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ANALYSIS OF TOOLS INTRODUCED BY THE DIRECTIVE ON ANTITRUST DAMAGES ACTIONS[1]

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Abstract

Private enforcement is an important part of competition law enforcement, with the administrative and criminal enforcement. Despite this fact, the experience in many EU Member states is that such actions are rarely used or successful.

Therefore, the EC decided to adopt the 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 Union to improve the conditions for private damage claims for competition law violations. The directive introduces a body of tools to be available for potential plaintiffs.

Our paper will provide an analysis of the tools introduced by the directive, examine their novelty and effectiveness. This analysis will be used to help us answer our main research question – do the mentioned directive and its tools provide a sufficient ground for an increase in the number and successfulness of actions for damages?

Keywords: Private damage actions, infringement of competition law, damages calculation, burden of proof, pass on defence

Topic groups: Law and business

[1] Preliminary version

INTRODUCTION

Private enforcement of competition law is an important part of competition law enforcement. Its main purpose is to compensate the plaintiff for the loss (damages and loss profit) he has suffered by the breach of competition law[2], thus correcting the imbalance caused by the breach of law. Despite the overall accepted importance of private enforcement[3], experiences in many EU Member states show only few cases of successful enforcement of such claims[4], some even do not have any relevant case law so far[5]. Nevertheless there is significant increase of antitrust damages actions at least in several countries. The directive aims to improve this situation mostly by improving the position of plaintiffs with regard to their burden of proof and introducing body of tools to be used within disputes on antitrust damages. General shift towards more effective private enforcement of competition law will probably influence also its administrative enforcement. The question in this regard is what will be then the overall effect of the mentioned directive on the antitrust enforcement in the EU.

This paper will focus on the analysis of tools, provided by the new Directive on antitrust damages actions[6] and their practical impact on private damages claims. The authors note, that in fact many of these tools are not novel – they have been present in many European legal systems well before the adoption of the directive. The authors will therefore examine, whether these new tools have the capacity to bring a positive change in the number of damage actions and increase their success rate.

The authors will attempt to answer the following questions:

1. Are the tools introduced by Damages directive really novel?
2. Are these tools capable of bringing positive changes in the number and success of damage actions?

METHODOLOGY

The authors will begin their paper with an analysis of the new directive and the tools it establishes. They will study their function and place in major European legal systems and examine the way they change the balance of chances of plaintiff and defendant ale with regard to their possible impact on administrative antitrust enforcement.

Then the authors will attempt to find existing legal instruments with similar functions and position in the respective legal systems. The authors will also be concerned with the reasons, why these existing tools were not successful and sufficient in competition damages litigation.

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[2] ECJ cases C-295/04 – C-298/04 *Manfredi* (13 July 2006)

[3] See the Executive summaries of comments of Member States and National reports on the Study on the conditions of claims for damages in case of infringements of EC competition rules, available at http://ec.europa.eu/competition/antitrust/actionsdamages/study.html.

[4] Ashurst (2004), *Study on the conditions of claims for damages in case of infringement of EC competition rules – comparative report,* available at http://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf. p. 43.

[5] For example in Czech Republic, there are a few actions pending in courts, but no decisions available.

[6] Directive of the European Parliament and of the Council 2013/185 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 (referred to as "*directive*").

In the main part of the article, the authors compare the existing and new tools for private enforcement of competition law and conclude, whether the tools, implemented by the new directive can provide for an increase in the number of damage actions and their success rate.

In conclusion the Authors will try to think about other possibilities how to improve the private antitrust enforcement within the EU while safeguarding to most possible extent efficiency of the current, almost completely on administrative enforcement pillar oriented, system.

FINDINGS

The authors have identified four most important tools, described in the directive. These tools are those relating to the disclosure of evidence (1)[7], joint and several liability (2)[8], passing-on (3)[9] and to the quantification of harm (4)[10].

These tools were highly anticipated and many have expected[11] the increase in both number and effectiveness of damage actions after their introduction to the legal systems of Member States. A result of an effective system of damage actions provides another strong incentive to follow competition law regulation and also helps to correct the market and the position of individual market players after a competition infringement[12].

Disclosure of evidence

The rules on the disclosure of evidence are to provide a more effective damages action system through an improved access to necessary evidence by plaintiffs. A well identified obstacle[13] for the plaintiffs to effectively sue was the lack of evidence of the infringement, the identity of the perpetuator and the amount of damages incurred[14]. The national legislation of Member states contains provisions on the disclosure of evidence; however, they contain a high standard of identification needed for the document to be produced. The ratio behind this situation is, that a plaintiff that requests others to produce documents must be able to identify individual documents to be produced so as the party requested must be able to identify such documents unmistakably. In situations when such a party fails to produce them, the request must be enforceable, meaning that an independent party must be able to enforce the courts request on plaintiffs' behalf to produce the document that is to recognize the document and bring it to court. Situations, where documents are mistaken, shall be avoided[15].

