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Quantification of Harm and the Damages Directive: Implementation in CEE Countries

by

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CONTENTS

Abstract

Quantification of harm is regarded as one of the most significant obstacles for the full compensation of harm and development of private enforcement within

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the European Union, including CEE Member States. Consequently, the Damages Directive establishes general rules and requirements for the quantification of harm, such as a rebuttable presumption of harm in case of cartels, the power of national courts to estimate harm as well as others, which closely interact with the principle of full compensation emphasized by the case-law of the European Union and directly established in the Damages Directive. The main focus of this paper is the effectiveness of the rules on the quantification of harm in general, and how these rules will contribute to the development of private antitrust enforcement in CEE Member States. Therefore, one of the issues to be discussed in the paper is the analysis of how, and to what extent specific rules and requirements for the quantification of harm have been transposed into the national legislation of CEE Member States. As certain CEE national jurisdictions have had certain rules for the quantification of harm already before the implementation of the Damages Directive, the paper analyses how effective these rules have been, and how much they have contributed to the development of private antitrust enforcement of those CEE national jurisdictions. Previous experience of those CEE Member States in applying specific rules for the quantification of harm is important, in order to assess the possible impact of the newly introduced rules on the quantification of harm and on private antitrust enforcement in general in other CEE Member States. The rules for the quantification of harm will not enhance private antitrust enforcement on their own, however, their effective application by national courts together with other rules under the Damages Directive should contribute to a quicker development of private enforcement in CEE Members States.

Résumé

La quantification du préjudice est considérée comme l'un des obstacles les plus importants à la réparation intégrale des dommages et au développement de l'application privée du droit de la concurrence au sein de l'Union européenne, y compris dans les États membres d'Europe centrale et orientale. Par conséquent, la Directive Dommages établit des règles et des exigences générales pour la quantification du préjudice, telles qu'une présomption réfragable de préjudice en cas des cartels, le pouvoir des tribunaux nationaux d'estimer le préjudice, ainsi que d'autres mécanismes qui interagissent étroitement avec le principe d'indemnisation intégrale - souligné par la jurisprudence de l'Union européenne et directement établi dans la Directive Dommages. L'objectif principal de cet article est de se focaliser sur l'efficacité des règles sur la quantification des dommages en général, et voir comment ces règles contribueront au développement de l'application privée du droit de la concurrence dans les États membres d'Europe centrale et orientale. C'est pourquoi, l'une des questions à examiner dans cet article est l'analyse de quelle manière et dans quelle mesure des règles et des exigences spécifiques pour la quantification des dommages ont été transposées dans la législation nationale des États membres d'Europe centrale et orientale. Étant donné que certaines juridictions nationales ont déjà adopté certaines règles pour la quantification des

dommages avant la mise en œuvre de la Directive Dommages, l'article analyse l'efficacité de ces règles et leur contribution au développement de l'application privée du droit de la concurrence. L'expérience de ces États membres d'Europe centrale et orientale dans l'application de règles spécifiques de quantification des dommages est importante pour évaluer l'impact éventuel des nouvelles règles sur la quantification des dommages et de l'application privée du droit de la concurrence en général dans les autres États membres d'Europe centrale et orientale. Les règles de quantification des dommages n'amélioreront pas l'application privée du droit de la concurrence elles-mêmes, mais leur application efficace par les tribunaux nationaux avec d'autres règles de la Directive Dommages devraient contribuer à un développement plus rapide de l'application privée du droit de la concurrence dans les États membres d'Europe centrale et orientale.

Key words: private antitrust enforcement; quantification of harm; full compensation; effectiveness; presumption of harm; implementation; Damages Directive; CEE Member States.

JEL: K13; K21; K41; K42

I. Introduction

Quantification of harm has been identified as one of the most significant obstacles for the development of private enforcement within the European Union, due to 'overly demanding requirements regarding the degree of certainty and precision of a quantification of the harm suffered'.[1] Before the implementation of the Damages Directive,[2] domestic legal systems of EU Member State have by themselves determined their own rules on the quantification of harm caused by a competition law infringement. It was for the Member States and for their national courts to determine what requirements the claimant had to meet when proving the amount of the harm suffered, the methods that could be used in quantifying its amount, and the consequences of not being able to fully meet those requirements.[3]

[1] European Commission DG Competition Brussels (June 2011). Draft Guidance Paper Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union. Retrieved from: http://ec.europa.eu/competition/consultations/2011_actions_damages/draft_guidance_paper_en.pdf (01.06.2017).

[2] Directive 2014/104/EU of the European Parliament and of the Council of 26.11.2014 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, 05.12.2014.

[3] Recital 46 of the Damages Directive.

