UDK 346(4-67EU:497.7)
339.137
Review article

ACTIONS FOR DAMAGES FOR BREACH OF EU COMPETITION LAW – EFFICIENT MARKET PROTECTION THROUGH PRIVATE ENFORCEMENT – WITH EMPHASIS ON NORTH MACEDONIA

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ABSTRACT

protection of the principle of free market competition is one of the fundamental principles on which the European Union was established, and as such it has been embedded in the Union's founding treaties. Articles 101 and 102 of the Treaty of the Functioning of the EU explicitly prohibit agreements which prevent and restrict free market competition, and abuse of dominant market position. However, despite the fact that the principle of free market competition is one of the cornerstones of the EU, in practice there are numerous cases where companies disrupt the internal market through destructive conducts. Led by the desire for greater profit, very often companies try to circumvent the internal market rules, while remaining unsanctioned in the process. In these situations, beside inflicting harm on the market and on the economies of the Member-States as a whole, the offenders also inflict concrete damage on their competitors, and direct and indirect customers. In this regard, an important issue which arises is the question of indemnifying specific victims of such anticompetitive conducts.

In the beginning, the European Commission through the Directorate General for Competition was the sole body which had jurisdiction in the enforcement of EU competition law. However, this approach proved highly inefficient as it was impossible to supervise the conducts on such a large scale, especially when taken into consideration the number of companies which operated on the market and the absence of clear division between internal market of the union and national market. It was even more difficult to provide compensation for all which were affected. This resulted in an initiative for decentralization of the enforcement of EU competition law, with great emphasis being placed on private enforcement.

The aim of this article is to give insight of the methods for private enforcement of EU competition law. The paper firstly provides an overview of the existing legislation within the European Union concerning the enforcement of EU competition law. It then turns to the Directive

2014/104/EU, the so-called "damages directive", which is considered the crucial instrument for providing more efficient protection of the internal market. The article examines the level of transposition of the Directive among Member-States, and the effects of its implementation. In addition, two important initiatives have arisen which will be also subject of analysis. The first initiative is for the increase of power of national competition authorities, which has resulted in the adoption of the Directive (EU) 2019/1. The second initiative is for enhanced level of protection of the consumers, through the introduction of collective redress mechanism in the form of class actions against the offending companies. This initiative has resulted in proposal for a directive of the European Parliament and of the Council, which has been accepted by the European Parliament in 2019. In anticipation of the final text, the article examines the key points contained within the proposal.

Finally, the article gives an insight into the current state of play of the national legislation of Republic of North Macedonia, and the level of harmonization with the EU acquis.

Keywords: *EU competition law, antitrust, damages, class actions, private enforcement*

1. INTRODUCTION

The main objective of the European Union (hereafter EU), is to achieve complete trade liberalization within its territory. The establishment of a single market was the main motive for the creation of the Union, and to this day it remains to be one of the fundamental principles which is deeply rooted in EU's main treaties. The Treaty on the Functioning of the European Union (hereinafter TFEU) as part of the Treaty of Lisbon, *i.e.* one of the two founding Treaties of the EU, explicitly provides that within the union's territory the "free movement of goods, persons, services and capital"[1] (*i.e.* the "Four Freedoms") is ensured within the single market. In this regard, the TFEU prohibits quantitative restrictions on imports[2] and exports[3] between Member-States. The greater significance is attached to the promotion of market freedom, the more important becomes the existence of an effective mechanism which can safeguard free market competition. Competition law aims to prevent all destructive actions that would have an adverse effect on the single market, and thus ensure efficient allocation of resources for the achievement of economic benefit.

The central provisions regulating prevention of unfair competition within the EU are Articles 101 and 102 of the TFEU. Article 101 deals with agreements, decisions and practices of undertakings which have the effect of prevention, restriction or distortion of competition within the internal market.[4] Article 101 contains an

1 Article 26 (2) TFEU (Lisbon)

2 *Ibid*., Article 34

3 *Ibid*., Article 35

4 *Ibid*., Article 101

inexhaustive list of such conducts. In particular, it invalidates conducts which would have the effect of:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[5]

If a conduct by an undertaking or association of undertakings is found to fall within either of these categorizations, it would be rendered void, unless proven that it contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.[6] There are several approaches which can be adopted in order to define the relationship between Article 101(1) and Article 101(3) and how should they be reconciled in their application.[7]

Article 102 on the other hand, prohibits the abuse of dominant position by one or more undertakings. In particular, Article 102 categorizes a s abusive, actions which consist in:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[8]

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5 *Ibid*., Article 101 (1)

6 *Ibid*., Article 101 (3)

7 Jones A.; Sufrin B., *EU Competition Law*, *Text, Cases and Materials*, Oxford University Press, 6th Edition, 2016, p. 183

8 TFEU, *op. cit.* note 1, Article 102

Given the specific nature of the EU as a *sui generis* organization, the question which arises is who is responsible for supervision and enforcement of the relevant competition law provisions. On one hand, the guarantee of free market competition is one of the key aspects of the EU, but on the other, all Member-States have their own national competition laws which are enforced by national competition authorities. While it is undisputed that the protection of the free competition is a common goal, for the purpose of effective protection of competition, a clear-cut scheme of duties and responsibilities is important. Given the fact that this is a matter of EU legislation, primarily the power for enforcement of EU competition law, lies within the European Commission (hereafter EC), more specifically the Directorate-General for Competition (hereafter DG COMP)[9]. Recourse against Commission's decision may me sought in front of the Court of Justice of the European Union (hereafter CJEU).[10] The CJEU may also give preliminary rulings related on questions related to interoperation of *EU acquis*, raised by courts of Member-States.[11]