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[7] Art. 5 to 8 of the directive.
[8] Art. 9 to 11 of the directive.
[9] Art. 12 to 16 of the directive.
[10] Art. 17 of the directive.
[11] Section 6.2, Impact assessment report – Damages actions for breach of the EU antitrust rules, available at http://ec.europa.eu/competition/antitrust/actionsdamages/impact_assessment_en.pdf (referred to as "*Impact Assessment report*")
[12] Section 3.2, Impact assessment report
[13] Cseres, K., & Mendes, J. (2014). Consumers' Access to EU Competition Law Procedures: Outer and Inner Limits. *Common Market Law Review*, *51*(2), p. 514, available at https://www.kluwerlawonline.com/document.php?id=COLA2014035
[14] Section 3.2, Impact assessment report
[15] Such a situation would constitute an interference with the rights of the defendant.

Such a system burdens the plaintiff to identify the documents requested with a high degree of certainty. In many cases outside damages actions in question, this is not a problem. This tool can be effectively used in situations, where the plaintiff knows about the document or has a relation to its content; however the document itself is not in its possession at the moment.

In our case, this limitation creates an obstacle that can effectively prevent the plaintiff to sue. In a case of competition infringement, the relevant documents might concern the plaintiff, however the plaintiff might have never seen them or know their exact content[16]. Such documents might nevertheless be crucial for the plaintiffs cause[17].

The directive imposes a new, lower threshold for the accuracy of the identification of such documents. The plaintiffs description of the sought documents need not to be absolutely accurate, it is enough if he justifies the plausibility of his claim and describes the evidence as precisely and narrowly as possible. This means, that the request to produce documents is not only to be evaluated on the basis of the accuracy of the description itself, such an evaluation also involves an *in rem* assessment.

The rules on disclosure of evidence also apply to the NCAs[18]. These should, under certain conditions, provide access to file to allow the collection of evidence.

Joint and several liability

Another feature common to damages actions is that the damages can be sought after the perpetuator, but not after other subjects. The reasoning behind this rule is again obvious – only the one that has breached the law and caused harm shall be requested to compensate for it[19]. In many other cases of damages action, this does not raise much debate.

However, in our specific case of damage actions, these rules have brought certain difficulties. Many competition infringements are, by definition, caused by a number of subjects, whose exact part in an anticompetitive effect and share of harm caused to a certain person is difficult to establish. A request to identify the exact role of each infringer and their share on the harm caused would be a burden impossible to bear by the plaintiff.

The directive has addressed this issue by clearly stating, that the perpetuators are jointly and severally liable for the total sum of the damages incurred. The plaintiffs have a choice, which perpetuator to choose to sue. It is on the perpetuators to settle the damages paid between them.

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[16] Sànchez Graells, A. (2006), Discovery, confidentiality and disclosure of evidence under the private enforcement of EU antitrust rules, p. 8, available at http://ssrn.com/abstract=952504.

[17] For instance communications between cartel members concerning the prices for the plaintiff – such documents are crucial for the plaintiff, concern it, however are also intentionally kept secret.

[18] Art. 7 of the directive

[19] And such a defendant is also the only subject, who fulfils the legal criteria to be held responsible for the damages incurred (harm, breach of law, causation).

This has significant advantages for the plaintiffs as they can sue undertakings that are settled in more favourable jurisdictions[20], whose current financial situation is better or simply whose defence is weaker.

Passing-on

The concept of passing-on seems reasonable, yet can also improve the position of the plaintiffs. It addresses a situation, when an undertaking has incurred damages, stemming from the competition infringement even though it is not in a direct contractual relationship with the infringer[21]. For this situation to occur, the supplier of such a plaintiff must pass on the overcharge caused by the infringement further the supply chain. The concept of passing-on therefore allows also those, who are not in a direct contractual relationship with the infringer and the causality between their harm and damages incurred and the actions of the perpetuator is somewhat weaker, to sue.

The passing-on also has strong uses as a defense. It prevents situations, where the perpetuator would be forced to pay damages to those directly harmed by his infringement, which have passed the damages on and also their customers.

Therefore, the concept of passing-on reinforces the position of those, who were damaged by the infringement further on the supply chain, but it is also crucial for the perpetuator.

Quantification of harm

One of the most difficult tasks in damages actions in question is to quantify the harm incurred and provide sufficient evidence for such results. With concepts, such as cellophane fallacy[22] and non-price impacts of competition infringements[23], quantifications are extremely difficult and can easily be challenged, courts can therefore be tempted to award relatively low damages or even refuse to provide compensation whatsoever. Such approach could effectively prevent the existence of an effective system of damages actions[24].

The directive clearly states, that such conduct is not acceptable[25] and provides measures to prevent it[26]. Among these measures, the presumption that cartels cause harm[27] and the assistance of NCAs[28] are important.

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[20] Brkan, M. (2005), Procedural aspect of private enforcement of EC antitrust law: Heading towards new reforms?, in 28 World Competition, p. 483. Available at https://www.kluwerlawonline.com/abstract.php?area=Journals&id=WOCO2005029.
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[22] Aron, D.J., Burnstein, D.E., (2010). Regulatory Policy and the Reverse Cellophane Fallacy. In Journal of Competition Law and Economics, Vol. 6, Issue 4, pp. 973 – 994, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1171292.
[23] Such as limitations of competitiveness or innovation.
[24] Brkan, M. (2005), Procedural aspect of private enforcement of EC antitrust law: Heading towards new reforms?, in 28 World Competition, p. 503, available at https://www.kluwerlawonline.com/abstract.php?area=Journals&id=WOCO2005029.
[25] Art. 17 / 1 of the directive.
[26] Art. 17 of the directive.
[27] Art. 17 / 2 of the directive.
[28] Art. 17 / 3 of the directive.