As European Union jurisprudence guarantees the right to full compensation of harm caused by the breach of Articles 101 and 102 TFEU,[4] it was necessary to ensure that the requirements of national law regarding the quantification of harm in competition law cases should not be less favourable than those governing similar domestic actions (**principle of equivalence**), nor should they render the exercise of the Union right to damages practically impossible or excessively difficult (**principle of effectiveness**).[5]

For that purpose, Article 17(1) of the Damages Directive stipulates that Member States must ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. In addition, the Damages Directive establishes common principles and requirements for the quantification of harm. Firstly, a rebuttable presumption that cartel infringements result in harm has been established. Secondly, the Damages Directive empowers national courts to estimate the amount of the harm caused by the competition law infringement, subject to conditions. Thirdly, national competition authorities (hereinafter, NCAs) may provide guidance to national courts on the quantum of the harm. Finally, the European Commission should provide general guidance on this issue at the Union level.[6] All these principles and requirements closely interact with the principle of full compensation established in the Damages Directive.

Therefore, the objective of this paper is to analyses and compare the rules on full compensation and the quantification of harm in CEE Member States according to existing national legislation, the impact of the Damages Directive on the national legislation of those countries, as well as possible further developments of the legislation and its application in this area. This paper, however, shall not analyse the specific methods of quantifying harm. Firstly, this paper reviews how the aforementioned rules of the Damages Directive had been, or intended to be transposed in different CEE Member States, and assesses whether the national rules are compliant with the Damages Directive.[7] Furthermore, the paper reviews the peculiarities of the legislation of certain CEE Member States, which went beyond the minimum scope and requirements of the Damages Directive and introduced additional rules related

[4] See judgment of 20.09.2001, *Courage and Crehan*, case C–453/99, ECLI:EU:C:2001:465, para. 26; judgment of 13.06.2006, *Manfredi*, joined cases C–295/04 to C–298/04, ECLI:EU:C:2006:461, para. 60; judgment of 14.06.2011, *Pfleiderer*, case C–360/09, ECLI:EU:C:2011:389, para. 36 and judgment of 06.11.2012, *European Community v. Otis NV and others*, case C–199/11, ECLI:EU:C:2012:684.

[5] Recital 46 of the Damages Directive.

[6] Recitals 46 and 47 of the Damages Directive.

[7] Rules related to passing-on of overcharges shall not be covered by this paper.

to the quantification of harm. As certain CEE Member States were still in the process of implementing the Damages Directive during the preparation of this paper, the paper is *inter alia* based on draft legislation proposals indicated by the respective contributors from those CEE Member States. Finally, the paper assesses whether and to what extent the new rules on the quantification of harm, both the rules implementing the Damages Directive and particular national rules of specific CEE countries, will contribute to the enhancement of private antitrust enforcement in CEE Member States.

II. Full compensation of harm and quantification of harm

1. Introductory remarks

The Damages Directive establishes the principle of full compensation of damages (*restitution in integrum*), which means that a person who has suffered harm should be placed in the position in which that person would have been if the infringement of competition law had not been committed.[8] Full compensation should, nevertheless, not lead to overcompensation, whether by means of punitive, multiple or other types of damages.[9]

Following the Damages Directive, full compensation shall cover the right to compensation for actual loss (*damnum emergens*) and for loss of profit (*lucrum cessans*), plus the payment of interest.[10] The Damages Directive does not define the aforementioned types of harm, except for the notion of overcharge[11] as the latter relates to the novelties introduced by the Damages Directive regarding the passing-on of overcharges.[12]

The principle of full compensation has been well-established in most CEE countries already before the implementation of the Damages Directive. However, some of the related rules differed (in particular with regard to the quantification of harm as overcharge, loss of profit and interest calculation). Furthermore, peculiarities with respect to the quantification of harm as loss of profit and interest will be overviewed before and after the implementation of the Damages Directive.

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[8] Art. 3(2) of the Damages Directive.

[9] Art. 3(3) of the Damages Directive.

[10] Ibidem.

[11] The difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law (Art. 2(20) of the Damages Directive).

[12] Art. 12–16 of the Damages Directive.

2. Quantification of lost profit

Some of the CEE Member States have imposed quite a high burden of proof on the party claiming damages, in the form of lost profit, before the implementation of the Damages Directive. Namely, Latvian Civil Law (Article 1787) states that 'mere possibilities shall not be used as the basis for calculating lost profits, rather there must be no doubt, or it must at least be proven to a level that would be credible as legal evidence, that such detriment resulted, directly or indirectly from the act or failure to act which caused the loss'. It follows from the above that in order to prove lost profit, the claimant will be forced to prove that a specific violation by the infringer was the only credible explanation for the fact that the claimant lost specific profit. It seems that such proof will rarely be possible, and claimants would be forced to ask for the court to give an estimate, at the court's discretion, of the amount of the profit lost (Jerneva and Druviete, 2017, p. 162–165).

Similarly, Czech case-law requires a rather high level of proof for the damages in the form of lost profit. No hypothetical calculations of theoretical profits are allowed. The court practice requires some form of a 'comparator-based' method to be employed by the claimant, in order to prove that in the ordinary course of its business activities it would have generated some profit (with practical certainty), and the only reason why it did not was an intervening event in the form of an illegal conduct of the infringer.[13] Several antitrust cases where the plaintiff claimed lost profit due to abuse of dominance were thus dismissed as 'hypothetical'.[14] In Slovenia, the court must be (practically) convinced of the existence of a certain amount of damages by the claimant. Article 216/1 of Slovenian Civil Procedure Act, however, provides that when the liability of the infringer is established, and only the amount of damages remains in dispute, a court may, in exceptional circumstances, use its judicial discretion to establish the missing facts (Vlahek and Podobnik, 2017, p. 280–282). This discretion should, however, by no means be a safe harbour for judges who are unwilling, or unable to objectively determine easily determinable facts through means of evidence (Vlahek and Podobnik, 2017, p. 280–282).