The framework for the implementation of Articles 101 and 102 TFEU by the EC is laid down in Regulation 1/2003.[12] The rules are supplemented by Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to [Articles 101 and 102 TFEU].[13] In accordance with the Regulations, the Commission has a wide range of measures at disposal to prevent actions which impede competition. The EC may impose behavioral or structural remedies against undertakings, whose actions infringe Articles 101 and 102 of the TFEU,[14] may order interim measures,[15] and it may even impose severe fines amounting up to 10% of the undertaking's total turnover in the preceding business year.[16] All of this is related to prevention of destructive actions by undertakings in the single market, and in the case such actions are detected – their efficient sanctioning. The penalties provided for in Regulation 1/2003 are intended to restore the balance within

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9 Galev G., *Institutional System of European Community Antitrust Law,* Balkan Social Science Review, *vol.* 13, 2019, pp. 27-29

10 TFEU, *op. cit.* note 1, Article 263

11 *Ibid.*, Article 267

12 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJL 001/03. The Regulation was adopted before the entry into force the TFEU, so the original wording refers to Article 81 and Article 82 of the Treaty of Rome, which correspond to Article 101 and Article 102 of the TFEU

13 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004], OJL 123/04. The same principle for the wording of the Articles applies here as well

14 Council Regulation (EC) No 1/2003, *op. cit.* note 12, Article 7 (1)

15 *Ibid.,* Article 8 (1)

16 *Ibid.,* Article 23 (2)

the single market and at the same time deter undertakings from acting in such a manner in the future.

However, in addition to disruption of the single market and Member-States economies, such actions also inflict harm on direct or indirect customers, or competitors of the undertakings that have committed the infringements. In most cases it is the customers who are at the bottom of the market chain who suffer concrete damage, as the effect of the infringement very often is passed down on them. Aside from the question of removing anomalies in the single market, the issue of indemnifying concrete victims of such prohibited actions is of equal importance. Therefore, it is essential for the EU to have a mechanism that will provide adequate compensation for the damage suffered. Such a mechanism is in line with the principle of "full compensation" for the harm suffered established by the CJEU in the cases of *Courage v Crehan*[17] and *Manfredi*.[18]

Given the vast number of persons which may be affected by an unlawful conduct, it is impossible for the EC to act and provide protection and redress to all who have been inflicted. In addition, due to the nature of the single market and the level of integration within the EU, the effect of the infringement would always go beyond the borders of a single country and affect the community as a whole. Therefore, in 2014, at the proposal of the Commission, the European Parliament adopted the Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member-States and of the European Union Text with EEA relevance.[19] This Directive is the first step towards ensuring the efficient and effective compensation through private enforcement.

2. THE NEED FOR PRIVATE ENFORCEMENT WITHIN THE EU

When discussing public enforcement from policy perspective, the key objective is usually seen in the creation of deterrent effect.[20] The deterrent effect is evident predominantly from the use and imposition of fines on wrongdoers as primary method for market correction. Public enforcement is conducted through the work

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17 C-453/99 *Courage Ltd. v. Bernard Crehan and Bernard Crehan v. Courage Ltd. and others* [2001] ECR I-6297

18 C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6641

19 Directive 2014/104/EU of the European parliament and of the council of 26 November 2014 on certain rules governing actions for damages under national law for infringement of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/14

20 Hüschelrath K., Peyer S., *Public and Private Enforcement of Competition Law - A Differentiated Approach*, Centre for Competition Policy, CCP- Working Paper 13-5, 2013, p.4

of national competition authorities, which have limited budgets and resources to be able to combat anticompetitive behavior successfully. According to Hüschelrath and Peyer, the use of deterrence-based approach, over alternatives such as prevention which requires changes in the competitive environment or stimulation of moral commitment, is justified primarily because it is the least expensive way of public enforcement of competition law.[21] On the other hand, there are several objectives which can be pursued through private enforcement. While deterrence from future misconducts and breaches can also be achieved through private enforcement, unless it is in the form of class action or collective redress mechanism, it seems more likely that fines imposed by national competition agencies are more effective in comparison to individual lawsuits and claims for damages. Nevertheless, this hinders an objective which unlike public enforcement, private enforcement of competition law can achieve – compensation of victims for breach of competition law. In line with this is the EC's White Paper on Damages actions for breach of the EC antitrust rules form 2008, where strong emphasis is placed on achievement of corrective justice.[22]

In the evaluation of the necessity of private enforcement of competition law within the EU it is inevitable to compare the EU initiatives with the established US system, and to draw from those experiences. From a historical standpoint, within the EU public enforcement has been more important than private enforcement.[23] In the US on the other hand, private enforcement has been the dominant approach. According to prof. Jones, 90% of all antitrust cases in the US involve private rather than public action.[24] This can be attributed to the fact that unlike the EU, the US has tradition of private enforcement of competition law dating from the Clayton Antitrust Act from 1914, which encouraged the utilization of private enforcement of competition law. Additionally, the characteristics of the US legal system itself have fertilized the sprout of this method: pre-trials discovery, consolidation of cases and class actions, joint and severable liability of infringers and possibility for contingency fees are just a number of concepts which stimulate private enforcement.[25]

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21 *Ibid.*

22 Commission of the European Communities, *White Paper on Damages actions for breach of the EC antitrust rules,* 2008, [https://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf], accessed 28. February 2020

23 Whish R.; Bailey D., *Competition Law*, Oxford University Press, 7th Edition, 2012, p. 295

24 Jones A., *Private Enforcement of Antitrust Law in the EU, UK and USA*, Oxford University Press, 1999, p.79

25 Jones A., *Private Enforcement of EU competition Law: A Comparison with, and Lessons from the US*, Transnational Law Institute, TLI Research Paper Series, Research Paper 10/2016, p. 6

