, given that victims often have difficulty in proving the harm they have suffered. The presumption is based on the finding that more than 90\% of cartels cause a price increase (as found by a study). In the very rare cases where a cartel does not cause price increases, infringers can still prove that their cartel did not cause harm.

Any participant in an infringement will be responsible towards the victims for the whole harm caused by the infringement (joint and several liability), with the possibility of obtaining a contribution from other infringers for their share of responsibility. However, to safeguard the effectiveness of leniency programs, this will not apply to infringers which obtained immunity from fines in return for their voluntary cooperation with a competition authority during an investigation; these immunity recipients will normally be obliged to compensate only their (direct and indirect) customers. Furthermore, a narrow exception from joint and several liability is foreseen under restrictive conditions for SMEs that would go bankrupt as a consequence of the normal rules on joint and several liability.\footnote{Frank Wijckmans, Maaike Visser, Sarah Jaques, Evi Noel (2016), \textit{The EU private damages directive practical insight}, Intersentia, Cambridge, 2016, pp. 5.}

According to the information (last updated on 13 November 2017) available at the European Commission's website,\footnote{http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html [accessed November 18, 2017]} 25 Member States communicated so far that they have fully transposed the Directive (Austria, Belgium, Croatia, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Malta, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom). The three remaining Member States are in
the final stages of their national legislative process to adopt measures transposing the Directive. *Annex I* shows the current state of play of transposition procedures.

### 3. Claims for Damages for the infringement of Competition Law – Antitrust enforcement in Romania

In Romanian legal system, the actions for damages have as legal basis the Civil Code, which is the general legislation for this matter. Hence, as a general rule, the Civil Code\(^{15}\) provides that any person that caused harm to another is obligated to compensate the damages suffered, whether it was committed intentionally or with negligence. Correlatively, any person that suffered harm must be able to claim reparation from the person who caused that harm. These provisions are acknowledging the principle of the civil liability based on an illegal conduct.

Due to lack of specific provisions, these rules are also applicable to actions for damages as a result of breach of European or national antitrust rules.

According to the applicable rules, the general conditions of the civil liability that the court must assess, once an application for seeking damages was brought before it, are: the existence of harm, the existence of illegal conduct, the causal link between the illegal conduct and the harm suffered and the fault of the person whose conduct caused that harm, intentionally or with negligence. In competition private enforcement cases, the court must ascertain the causal link between the breach of the antitrust rules by the offender and the losses suffered by the claimant.\(^ {16}\)

According to the Competition Law, damages actions may be brought before courts either before or after a decision sanctioning an antitrust infringement was adopted by the Romanian Competition Council (hereinafter referred as RCC). The damages actions can be brought before the courts by harmed persons, by an attorney on behalf of a number of harmed persons, based on individual will expressed by each of them, or by the associations for the protection of the consumer’s interests or trade associations.

The applicable procedural rules are those provided by general legislation, respectively the Civil Procedural Code.\(^ {17}\)

The competent courts, in a first instance, are the local courts and county courts, civil or commercial sections, depending on the level of the damages claimed. The burden of proof is on the plaintiff, as in public enforcement. The court may use, at the request of the parties or ex officio, any type of evidence, including witnesses and expertise.\(^ {18}\)

The burden of proof falling on the claimant in competition damages actions, especially if stand-alone type, is notoriously fraught with difficulty. As a consequence, if the national judge interprets the domestic procedural laws in a strict and formalistic manner, this may render the burden not just difficult but nearly close to impossible.\(^ {19}\)

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\(^{15}\) The new Civil Code is in force as of 1 October 2011; it contains modern and efficient provisions in respect of the liability for torts.


In private judicial procedures, a decision issued by the competition authority, prior to a final judgment, may represent a strong presumption in relation to the illegal conduct and the responsible persons. If the appellate court has given a final judgment upholding the competition authority’s decision, this decision is mandatory for the civil or commercial courts with regard to decided aspects, on the res judicata principle.

Also, the full compensation principle is applicable, meaning that the damaged persons are able to seek compensation not only for actual loss (damnumemergens) but also for loss of profit (lucrumcessans) plus interest. Thus, the Competition Law establishes this principle in Art 64 para. (1). The Civil Code contains also provisions regarding the full recovery of the harm (Art.1531-1537) and the Procedural Civil Code establishes the way of covering the legal expenses (Art. 451-455).

It should be emphasized also that in Romanian legal system the civil liability has a reparatory role and not a punitive role as the damages do not represent a punishment.20 Competition Law provides also that the passing-on overcharges defence is not a legal basis for considering that the harm does not exist. The unjust enrichment principle is also applicable to all private litigations. It means that damages shall be granted for both direct and indirect buyers, for covering the harm they prove to have suffered. In order to ensure that the leniency program is attractive, the Competition Law provides that civil liability of successful immunity applicants is limited to the damages attributable to its conduct, in this case the general civil principle of the joint and several liability not being applicable.21

Another important modification brought to the Competition Law during 2010-2011 consists in the introduction of the RCC’s role as amicus curiae, giving it the power to issue observations to courts in particular cases when the national and European competition rules are applied. These observations may be issued ex officio or at the request of the courts. This role of RCC may be exercised in private enforcement cases as well, since the competition authority is not part of the trial as plaintiff or defendant.22

It must be emphasized that the amicus curiae role of public institutions in Romania is also provided by the new Civil Procedural Code that entered into force in 2014, these institutions being empowered to intervene in cases for the protection of public interest.

With regard to time limits for seeking compensation, Competition Law provides at Art. 64 para. (5) for a special limitation period of two years that will start once the infringement decision of the competition authority, on which a follow-on claimant relies, has been confirmed by a final court decision. The general time limit for seeking

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21 The importance of the leniency programs are recognized also by the ECJ: C-536/11, *DonauChemie, the Court of Justice stated that*: “(42)The Court has recognised that leniency programmes are useful tools if efforts to uncover and bring an end to infringements of competition rules are to be effective and thus serve the objective of effective application of Articles 101 TFEU and 102 TFEU.”
22 Ana Maria Toma Bianov (2016), *Aplicarea privată a regulilor concurenței in Uniunea Europeană – Actiunile in despăgubire promovate in fata instantelor nationale si tribunalor arbitrale*, Editura Universitara, Bucharest, 2016, pp. 32.
compensation provided by the Civil Code is three years since the date the claimant had to know or he should have known about the appearance of this right.\footnote{Ionel Reghini, Şerban Diaconescu, Paul Vasilescu, Introducereîndreptul civil, Editura Colecțiauniversitaria. Sfera Juridică, Cluj-Napoca, 2008, p. 649;}

The quantification of harm suffered by the victims in the actions for damages based on infringements of European and national antitrust rules rests entirely with the judge. In practice it is very likely that the judge will ask for an expert opinion, on the expense of the plaintiff.

A major impact in the direction to facilitate further development of effective competition law enforcement will have the transposition of the provisions of the EU Directive into national legislation, however this implementation is late with half a year in Romania, while Member States shall had to transpose it in their national legislation by 27 December 2016.

List of references


- ECJ: C-536/11, DonauChemie;
- Kone and Others, C-557/12, EU: C: 2014: 1317.
- Manfredi and Others, C-295/04, EU: C: 2012: 461;
- Pfleiderer C-360/09, EU:C:2011:389;
- The new Romanian Civil Code is in force as of 1 October 2011; Law No. 278/2009, republished in the Official Journal of Romania, Part I, No. 505 of 15/07/2011;

Annex 1.

Antitrust damages directive: state of play of transposition procedures

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