As the aforementioned national legislation and case-law establishes a rather high standard of proof for the quantification of lost profit, in order to comply with the Damages Directive (including the principles of effectiveness and equivalence under Article 4 of the Damages Directive), certain changes

[13] See e.g. the Judgment of the Supreme Court of the Czech Republic of 17.04.2012, Ref. No. 28 Cdo 1824/2010. For more details see commentary to sections 2988 and 2990 by: Kindl, 2016.

[14] See e.g. the Judgment of the Superior Court in Prague of 29.07.2015, Ref. No. 3 Cmo 316/2014.

should be introduced into national legislation and/or case-law with respect to the quantification of harm in the form of lost profit in competition based damages cases.

In addition, Slovenian law has introduced additional rules for the quantification of damages while implementing the Damages Directive. Article 62k/1 of Slovenian Prevention of Restriction of Competition Act[15] states that in determining damages 'the court may take into account also part of the defendant's profit gained by the breach of competition law'. This provision was introduced into the proposal of the Prevention of Restriction of Competition Act by the Ministry only at the latest stage of the implementation process, depriving the stakeholders of the opportunity to comment on it. It is doubtful whether any analysis of the need and of the appropriateness of this provision has actually been made. This provision, as it stands now, is not clear enough as to what 'taking into account also part of the defendant's profit' means. No explanations whatsoever are given in the commentary to the proposal that has been submitted to the National Assembly (Vlahek and Podobnik, 2017, p. 280–282). Nevertheless, it is believed that the aforementioned novelty should be used in compliance with the principle of full compensation and avoiding any overcompensation as established under the Damages Directive.

It should be noted that a possibility for a claimant to require the infringer's profit as this claimant's damages has been effective in Lithuanian law since 2001, when the Civil Code had come into effect (Article 6.249 (2) of the Civil Code). Nevertheless, this provision has not been used in private antitrust cases yet, albeit it was used in a few cases for damages compensation resulting from actions of unfair competition[16] with respect to competitors (their legal basis lies in Article 15 of the Lithuanian Law on Competition). The Supreme Court of Lithuania emphasized that when the lost profit of the injured person and the infringer's gain from the illegal actions coincide, they cannot be awarded together, otherwise the principle of full compensation and *ne bis in idem* principle shall be violated.[17] Such jurisprudence is in line with the principle of full compensation under the Damages Directive.

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[15] Law Amending the Law on the Prevention of Restriction of Competition of Slovenia. Retrieved from: https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2017-01-1208?sop=2017-01-1208 (01.06.2017).

[16] For instance, the company claims damages compensation jointly and severally suffered due to the illegal usage of its business secrets by its rival where an ex-employee of the company discloses illegally such business secrets to the rival company.

[17] See Resolution of the Supreme Court of the Republic of Lithuania of 05.02.2016, civil case No. 3K–7–6–706/2016.

3. Calculation of interest

Full compensation under Article 3(2) of the Damages Directive covers *inter alia* the payment of interest. As Recital 12 of the Damages Directive indicates, '[t]he payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time (…)'. It coincides with the jurisprudence of the Court of Justice that full compensation for the harm sustained must include the reparation of the adverse effects resulting from the lapse of time since the occurrence of the harm caused by the infringement.[18]

Therefore, Recital 12 of the Damages Directive establishes that the interest should be calculated from the time when the harm occurred until the time when compensation is paid. However, the Damages Directive leaves it to the Member States to establish the qualification of such interest (as compensatory or default interest), and whether the laps of time is taken into account as a separate category (interest) or as a constituent part of actual loss or loss of profit. The Damages Directive does not establish any criteria for the calculation of the interest rate. Nevertheless, the general principle established under Article 3(3) of the Damages Directive that full compensation under the Damages Directive should not lead to overcompensation should be followed. Therefore, Member States are free to establish their own rules on the calculation of interest, provided they do not lead to overcompensation.

Most of the CEE countries transposed the aforementioned provisions granting a right to the claimant to interest from the moment the harm occurred and until the date of the compensation of the harm caused.