In stark contrast, the lack of these mechanisms has resulted in a very small number of cases for private enforcement of EU competition law, ranging from just 54 judgements in 1999 up to 146 in 2011.[26] These numbers can be attributed predominantly to the fact that unlike the US, the EU has member-states each with their own national legislation regulating competition law, making harmonization and unification more difficult. The principle of national procedural autonomy makes enforcement of EU competition law dependent on the procedural, evidential, and substantive rules governing civil litigation applicable in each Member-State.[27] Additionally, the EU *acquis* lacks provisions which would stimulate private enforcement. Namely, both of the founding treaties are silent on this issue, and for a long time there had been confusion and division in relation to the application of articles 101 and 102 of the TFEU and the rights which they confer upon individuals.[28] While there has been a strong initiative towards promotion of private enforcement of competition law, the period of a decade seems quite short for developing a mindset and measuring the results compared to the longer tradition in the US.

There is an ongoing debate for the need of establishment and promotion of mechanisms for private enforcement of EU competition law. While majority of authors supports this initiative and considers it beneficial both from policy[29] and economic perspective[30], there are some authors who look at it with a dose of suspicion and reluctance.[31] What is undisputed however, is that in the process of establishment of private enforcement system, experiences of the US system have to be taken into consideration. As evident from the initiatives within the past decade the EC has taken a proactive stance towards implementation of efficient mechanisms for private enforcement primarily through accepting concepts stemming from the common law systems. Private enforcement has been recognized as a necessity for achieving the objective of compensating victims of anticompetitive behavior in situation where the Commission itself does not have the power do so. In the White Paper form 2008, the Commission echoed the need to provide minimum rules regarding full compensation of persons affected by anti-competitive prac-

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26 Rodger B. (ed), *Competition Law: Comparative Private Enforcement and Collective Redress Across the EU,* Wolters Kluwer International, 2014, p.87

27 Jones, *op. cit.* note 25, p. 13-14

28 *Ibid.*

29 Berrisch G.; Jordan R.; Salvador Roldan R., *E.U. Competition and Private Actions for Damages*, The Symposium on European Competition Law, Northwestern Journal of International Law & Business, *vol.* 24, issue 3, 2004

30 Hüschelrath; Peyer, *op. cit.* note 20

31 Wills W.P.J., *Should Private Antitrust Enforcement be Encouraged in Europe?*, World Competition, *vol.* 26, Issue 3, September 2003, pp. 473-488

tices. Emphasizing that, due to the lack of an effective mechanism, victims fail to receive compensation of up to several billion euros annually.[32] These statistics quantify the cost of the absence of efficient mechanism for private enforcement.[33] The period of publication of the report coincides with the rise of the number of damages litigations for breach of competition law, most notably in Germany, the Netherlands and the United Kingdom.[34]

3. COMPENSATION FOR DAMAGES UNDER THE DIRECTIVE 2014/104/EU

As a result of the EC's initiative, Directive 2014/104/EU was adopted in 2014 as the first attempt to improve the possibility of adequate compensation for those affected by anti-competitive conducts.[35] The Directive is the most significant step towards decentralization of the enforcement of EU competition law.[36] The purpose of the Directive is to provide minimum standards in all Member-States for the compensation of victims of illicit practices, regardless for whether the victims are other companies or consumers. Bellow we outline the main features of the Directive.

Full compensation. The Directive incorporates the principle of full compensation established by the CJEU in the *Courage v Crehan* and *Manfredi* cases. Article 3 provides that Member-States are obliged to provide full compensation to both natural and legal persons.[37] Accordingly, full compensation should cover actual loss suffered, loss of profit, plus the payment of interest,[38] but should not be interpreted as widely as to cover punitive damages or multiple types of damages which would lead to overcompensation.[39] Since in practice it is very difficult for victims to prove and to substantiate the amount of loss, the Directive asserts a rebuttable presumption that cartels cause harm, and the national courts have the power to estimate the loss once the existence of cartel is established.[40] In order to be able

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32 Commission of the European Communities, *op. cit.* note 22. p.2

33 Whish; Bailey, *op. cit.* note 23, p. 295

34 Funke T.; Clarke O., *The EU Damages Actions Directive*, Getting the Deal Through – Private Antitrust Litigation, 2016, p.1 [https://www.osborneclarke.com/media/filer_public/28/2a/282a0ac7-4563-4b77-afff-83c283d357cf/the_eu_damages_actions_directive.pdf], accessed 20. February 2020

35 *Ibid.*

36 Rodger B.; Ferro M.S.; Marcos F., *The Antitrust Damages Directive: Facilitation Private Damages Actions in the EU?*, Journal of European Competition Law & Practice, *vol.* 10, 2019, p. 129

37 Directive 2014/104/EU *op. cit.* note 19, Article 3.1

38 *Ibid.*, Article 3.2

39 *Ibid.*, Article 3.3

40 Funke; Clarke, *op. cit.* note 34, p.1

to calculate the actual damages, the EC has issued practical guide for quantifying harm in actions for damages.[41]

Effects of national decisions. Decisions of national competition authorities which establish breach of competition law have two-fold effect: at national and at Union level. At national level, the Directive establishes that decisions for infringement are irrefutably established for the purpose of actions for damages in front of national courts.[42] This improves the position of the affected victims as they would not need to prove that over again that a violation has been committed. The Directive enlarges the number of authorities whose decisions have binding power, since in the past only decisions of the EC had binding effects upon national state courts. At the union's level, decisions rendered in one Member-State may not be binding upon courts in other Member-States, however can be presented as a *prima facie* evidence that infringement of competition law has occurred.[43]