The directive establishes that the abovementioned difficulties should not render the exercise of the right to damages practically impossible or excessively difficult. Also, a quantification guide[29] has been created, that should provide support in the application of these provisions. This should provide the courts with sufficient grounds a more welcoming approach to damages actions.

DISCUSSION

At this point, we have briefly described the tools, provided by the new directive for damages actions, presented their background, functioning and ratio. Therefore, we can discuss whether these tools are novel and can actually change the situation in damages actions in individual Member States. We will discuss each tool separately.

To Disclosure of evidence

We have identified the duty to produce documents upon courts request as a fairly common measure in European legal systems. As we understand from the theory of civil procedure, the plaintiff is only to describe the evidence, supporting his claim and it is for the court to obtain it. In this part, the directive is therefore not novel.

The directive also states, that the identification of the documents requested by the plaintiff must be as precise and narrow as possible. However, such a description is still an open one. It does not provide for a situation, where the perpetuator provides only a part of the documents requested, claiming, that no other documents exist. The selection of the documents to be provided is, in the end, on the perpetuator, whose motivation is, obviously, to provide as little self-incriminating as possible. Therefore, the directive does not address the core of the problem.

To Joint and several liability

The directive states, in short, that the perpetuators of a competition infringement are jointly and severally liable for the harm caused by the infringement and the plaintiff can sue any one of them, with a few exceptions of leniency applicants and such. After only a brief review of the theory of Tort Law, we can conclude, that this is not a novel concept. The only novel parts are the exceptions for leniency applicants and such. However well supported by the need to protect an effective administrative system of competition law enforcement[30], these provisions do not improve the position of the plaintiffs, they do the opposite.

The rules on joint and several liability are therefore not novel and they do not provide any grounds for a conclusion, that they would bring increase in the number nor success of damages actions.

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[29] 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. Available at http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf

[30] Opinion of Advocate General Mazák, ECJ case C360/09 *Pfleiderer* (14 June 2011), para. 38; Case C-536/11 *Pfleiderer* (6. June 2013), para. 27; Case C-536/11 *DonauChemie* (6 June 2013), para. 42.

To Passing-on

When assessing the concept of passing on, it is important to keep in mind, that when suing for damages, one can only claim an amount corresponding to the actual harm incurred[31]. A claim, containing also damages incurred by others is not to be considered well founded and should not succeed. A perpetuator can also only be forced to pay only the total sum of damages corresponding to the total sum of harm incurred by all the injured parties.

We conclude that the general theory of ex delicto damages inherently contains also the ratio of what the directive describes as the concept of passing-on. Therefore, the concept is not novel and does not provide any grounds for a conclusion, that they would bring increase in neither the number nor success of damages actions.

To Qualification of harm

The directive aims at solving the difficulty of sufficiently supporting the amount of claimed damages with evidence. When assessing these difficulties, it is crucial to remember, that no evidence under no circumstances provides an absolutely certain information on the situation it should describe[32]. Under any evidentiary standard, the evidence describes only an idea of the situation, further biased by subjective perception and evaluation by the parties and the court[33]. Therefore, a degree of uncertainty is unavoidably present in any standard of proof[34]. The directive does not provide any guidance on how should the standard of proof exactly look like. National courts that were imposing excessively strict standards will find no instruction on how to adjust their approach.

Therefore, the concept is not novel and does not provide any grounds for a conclusion, that they would bring increase in neither the number nor success of damages actions.

IMPLICATIONS

The implication of our article is that the directive does not really provide any grounds to expect an increase of the number or success of damages actions. It does not contain any tools that would make the litigation simpler, more predictable nor less demanding. The tools that were expected to change the situation are actually already present in European legal systems and do not provide sufficient grounds for increased efficiency of such litigation. The more efficient measure to take would be to change the approach of the courts in Member States towards damages actions. However, under current circumstances, we do not expect a substantial increase in damage actions or their success rate due to the adaptation of the directive.

This has a strong practical implication – the victims of competition infringements won't be provided with a functioning and effective framework that allows for their full compensation.

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[31] To be more precise, to claim damnum emergens, lucrum cessans and applicable interest rates. See ECJ cases C-295/04 – C-298/04 *Manfredi* (13 July 2006), para 95.
[32] The common law system uses a well-fitting expression „*on the balance of probabilities*".
[33] For example the common law criminal procedure uses the expression „*beyond reasonable doubt*". The common law terms remind of the true nature of evidence.
[34] Hamer, D. Probabilistic Standards of Proof, Their Complements and the Errors that are Expected to Flow from Them, available at http://espace.library.uq.edu.au/view/UQ:178365/HCA10UQ178365.pdf.

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