The calculation of the interest rate varies between countries. For instance, the Civil Code of Poland sets forth in Article 363 § 1 that 'if the redress of damage is to be made in cash, the amount of damage shall be determined according to the prices on the date of calculating damage unless particular circumstances require that the prices existing at a different moment be adopted as its basis'.[19] Having this in mind, as well as the motive of Recital 12 of the Damages Directive in relation to the time when the injured party can demand interest, Polish lawmakers provided in Article 8 of the Act[20]

[18] See judgment of 27.03.1990, *Grifoni II*, Case C–308/87, ECLI:EU:C:1990:134, para. 40 and Opinion of Advocate General Tesauro in case C–308/87 *Grifoni II*, ECLI:EU:C:1989:624, para. 25; judgment of 19.05.1992, *Mulder and others v. Council and Commission,* joined cases C–104/89 and C–37/90, ECLI:EU:C:1992:217, para. 51. In the context of loss of purchasing power, see judgment of 26.02.1992, *Brazzelli Lualdi*, joined cases T–17/89, T–21/89 and T–25/89, ECLI:EU:T:1992:25, para. 40.

[19] English version: Bil, Broniek, Cincio and Kiełbasa, 2011, p. 161.

[20] Act on Claims for Damages for Infringements of Competition Law of Poland.

that if the basis for calculating damages are prices from a date other than the date of calculating the damages, the party injured by the infringement of competition law can demand interest in the amount of the reference rate of the NBP[21] for the period of time from the day the prices of which were the basis for calculating the damages until the day when the claim for damages is due. Based on that, the injured party can demand compensatory interest for the aforementioned period (Piszcz and Wolski, 2017, p. 222–223).

In Lithuania, the new Law on Competition does not directly establish the interest rate, nor does it refer to the Civil Code with respect to its rate. However, it is assumed that the general interest rate of 5% or 6% (depending on the nature of the parties to the court proceedings[22]) established under Article 6.210 of the Civil Code of Lithuania shall apply. The Civil Code does not directly provide any discretion for the courts to reduce or increase interest payments,[23] if this is necessary to avoid overcompensation or under-compensation.

III. Presumption of harm

One of the main novelties introduced by Article 17(2) of the Damages Directive is a rebuttable presumption that cartel infringements cause harm. As Recital 47 of the Damages Directive stipulates, such a presumption has been established in order to 'remedy the information asymmetry and some of the difficulties associated with quantifying harm in competition law cases, and to ensure the effectiveness of claims for damages (…)'. Therefore, the claimant shall be relieved from the duty to prove the fact that he has suffered damages due to a cartel infringement. As the presumption is rebuttable, the defendant shall have a right to prove that no damages have been caused due to the cartel.

The presumption of harm under the Damages Directive applies only to cartel infringements,[24] in other words, no presumption of harm (even rebuttable) is applicable in the case of damages suffered due to other restrictive

[21] Polish National Bank.

[22] The 6% rate shall apply when the parties are private legal persons or businessmen, in other cases the 5% rate will apply.

[23] The court may only reduce the amount of damages if awarding full compensation would lead to unacceptable and grave consequences under Art. 6.251(2) of the Civil Code.

[24] Art. 2(14) of the Damages Directive defines a cartel as 'an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or

agreements and the abuse of a dominant position. The explanation for limiting this presumption in such way is given in Recital 47 of the Damages Directive: a rebuttable presumption is limited to cartels, 'given their secret nature, which increases the information asymmetry and makes it more difficult for claimants to obtain the evidence necessary to prove the harm'.

Most of the CEE countries have not been familiar with the aforementioned rebuttable presumption before the implementation of the Damages Directive. Therefore, this novelty has been introduced, or is intended to be introduced into the national legislation of such countries as Bulgaria (Petrov, 2017, p. 38–41), Czech Republic (Petr, 2017, p. 92–94), Estonia (Pärn-Lee, 2017, p. 117–118), Lithuania,[25] Slovakia (Blažo, 2017, p. 255–256), Slovenia (Vlahek and Podobnik, 2017, p. 280–282), etc.

Some of the CEE countries, namely Latvia and Hungary, have had the presumption that cartel infringements result in harm even before the implementation of the Damages Directive. Furthermore, those countries have extended the aforementioned presumption to also cover the amount of harm caused by the cartel infringements, namely it is presumed that cartel infringements cause a price increase of 10%.[26] For instance, Section 88/C § of the Competition Act of Hungary provides that '[i]n the course of civil proceedings for any claim conducted against a party to a restrictive agreement between competitors aimed at directly or indirectly fixing selling prices, sharing markets or setting production or sales quotas that infringes Article 11 of this Act or Article [101 TFEU], when proving the extent of the influence that the infringement exercised on the price applied by the infringer, it shall be presumed, unless the opposite is proved, that the infringement influenced the price to an extent of ten per cent'. This provision was introduced into Hungarian law in 2009 and it is applicable to actions filed after 1 June 2009, even if the unlawful behaviour occurred before the entry into force of this provision (Nagy Csongor, 2016, p. 447–457).

It is doubtful whether this presumption is in accordance with Recital 47 of the Damages Directive (Miskolczi Bodnár, 2017, p. 143–144), which does not encourage the presumption of the concrete amount of harm (Recital 47 of the Damages Directive). The effect of such a presumption is also not unambiguous. On one hand, such an extended presumption helps injured persons to fulfil their duty to prove the civil liability of the cartelists, as both

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sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors'.

[25] Art. 44(3) of the Law on Competition of the Republic of Lithuania.