Disclosure of evidence. Disclosure of evidence is one of the most notable novelties contained within the Directive. The concept of disclosure of documents is deeply rooted in the Anglo-Saxon legal tradition, but in recent years it has slowly started to emerge in continental law systems. The Directive explicitly provides that in proceedings related to actions for damages, upon requests of claimants, courts can compel the defendant or third parties to disclose evidence in their possession.[44] This provision is justified due to the fact that in most cases there is an inequality of information between the parties, as most of the affected parties have no insight into documents relevant to the infringement. Therefore, disclosure of evidence can restore the balance so that the claimants are able to support their claim effectively. However, the Directive provides that such requests must be justified, *i.e.*, there must be a reasoned justification for the party requesting the documents as evidence. Furthermore, the request must be specific and refer to a specific document or category of documents as evidence for whose relevance the claimant has to substantiate based on reasonably available facts and reasoned justification.[45] More importantly, the evidence sought should enable the aggrieved party to affirm its claim, not to serve as a basis for so-called "fishing expeditions`' for seeking new grounds for future claims.

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41 European Commission, *Commission Staff Working Document, Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty of the Functioning of The European Union*, 2013, [https://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf], accessed 03. March 2020

42 Directive 2014/104/EU *op. cit.* note 19, Article 9.1

43 *Ibid.*, Article 9.2

44 *Ibid.*, Article 5.1

45 *Ibid.*, Article 5.2

In the event that the court requests the defendant to submit evidence, they should have appropriate measures to protect the information contained within the evidence.[46] In such situations, the courts have several measures to protect the confidentiality of the information. For example, courts can only disclose information to a limited number of people which can additionally sign an NDA or confidentiality agreement, or they may redact the content of the evidence. It is important to note that national competition authorities are held to a more lenient standard, as they can refuse to disclose evidence used in ongoing investigation.[47] A point of contention in the process of adoption of the Directive was the issue for disclosure of leniency statements and settlement submissions. Although the CJEU has held on two occasions, first in the *Pfleiderer*[48] and later in *Donau Chemie*[49] that such documents are not exempted form disclosure, the Directive adopts opposite approach and grants exemption on such categories of evidence.

Longer statute of limitations. Until the entry into force of the Directive, the statute of limitations varied among Member-States. The goal within the Directive is to provide predictability and fair chance for the aggrieved to receive compensation, by establishing longer limitation periods, and clear guidelines for their computation. Accordingly, Article 10.3 stipulates that the statute of limitations for the initiation of compensation proceedings shall be at least 5 years.[50] Additionally, the limitation period is subjective *i.e.* it is established and calculated from the perspective of the aggrieved party. The limitation period would not begin to run before the infringement has ceased; the aggrieved party knows the identity of the infringer; is aware that the behaviour constitutes an infringement of competition law; and that due to the infringement it has suffered harm.[51] Additionally, the Directive stipulates that the limitation period would be suspended or interrupted if an investigation is conducted, and that suspension would end at the earliest one year after the infringement decision has become final.[52] Accordingly, NCA's should publish their decisions in a timely manner so that confusions regarding the limitation periods are avoided.

Joint and several liability. In order enable the principle of "full compensation" to be effectively fulfilled, the Directive provides that infringing companies are

46 *Ibid*., Article 5.4

47 *Ibid*., Article 6.5

48 C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECLI:EU:C:2011:389

49 C- 536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others* [2013] ECLI:EU:C:2013:366

50 Directive 2014/104/EU *op. cit.* note 19, Article 10.3

51 *Ibid*., Article 10.2

52 *Ibid*., Article 10.4

jointly and severally liable for the caused harm.[53] The aggrieved party has the right to seek compensation for the harm suffered by any of the infringing undertakings, which has two-fold effect – it gives the aggrieved party additional level of protection to recover damages regardless whether one of the infringing companies goes insolvent, or does not have sufficient assets, and additionally it prevents companies from shielding from liability by acting through affiliate or daughter companies. Once the victim(s) has been indemnified the undertaking may seek recourse against other infringing undertakings. However, the Directive provides two exceptions to this rule:

- The first exception relates to immunity recipients, which are jointly and severally liable only in relation to their direct or indirect purchasers of providers, and to the other injured parties only when full compensation cannot be obtained from the other undertakings involved in the infringement of competition law.[54] In this regard immunity recipients, limit the scope of their liability only towards their purchaser, and secure lowest ranking for indemnification towards all other aggrieved parties.
- The second exception relates to undertakings classified as small and medium entities (hereafter SME) under the Commission Recommendation 2003/361/EC, *i.e.* companies with market share of less than 5% at the time of the infringement, when the application of the rules of joint and several liability would seriously endanger the economic viability of the SME.[55] However the Directive provides for an exception to this exception, by stipulating that it would not apply in cases where the SME has already committed infringement in the past or where the SME was the leader in the coercion or infringement.[56]

Passing-on of overcharges. In cartel situations, very often the direct purchasers of the infringing undertakings have the opportunity to compensate for the increased prices by way of charging higher price than to their customers. In instances like this, the increased price may be passed down through the supply chain all the way to the end-customers, as these are the only one that do not have the chance to "pass-on" the overcharges. Prior to the adoption of the Directive the passing-on defense was not unanimously accepted.[57] Since the goal of the Directive is to achieve full compensation to the injured parties, seeking indemnification for loss which has been passed down, would inevitably lead to overcompensation. In order

53 *Ibid*., Article 11.1

54 *Ibid*., Article 11.4

55 *Ibid*., Article 11.2

56 *Ibid*., Article 11.3

57 Whish; Bailey, *op. cit.* note 23, p. 310-311

to avoid this, the Directive deals with the passing-on of overcharges. For instance, the infringing undertaking may seek reduction of the compensation claimed by its direct purchaser if it can prove that the overcharges have been passed down to its' direct purchasers. The burden of proof regarding the "passing-on" would be on the side of the infringing company, however it may request disclosure of evidence from the opposing side (for example, internal communication regarding price calculation, methodology for price determination towards its customers etc.).