[26] The 10% price increase presumption cannot be equated to 10% damage, one reason being the passing on of the price increase, another one being the negative effect on the quantities sold at a higher cartel price (Tóth, 2016, p. 399–420).

the fact and the quantum of the price increase is presumed. In such cases, it is for the defendant to prove that no harm and a lower quantum of damages have occurred as a result of his conduct in a cartel.[27] On the other hand, the presumed amount of the price increase does not necessarily coincide with the quantum of harm, and so the actual amount of the harm might have been higher. In addition, as the presumption is rebuttable, from the practical points of view, the defendant in all cases will rebut the quantum of harm and the claimant will then have to defend the presumption or provide evidence on the actual harm suffered. Lack of case-law in Hungary (Miskolczi Bodnár, 2017, p. 143–144) and Latvia, where the presumption would have been applied, shows that the presumption of damages caused by cartels and their quantum will not in itself boost private antitrust enforcement in national jurisdictions.

The Polish legislator went even further than stipulated in Article 17(2) of the Damages Directive, and extended the presumption of damages caused by any infringement of competition law (Article 7 of Act on of Claims for Damages for Infringements of Competition Law). As stated in the reasoning of the draft Explanatory Notes accompanying the indicated law, the Damages Directive does not oppose such solution. Additionally, according to the aforementioned Explanatory Notes, there is a need to help injured parties to bring competition-based damages claims in relation to the premises of liability of the infringer in cases of other, than cartels, infringements of competition law too (Piszcz and Wolski, 2017, p. 222–223). The aforementioned presumption is rebuttable according to Article 234 of the Code of Civil Procedure of Poland.

The presumption has been limited to cartels under the Damages Directive, given the information asymmetry and difficulties to obtain the evidence necessary to prove the harm (Recital 47 of the Damages Directive). Nevertheless, as mentioned above, the Damages Directive does not restrict national jurisdictions from extending such presumption to other competition law infringements as well. It is obvious that the injured person might face similar challenges of information asymmetry, as well as difficulties to obtain evidence to prove harm, also in the case of other competition law infringements (for instance, in case of predatory or excessive pricing by the dominant undertaking).

In any case, the presumption of harm under the Damages Directive and national jurisdictions has been welcomed by legislators and practitioners, and it is expected to facilitate and even enhance private antitrust litigation. The

[27] Organisation for Economic Co-operation and Development. (2011). Policy Roundtables. Quantification of Harm to Competition by National Courts and Competition Agencies, p. 112. Retrieved from: http://www.oecd.org/daf/competition/QuantificationofHarmtoCompetition2011.pdf (01.06.2017).

success of this novelty will, however, highly depend on the efficiency of public enforcement by competition authorities in the field of cartel infringements.

IV. Quantification of harm by national courts

A general rule with regard to the quantification of harm is that the burden of proof rests upon the claimant. In quantifying damages in antitrust cases, information asymmetries between the parties should be taken into account, as well as the fact that quantifying the harm means assessing how the market in question would have evolved in the absence of the competition law infringement. This assessment implies a comparison with a situation which is by definition hypothetical, and can thus never be made with complete accuracy.[28]

Considering the fact that it is a difficult task for the claimant to quantify the harm precisely for the aforementioned reasons, Article 17(1) of the Damages Directive requires Member States to ensure that national courts have the power to estimate the amount of harm, if it is established that a given claimant suffered harm, but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the available evidence.

In most CEE countries, for example in Bulgaria (Petrov, 2017, p. 38–41), Croatia (Butorac Malnar, 2017, p. 68–70), Czech Republic,[29] Estonia (Pärn-Lee, 2017, p. 117–118), Hungary (Miskolczi Bodnár, 2017, p. 143–144), Latvia (Jerneva and Druviete, 2017, p. 162–165) and Lithuania,[30] national courts were empowered to estimate the size of the harm by themselves already before the implementation of the Damages Directive. Therefore, the aforementioned provisions of the Damages Directive have already been in place before the implementation of the Damages Directive. However, it is difficult to evaluate the effect of such court competences in practice, due to the lack of relevant case-law in those national jurisdictions from the time before the implementation of the Damages Directive.

As national courts of some CEE Member States have not been empowered to estimate the quantum of harm, such discretion and power has been granted to them by the implementation of Article 17(1) of the Damages Directive. For instance, Slovakia has introduced the power of the national courts to estimate the amount of damages when the quantification is 'unevenly difficult or absolutely impossible' (Blažo, 2017, p. 255–256). Although the wording is

[28] Recital 46 of the Damages Directive.

[29] Czech, Civil Procedure Code, Sec. 136; Civil Code, Sec. 2955.

[30] Art. 6.249 (1) of Civil Code of the Republic of Lithuania.

different and there can be discussion on the meaning of these differences ('practically' impossible in the Damages Directive and 'absolutely' impossible in the Slovak law; 'excessively difficult precisely' in the Damages Directive comparing to 'unevenly difficult' in the Slovak law), the meaning of the sentence in Slovak law should be the same as in the Damages Directive due to the obligation of an Euro-conform application of national law (Blažo, 2017, p. 255–256).