The difference between what is claimed, and what the infringing undertaking would prove that has been passed down, is actually the loss suffered by the infringer's indirect customers. In reality, indirect purchasers have much more difficulty in proving that overcharges have been passed down to them. In order to allow indirect customers to claim damages, the Directive sets forth a refutable presumption that passing-on of overcharges has occurred when:

- the defendant has committed an infringement of competition law;
- the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and
- the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them. [58]

The Directive was first concrete step towards implementation of effective mechanism for indemnification victims of anticompetitive behavior. The deadline for its transposition was 27.12.2016.[59] However, by the end of 2016, 21 of the Member-States failed to communicate successful transposition of the Directive, which led to the dispatch of Formal Notice to these Member-States at the beginning of 2017.[60] By the end of 2017 most of the Member-States took the necessary measures for implementation of the Directive, except Greece, Bulgaria and Portugal who did so at the beginning of 2018.[61]

Despite the implementation of the Directive, there hasn't been much of a shift in a positive direction in regard to decrease of anticompetitive actions, or successful indemnification of the victims of such actions. Although the Directive is a positive and necessary step towards higher level of protection from infringements of EU competition law, there are additional measures that need to be taken. In April

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58 Directive 2014/104/EU *op. cit.* note 19, Article 14.2

59 *Ibid.*, Article 21

60 Status of the transposition of the Directive 2014/104/EU, 2020, [https://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html], accessed 10. March 2020

61 *Ibid.*

2018, the EC announced the implementation of a New Deal for Consumers, with the aim of enhancing efficiency and effectiveness in consumer protection.[62] The New Deal should be implemented through two initiatives: strengthening the role national competition authorities, and establishment of collective redress mechanism. Both initiatives are elaborated below.

3.1. Strengthening the role national competition authorities

The strengthening of national competition authorities is one of the essential prerequisites for ensuring effective functioning of the single market. At the moment, the competences and the powers of NCA vary significantly from one Member-State to another. Additionally, even if at first glance it seems that some of the NCA's have the same competences and powers, there is a difference and imbalance regarding the enforcement activities. These imbalances have led to the creation of "safe havens" within the EU where anticompetitive actions remain unsanctioned.[63]

In 2017, the EC published Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member-States.[64] The Commission's Assessment estimates that due to the presence of undiscovered cartels, a loss оф 181-320 billion euros annually occurs, which is approximately 3% of EU GDP.[65] In the Assessment, the Commission identifies four factors that reduce the effectiveness of NCA's:

- Lack of effective competition tools;
- Lack of powers to impose deterrent fines;
- Divergences between leniency programmes in terms of summary applications, core principles, protection of self-incriminating material and interplay with individual sanctions can lead to less effective competition enforcement against cartels;

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62 European Commission, *European Commission Press Release*, 2018 [https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3041], accessed 15. March 2020

63 Burke P., *EU Directive strengthens competition authorities of the Member States to be more effective enforcers of EU competition law*, 2018, [https://www.carteldamageclaims.com/eu-directive-strengthens-competition-authorities-of-the-member-states-to-be-more-effective-enforcers-of-eu-competition-law/], accessed 15. March 2020

64 European Commission, *Comission Staff Working Document Impact Assessment Accompanying the Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal marke*t, 2017, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017SC0114], accessed 10. March 2020

65 *Ibid*., p.9

- Lack of safeguards for NCAs to act independently when enforcing the EU competition rules and have the resources they need to carry out their work.[66]

Taking these obstacles into account, on 11 December 2018, the European Parliament adopted Directive (EU) 2019/1 to empower the competition authorities of the Member-States to be more effective enforcers and to ensure the proper functioning of the internal market.[67] The Directive contains provisions aimed at making progress in each of the four directions identified as problematic.

Regarding the lack of effective tools to combat infringements of competition law, the Directive provides that Member-States should empower NCA's to conduct unannounced inspections, and particularly and at minimum: enter any premises, examine the books and other records related to the business and access any information; obtain copies of or extracts from such books or records and; seal any business premises and books or records for the period and to the extent necessary for the inspection; ask representatives for explanations on facts or documents relating to the subject matter and purpose of the inspection and record the answers.[68] Furthermore, NCA's are authorized to carry out unannounced inspections of homes of directors, managers, and other members of staff of undertakings or associations of undertakings if there is any doubt that documents which would be of interest to the investigation are located there.[69] In addition, Member-States are obliged to empower NCA's to grant interim measures in situations where there is a risk that the conduct may cause irreparable harm to competition.[70]

The Directive makes a significant step towards empowerment of NCA's in imposing deterrent fines. It requires Member-States to empower NCA's to impose effective, proportionate and dissuasive fines on infringers, either in their own enforcement proceedings, or in non-criminal judicial proceedings.[71] To prevent possible abuses by companies by setting up special purpose vehicles with ultimate intention to avoid penalties, the Directive provides a broad notion of "undertaking" by making referral to its interpretation by the CJEU and by explicitly providing that it should encompass parent companies, subsidiaries as well as potential legal or