In the opinion of the authors, considering the principle of effectiveness under the Damages Directive, national courts, to the extent allowed by their national legislation, should be more proactive in using their powers to estimate the quantum of ham if the conditions for such estimation are met. Also, the laws related to the quantification of harm should be interpreted and applied by national courts in the light of the goals sought and principles established by the Damages Directive. A more proactive role of national courts in interpreting and applying national legislation related to the quantification of harm (such as loss of profit) would at least reduce the current obstacles for the development of private antitrust enforcement in certain CEE Member States.

Nevertheless, as indicated, national courts cannot use the power to estimate the quantum of the harm in an arbitrary manner. First of all, at least in certain CEE Member States (for example Latvia, Lithuania), a court may not at its own discretion decide to use such power – a request of the claimant has to be submitted. In Lithuania, following the Code of Civil Procedure, a claimant should submit such a request during the preparations for a court hearing (Article 226). Otherwise, the court might refuse to satisfy such a request, if it was possible to submit it earlier (Article 245(2)). In any case, the latest time when the claimant might submit such a request is before the beginning of the closing arguments in the court of first instance. In order to ensure fairness of court proceedings, it is important for the court to have informed the procedural parties in advance about its intention to implement the court's right to estimate damages.

More stringent rules with regard to the submission of the claimant's request apply in Latvia. Article 192 of the Latvian Civil Procedure Law precludes the court from deciding by itself on such estimate when no specific request of the claimant is submitted. This means that even if the court finds the calculations of the damages amount unsatisfactory, the court cannot on its on motion substitute the quantification of the claimant with its own estimate. In addition, following established case-law of Latvian courts, the claimant is precluded in Latvia from submitting alternative claims. Therefore, the claimant has to decide before the submission of the claim on (1) whether to submit his own calculations; or (2) to ask the court to estimate the damages. However, it is rather difficult to adopt such a strategic decision at such an early stage of

a private antitrust case; as in most cases, the relevant evidence related to the quantification of harm are not yet available to the claimant (including evidence regarding the quantification of harm of the defendant) (Jerneva and Druviete, 2017, p. 162–165). Therefore, it is discussable if such an approach would not hamper the goals sought by the Damages Directive. It is suggested that the Latvian law would empower the court to give an estimate of the damages even if not initially asked for by the claimant and/or explicitly would allow the claimants to submit alternative claims in competition cases (Jerneva and Druviete, 2017, p. 162–165).

Furthermore, all the relevant facts and evidence have to be taken into account in order to determine the amount of the claim, and only where there are no other indications the amounts should be estimated by the national court following its own evaluation. We agree with the opinion of dr. A. Petrov (Petrov, 2017, p. 38–41), that where the available evidence points to a specific manner of calculation of the amount of damages (such as market benchmark, annuity formula, etc.), the court may not use its own estimation by not taking into account the available evidence. Moreover, even where the court is entitled to estimate the harm in accordance with its own understanding of justice, it is still recommended that it first asks for expert help in a way that would allow the court to consider the relevant facts to the maximum extent. For instance, the Bulgarian Supreme Cassation Court emphasized that an expert evaluation may be commissioned not only upon a request of one of the litigating parties, but also *ex officio* by the court and this would not violate the adversarial nature of the proceedings (Petrov, 2017, p. 37–38). In Lithuania, following its Code of Civil Procedure, the court will appoint an expert subject to the opinion of the participants in the proceeding.[31]

Assistance of competent experts in the quantification of harm is crucial for national courts. The estimation of harm is a difficult task, requiring not only the proper qualification and application of the legal rules related to the assessment of damages caused by a competition law infringement, but also proper estimation and application of economic knowledge related to the quantification of harm issue (in order to assess reliability and suitability of methods employed for the establishment of counterfactual scenarios and assessment of damages, compounding and discounting of damages, etc.) (Ashton and Henry, 2013, p. 235–258). Therefore, the synergy of law and economics is crucial in this field.

A common challenge for the jurisdictions of most CEE Member States is the selection and appointment of proper experts for the quantification of harm in private antitrust cases. For instance, in Bulgaria such selection is usually made

[31] Art. 212 of the Code of Civil Procedure of the Republic of Lithuania.

from a list of designated experts. It is possible to nominate a person beyond the list, though the practice is rare since judges usually prefer to entrust the task to people they are used to work with. Unfortunately, this approach does not guarantee that the expert opinion will be prepared by the person with an adequate expertise (Petrov, 2017, p. 37–38). In Latvia, there is also a striking lack of experts that may serve for the purpose of quantifying harm in private antitrust cases, and who would be able to professionally quantify the harm in such a case (Jerneva and Druviete, 2017, p. 162–165).