66 *Ibid*., p.15

67 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11

68 Directive (EU) 2019/1, *op. cit.,* note 67, Article 6.1

69 *Ibid*., Article 7.1

70 *Ibid*., Article 11.1

71 *Ibid*., Article 13.1

economic successors of the undertaking.[72] Additionally, the Directive sets a minimum standard for the maximum fine that may be imposed by NCA's, which may not be less than 10% of the worldwide turnover of the undertaking or association of undertakings in the business year preceding the year in which the decision is rendered.[73]

The Directive also contains provisions aimed at establishing mechanisms for effective leniency programs. Firstly, Member-States are obliged to authorize NCA's to grant immunity to companies approaching for cooperation and disclosure of secret cartels.[74] The Directive also sets out the conditions which undertakings must meet to qualify for immunity. Most importantly, the applicant for immunity has to submit evidence for a secret cartel, which would enable the NCA to carry out a targeted inspection, and for whose existence the NCA does not possess sufficient evidence yet.[75] In addition, the applicant must fulfill the general requirements laid out in the Directive: the applicant must have ended its involvement in the cartel at the latest immediately after its leniency application; it has to cooperate with the NCA during the whole process which particularly encompasses disclosing relevant information and evidence; it has to remain at disposal of the NCA for establishment of the factual situation; it has to make its directors, managers and staff available for interviews with the NCA; it must not be involved in destruction and falsification of documents and it must not disclose its involvement in leniency program during the investigation.[76] The Directive also provides for the possibility for inclusion of a wider range of undertakings involved in anticompetitive practices wishing to cooperate. However, given the fact that not all applicants would fulfill the requirements for immunity, the Directive also provides for reduction of fines as part of the leniency programs. Accordingly, undertakings which that do not qualify for an immunity may receive a reduced sentence if they fulfill the general conditions, and submit evidence which represents significant added value for the purpose of proving an infringement.[77]

The Directive also provides that NCA's staff y must be protected from political or any other external influence in their operational activities. Particularly, staff cannot seek or take any instructions from government or any other public or private entity when carrying out their duties.[78] In order to safeguard the independence of

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72 *Ibid*., Preamble, paragraph 46

73 *Ibid*., Article 15.1

74 *Ibid*., Article 17.1

75 *Ibid*., Article 17.2

76 *Ibid*., Article 19

77 *Ibid*., Article 18

78 Directive (EU) 2019/1, *op. cit.,* note 67, Article 4.2.(b)

the NCA's, members have to be selected in clear and transparent procedures laid out in advance.[79] Additional protection is offered to the employees by limiting the grounds for their dismissal only to serious misconduct under national law, or if they no longer fulfill the conditions required for the performance of their duties. Particularly, employees cannot be dismissed if they exercise their powers granted by the Directive.[80] Member-States are also required to provide sufficient resources to NCA's for efficient and effective functioning (qualified stall, financial, technical and technological resources), as well as independence in the spending of the allocated budget.[81]

The adoption of this Directive is an important step towards strengthening the role of national competition authorities in the battle for securing free market competition. While it is undisputed that the strengthening of the role of the NCA's is a step towards more efficient public rather than private enforcement of competition law, the empowerment of the first approach would not undermine the efficiency of the latter. In this regard the methods of enforcement do not contradict, but rather complement each other. Namely, the effective detection and sanctioning of infringements of the NCA's can also result in increased actions for damages against infringing undertakings. Given the fact that the Directive was adopted a little more than a year ago, it is still too early to assess the impact it has on single market. Member-States have a deadline for implementation of the provisions by 4 February 2021, when more detailed reports on its application and effectiveness are expected.

3.2. Establishment of collective redress mechanism as a means for proper consumer protection

In recent years, a number of cases have been discovered within the European Union where companies have infringed EU competition law: starting in 2015 with the "Dieselgate"[82] emissions scandal up to the Facebook - Cambridge Analytica[83] case that was announced in 2018. These scandals have caused harm to a large number of citizens within the EU, and at the same time have allowed companies

79 *Ibid*., Article 4.4

80 *Ibid*., Article 4.3

81 *Ibid*., Article 5

82 In 2015, the US Environmental Protection Agency revealed that Volkswagen had installed software in Volkswagen, Audi, Skoda, Porsche and Seat to regulate the emissions of gases when testing vehicles so they could meet the set standards, whereas in the actual use of the vehicles the emission was 3 times higher

83 In 2018, it was announced that Cambridge Analytica was processing private data of millions of Facebook users without permission, which was then used for political purposes

to make illicit profits. One way to reduce the negative impact of such actions and prevent them from happening in the future is to establish an effective mechanism to compensate affected consumers.

While the need for collective redress mechanism has been advocated for longer period, the efforts have only resulted in the adoption of the Directive 2009/22/EC,[84] the so called "Injunctions Directive", according to which qualified representative bodies may seek injunctive relief and take actions aimed at to stop harmful practices, but do not have the power to seek compensation for consumers.

Currently within the EU, only 19 of the Member-States have within their legislation some sort of legal remedy to victims of mass harm.[85] However, there are significant differences within the legal systems, the effectiveness also varies from one Member-State to another, and most significantly, neither has adopted a mechanism to address cases with cross-border implications.[86] Consumers, on the other hands, do not have the necessary means to deal with the effects of anticompetitive practices - the procedures are complicated and quite expensive, so they have no incentive to initiate proceedings individually. By comparison, following the outbreak of the Dieselgate scandal, due to the existence of a developed class action system, consumers in the US have been able to obtain compensation for the value of the vehicle, or pair of the defects in the vehicles, and additional compensation in damages varying between $5,000 and $10,000 - unlike the EU, where Volkswagen still refuses any compensation.[87]

It was exactly Dieselgate that prompted the EC's proposal for adoption of a new Directive which should ensure consumer protection through the implementation of a collective redress mechanism (hereafter Proposal Directive).[88] On March 26 2019, the Proposal Directive was also adopted by the European Parliament.[89] The

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84 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests [2009] OJ L 110

85 European Parliament, *Press Release, First EU collective redress mechanism to protect consumers*, 2018, [https://www.europarl.europa.eu/news/en/press-room/20181205IPR21088/first-eu-collective-redress-mechanism-to-protect-consumers], accessed 10. March 2020

86 Vanhooydonck H., *Consumer Rights: Time for a Class Action Mechanism in the EU*, 2019 [https://www.greens-efa.eu/en/article/news/consumer-rights-time-for-a-class-action-mechanism-in-the-eu/], accessed 11. March 2020

87 *Ibid*.

88 European Commission, Proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC [2018]

89 European Parliament, Position of the European Parliament adopted at first reading on 26 March 2019 with a view to the adoption of Directive (EU) 2019/... of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing

Proposal expends the existing 2009 Injunctions Directive. It takes into account recent developments which have transnational implications and aims to provide for effective cross-border protection mechanisms in various areas such as financial services, tourism, telecommunications, energy, data protection, health and environmental protection.[90] The main features of the Proposal Directive are:

- Introduction of new and harmonization of the existing systems for collective redress for mass harm caused by anticompetitive conducts.
- Reduction of the financial burden arising from procedures for indemnification of victims, as well as providing access to justice through the system of collective representation.
- Facilitated access to justice by enabling consumers to be represent by qualified representative entities (hereafter QRE) in proceedings related to anticompetitive conduct. Representative bodies can be in the form of consumer protection organizations, NGOs, or any non-profit organizations, which should not have a financial connection with a law firm.
- Striking a balance between effective consumer protection on the one hand, and protection of businesses from abusive lawsuits on the other hand. Namely, the Proposal Directive adopts the "loser pays principle", allowing the prevailing party to recover its legal costs, which at the same time acts as a preventive mechanism for filing frivolous lawsuits.[91]

From the outset of the publishing of the Proposal, parts of it have been subject to scrutiny and criticism. Most notably, the provisions regarding the QRE which should have the power to bring actions on behalf of the consumers have been criticized for being vaguely defined.[92] While the Proposal stipulates that these QRE would have to be independent and should not have financial agreements with law firms it does not contain detailed provision neither on the criteria which it should fulfill to be established as a QRE nor on the possibilities for its funding and budgeting. Additionally, unlike the procedures of the US style of class action, the Proposal fails to sufficiently address the manner in which it will be determined whether putative actions fulfill the criteria to be established as class actions. This can lead to abuse of the collective actions' procedures, and can be a powerful tool to pressure companies potentially facing negative press and public scrutiny.

Directive 2009/22/EC, 2019, [https://www.europarl.europa.eu/doceo/document/TA-8-2019-0222_EN.pdf], accessed 26. February 2020

90 European Parliament, *Press Release*, *op. cit.*, note 85

91 European Parliament, *Press Release*, *op. cit.*, note 85

92 Mc Tigue, M., *An EU Approach to Class Action Litigation*, 2019, p.2, [https://www.akingump.com/a/web/106088/Class-Actions-Alert.pdf], accessed 13. March 2020

Given the fact that some Member-States have already adopted systems for collective actions, it is important to note that the goal of the Proposal is not to abolish and replace those systems, but merely to provide a framework for specific representative actions which would give consumers at least one familiar and uniform mechanism on EU level.[93] One of the most significant steps towards effective consumer protection contained in the Proposal Directive is the possibility of indemnification for a group of persons who are not *de facto* consumers of an undertaking in the true sense of the word but may be affected by its anticompetitive practices. Article 3 of the Proposal Directive defines consumers in a broad sense as to include "personal data subjects" as defined in Regulation (EU) 2016/679 (GDPR Regulation).[94] This would enable individuals whose personal data is misused and processed without consent, as in the case of Facebook - Cambridge Analytica, to be able to use this mechanism to exercise their right for protection and indemnification.

The Proposal Directive contains groundbreaking idea (at least in the context of the EU), which raises the stakes higher and beyond competition law. The successful adoption of the collective redress mechanism for infringement of competition law across the Member-States can serve as a ground for potential expansion and use of the collective redress mechanisms for other types of disputes in the future. Once it is proven that the mechanism can function properly, then it becomes a matter of modification and adjustment for its application in other spheres of corporate, commercial or labor law. In the forthcoming period the Proposal Directive will be subject to debate between the European Parliament and the European Council. After successful approval by the European Council, the Directive can be passed, and subsequently Member-States would have the obligation to transpose it into national law. Only after the completion of these subsequent processes it will be possible to assess the impact which it would have on the single market.