Similarly, the Lithuanian Code of Civil Procedure and Law on Court Expertise directly establish the duty of the court to appoint as an expert a person who has the necessary qualifications to produce an expert opinion, and who is included in the official list of designated court experts in Lithuania or regarded as court experts in other Member States. Only if there are no court experts who have sufficient qualifications, or if existing experts may not produce an expertise due to other reasons (conflicts of interest, business in other cases, etc.), the court may appoint other qualified persons as experts to produce an expert opinion. In practice, Lithuanian courts usually preferred to appoint experts from the aforementioned list, irrespective of their quite limited understanding and experience in quantifying harm in private antitrust cases. Following Lithuanian law and case-law, an expert opinion does not have *prima facie* value and has to be evaluated in the context of other evidence. In practice, however, the court will highly likely refer to such opinions in order to quantify damages. Therefore, competences in the field of competition economics, sufficient knowledge of the relevant sector and related damages' quantification are crucial not only for court appointed, but also for other experts.

The Damages Directive is silent about the methods applicable to the quantification of harm by national courts; it only refers to guidelines on how to estimate the share of overcharge which was passed on to the indirect purchaser under Article 16 of the Damages Directive. National legislation of some CEE Member States (for example Croatia) implementing the Damages Directive is also silent about such methods. One of the reasons for such an approach is that national courts should not be limited in that regard, 'as different methods may be suitable depending on the concrete circumstances of a particular case' (Butorac Malnar, 2017, p. 68–70). It is, nevertheless, expected that judges and court appointed experts will avail themselves of the Practical Guide Quantifying Harm in Actions for Damages based on Breaches of Article 101 and 102 TFEU published by the European Commission (Butorac Malnar, 2017, p. 68–70).

Certain countries, however, have introduced specific rules for the quantification of harm by national courts by implementing the Damages

Directive. For instance, in Lithuanian legislation significant importance has been directly given to the guidelines of the European Commission regarding the quantification of harm. The Law on Competition of Lithuania does not specify the guidelines regarding the quantification of harm,[32] Article 44(4) of the Law on Competition just indicates that the court will refer to these guidelines, as well as other circumstances important for the implementation of the principle of full compensation, when the court uses its discretion to estimate the amount of damages. The court will inform the procedural parties of its intention to use such discretion. In addition, the new Lithuanian Law on Competition obliges the court appointed expert to always follow the guidelines of the European Commission regarding the quantification of damages in antitrust damages cases.[33] The Law on Competition is silent whether the aforementioned guidelines are also obligatory with respect to private expert opinions submitted by the parties to the court proceedings. However, it might be concluded that private experts should also follow these guidelines, because otherwise their opinion would be criticized by the other procedural parties and the court itself. It is expected that these new requirements to be followed by experts while quantifying harm in private antitrust cases will ensure the use of proper methods in quantifying damages, and therefore improve the quality and reliability of expert opinions.

Similarly, in Poland a national court may refer to the guidelines included in the Communication from the European Commission 2013/C 167/07[34] as well as guidelines of the Commission indicated in Article 16 of the Damages Directive.[35]

It is expected that these new requirements to be followed by both national courts and experts while quantifying harm in private antitrust cases will ensure the use of proper methods in quantifying damages and, as a result, facilitate a more reliable assessment of actions for damages in private antitrust cases.

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[32] However, it is understood that the 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 accompanying the 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.

[33] Includes *inter alia* Practical Guide Quantifying Harm in Actions for Damages based on Breaches of Article 101 and 102 TFEU published by the European Commission, Strasbourg, 11.06.2013, SWD(2013) 205.

[34] 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.

[35] Art. 30(1) of the Act on of Claims for Damages for Infringements of Competition Law of Poland.

V. Assistance of national competition authorities in the quantification of harm

Article 17(3) of the Damages Directive establishes an additional tool for the quantification of harm. Namely, 'Member States shall ensure that, in proceedings relating to an action for damages, a national competition authority may, upon request of a national court, assist that national court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate'. Before the adoption of the Damages Directive, based on Article 15 of Regulation 1/2003[36] and EC Notice,[37] national courts might request the opinion of the European Commission. Moreover, also the European Commission itself, as well as National Competition Authorities (NCAs) acting on their own initiate, might submit written observations (*amicus curiae*) to national courts of their Member States on issues relating to the application of Article 101 or Article 102 TFEU. Hence, the Damages Directive has extended the scope of the possible assistance of NCAs to also cover the determination of the quantum of damages.

Cooperation with a NCA with respect to the quantification of harm has not been available in CEE Member States – except for Estonia (Pärn-Lee, 2017, p. 117) – before the implementation of the Damages Directive. This novelty was therefore introduced into the national legislations of CEE countries, albeit not identically.

As the Damages Directive does not establish the duty of a NCA to provide its assistance to national courts in the quantification of harm, CEE countries followed the same approach by introducing a right and not an obligation onto NCAs.

For instance, according to the Lithuanian Law on Competition, the Lithuanian competition authority shall be entitled to provide its opinion on the determination of the quantum of damages upon the request of a court. That means that the NCA will decide, at its own discretion, whether to provide such an opinion or not. Article 51(8) of the Law on Competition does not set any criteria for the assessment by the NCA whether to assist the court or not in that respect. However, the NCA should interpret such discretion in the light of the Damages Directive (that is, **where that NCA considers such assistance to be appropriate**). This approach differs from the general rule under the

[36] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU], OJ L 001, 04.01.2003, p. 1–25.

[37] Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles [101] and [102 TFEU], OJ C 127, 09.04.2016, p. 13–21; OJ C 101, 27.4.2004, p. 54–64.

Lithuanian Code of the Civil Procedure, whereby the Lithuanian Competition Authority is obliged to provide its opinion if a national court requests it with respect to the application of competition law in general. However, the Law on Competition is considered to be a *lex specialis,* hence the aforementioned duty under the Code of Civil Procedure will not apply to the Competition Authority with respect to the determination of the quantum of damages.

In Poland, the discretion of the NCA to refuse to provide assistance to a national court regarding the quantification of damages depends on whether the evidence collected and information possessed by the NCA allow it to do so.[38]

Interestingly, Polish legislation entitles national courts to refer both to the Polish competition authority (UOKiK President) and to the NCAs of other Member State for support in determining the quantum of damages (Piszcz and Wolski, 2017, p. 222–223). Similarly, a Slovenian court may also ask the NCAs of other Member States to provide such opinions. Likewise, following the Slovenian legislation, the Slovenian competition agency may provide assistance to national courts of other Member States (Vlahek and Podobnik, 2017, p. 280–282). In addition, unlike other Member States, Slovenian law establishes a 30-day deadline for the submission of the opinion of the Slovenian competition agency on the determination of the amount of damages. In Croatia, the Draft Act does not provide explicitly which competition authority is entitled to support a national court in quantifying harm. However, following the definitions of the Draft Act on Antitrust Damages, the term 'national competition authority' covers the Croatian Competition Agency, the NCAs of other Member States, as well as the European Commission.[39] Therefore, it is ambiguous whether it may be interpreted in such a way, or whether this right should be confined to the assistance of the Croatian Competition Agency only (Butorac Malnar, 2017, p. 68–70).

In any case, it will be interesting to follow whether and to what extent NCAs (especially of other Member States) will prove eager to cooperate with national courts in the determination of the quantum of damages. The increase of the role of NCAs in private enforcement will strongly depend on the resources available to such institutions, and their willingness to be active with respect to the quantification of harm. However, it is doubtful whether NCAs would act as court appointed experts in quantifying damages. It is more likely that NCAs would assist courts in providing their opinion about evidence held in the case material regarding the quantification of damages. In any event, closer cooperation of national courts and NCAs would contribute both to the

[38] Art. 30(2) of the Act on of Claims for Damages for Infringements of Competition Law of Poland.

[39] Art. 3(12) of the draft Act on Antitrust Damages of Croatia.

enhancement of private enforcement as well as to deterrence of competition law infringement, a direct goal pursued by competition authorities.

VI. Conclusions

The Damages Directive has established certain novelties with respect to full compensation of harm caused by competition law infringements and the quantification of such harm. Certain CEE countries had already introduced some of these rules into their national legislation before the implementation of the Damages Directive, such as the presumption of harm (in Hungary and Latvia), national court's power to estimate the harm (in Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia and Lithuania). However, due to lack of relevant national case-law, it is quite difficult to estimate the effectiveness of such provisions with respect to the development of private antitrust enforcement.

While implementing the Damages Directive, some CEE Member States have chosen to transpose the rules on the quantification of harm under the Damages Directive to the minimum extent permitted, that is, by introducing the same rules as the Damages Directive. This applies particularly to the calculation of interest from the time of the occurrence of harm, and a rebuttable presumption of harm caused by cartel infringements. As indicated in Part III of this paper, certain CEE Member States have decided to extend the presumption of harm in their national legislation, complementing it by a presumption of the amount of the price increase. Therefore, no new rules regarding the presumption of harm have been introduced in these jurisdictions.

In other cases, some of the CEE countries have decided to go beyond the literal scope of the Damages Directive by introducing additional rules while transposing the Damages Directive. For instance, Poland has chosen to extend the presumption of harm to any competition law infringements. Also in Poland as well as in Lithuania, significant importance has been directly given to the guidelines of the European Commission regarding the quantification of harm by national courts and (or) court appointed experts. It is expected that this will ensure more comprehensive and reliable quantification of harm in private antitrust cases. Also, some of the countries (Poland and Slovenia) have extended the possibility for national courts to apply for assistance in determining the quantum of harm also to the NCAs of other Member States. However, considering the soft nature of the discretion of NCAs whether to provide such support or not, the significance of such a novelty in practice is debatable.

Novelties in the quantification of harm as well as other novelties under the Damages Directive are expected to facilitate and enhance private antitrust enforcement within the Union. However, the lack of case-law even in those CEE jurisdictions where specific rules for quantifying harm have already been introduced before the implementation of the Damages Directive do not lead to great optimism about a quick enhancement of private antitrust enforcement. Furthermore, practice shows that the private enforcement process has not changed significantly after transposition. These changes will largely depend on how successfully the courts will apply these and other novelties under the Damages Directive in practice. Strong knowledge of EU and national competition law and case-law is also crucial for the courts in order to enhance the private enforcement culture.

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