4. COMPENSATION FOR DAMAGES UNDER THE LAW OF REPUBLIC OF NORTH MACEDONIA

Unlike the EU, Republic of North Macedonia has not reflected these trends within the national legislation, and is yet to take concrete steps towards establishment of a more efficient mechanism for indemnification of victims of anticompetitive conducts. According to recent study which measures the competitiveness of the countries from Western Balkans in general compared with EU members states from the perspective of competition law and trough evaluation of institutional

93 *Ibid.*

94 Proposal Directive, *op. cit.*, note 88, Article 3

and legislative factors, Republic of North Macedonia has the highest score and rank among the other countries from the region.[95] However, according to another study building up on this research, in all of these countries the progress in the competition policy area is significantly slower compared to other transition indicators and areas of harmonization with the EU *acquis*.[96]

In terms of the legislation, the principle of free market competition has been raised to the highest level and as such is established in the country's Constitution.[97] The main source is the Law on Protection of Competition (hereinafter LPC).[98] Article 6 of the LPC provides that the competent supervisory authority for the protection of the free trade is the Commission for the Protection of Competition (hereafter CPC).[99]In addition, a number of regulations and directives have been implemented in national legislation as part of the process of alignment with the *EU acquis*, which have been taken as by-laws.[100]

However, despite the process of alignment of national law with the relevant EU law, so far, no amendments have been made neither towards compensating victims of anticompetitive practice, nor towards strengthening the position of the CPC. According to the official annual reports of the CPC relating to the national market, in 2018 it rendered 6 decisions establishing infringement of competition law, and the total fine amounted to 18.461.544,00 MKD (298.470,00 EUR equivalent)[101], whereas in 2017 the Commission rendered 7 decisions, and the total

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95 Sanfey P.; Milatović J.;Krešić A., *How the Western Balkans can catch up?,* European Bank for Reconstruction and Development- EBRD: Working Paper No. 186, 2016, p. 5, [www.ebrd.com/documents/oce/pdf-working-paper-186.pdf], accessed 20. June 2020

96 Tosheva E;, Dimeski B., *The competition policy in Western Balkan countries: How far they have come on the EU accession "road",* Balkan Social Science Review, *vol.* 14, 2019, pp. 31-55

97 Constitution of Republic of North Macedonia, Article 55:
"The freedom of the market and entrepreneurship is guaranteed. The Republic ensures an equal legal position to all parties in the market. The Republic takes measures against monopolistic positions and monopolistic conduct on the market. The freedom of the market and entrepreneurship san be restricted by law only for reasons of the defence of the Republic, protection of the natural and living environment or public health."

98 Law on Protection of Competition (Official Gazette of the Republic of Macedonia no. 145/10, 136/11, 41/14, 53/16 and 83/18)

99 *Ibid.*, Article 6

100 In 2012, upon the proposal of the Commission for Protection of Competition, the Government of the Republic of North Macedonia adopted 9 decrees as by-laws in accordance with the LPC, transposing relevant EU Directives and Regulations concerning the free market protection [http://kzk.gov.mk/en/category/legal-framework/competition/by-laws/], accessed 20. January 2020

101 Commission for Protection of Competition, Annual Report, 2018 [http://kzk.gov.mk/wp-content/uploads/2019/05/Годишен-Извештај-на-КЗК-за-2018-година.pdf], accessed 18. January 2020

fines amounted to 635.893.622,00 MKD (10.280.555,00 EUR equivalent).[102] Without assessing the merits of the investigation, as some of the decisions of the CPC have been appealed and there are ongoing judicial proceedings, it is important to highlight the profile of the companies and the their respective fields of operation- telecommunications, pharmaceuticals, alcoholic and non-alcoholic beverages. Determining infringement of competition law in any of these instances inevitably means that the such conduct not only harms the market as a whole, but also causes harm to consumers, customers and competitors of these companies. However, to this date, there isn't a single case in which compensation in the form of damages has been awarded to any of these categories, nor have such proceedings been initiated. This might be the result of the fact that the national legislation does not contain specific rules for indemnification in situations like these.

In regard to compensation for damages, the LPC only contains a general provision stipulating that if an action amounts to infringement of competition law, the damaged party may seek indemnification in accordance with the law.[103] Under the national legislation, the *lex generalis* for compensation of damages would be the Law on Obligations, and for the procedure for indemnification would be the Law on Civil Procedure. However, these acts also do not contain specific provisions, as neither the Law on Civil Procedure contain rules for simplified procedures for victims of mass harm, or collective redress mechanisms in the form of class action, nor does the Law on Obligations contains guidance for indemnification of victims of mass harm for infringements of competition law. Additionally, unlike the previous EU Directives and Regulations, which were adopted in a form of by-laws, from 2012 onwards there have not been similar transpositions. The lack of specific rules combined with the high costs on which the injured party would have to be exposed *a priori* have deterrent effect, discouraging consumers from the thought of initiating legal proceedings despite the suffered harm. Therefore, it is advisable and important that steps are undertaken towards implementation of mechanism which would allow victims to be indemnified for the harm suffered as a result of anticompetitive conducts on the market.

In addition, it is necessary to align national legislation with the EU *acquis*, also in regard to strengthening the role of the Commission for Protection of Competition. As the principle body responsible for the enforcement of the LPC, the CPC is one of the main factors in ensuring the efficient functioning of the market and ensuring free market competition. The CPC's latest annual reports show that ac-

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[102] Commission for Protection of Competition, Annual Report, 2017 [http://kzk.gov.mk/wp-content/uploads/2019/05/Godishen-izvestaj-2017.pdf], accessed 18. January 2020

[103] LPC, *op. cit.*, note 98, Article 58

tion has been taken to prevent market abuses, but the number of cases processed is relatively small and he companies which were fined belong to one or two industries. There is no doubt that there is a great deal of secret cartels and abusive conduct in other industries that inflict harm from the market economy all the way to the end-consumers, but with the current status of the CPC and its available resources it is unrealistic to expect that greater efficiency and effectiveness can be achieved.

5. CONCLUSION

The functioning of the single market is impossible without an efficient and effective system of protection of the principle of free competition. Therefore, building mechanisms to ensure the protection of the single market is one of the European Union's top priorities. To this end, a number of initiatives have been undertaken in the past decade aimed at strengthening the role of NCA's and enabling consumers to receive indemnification for harmful conducts through private enforcement of EU competition law.

The adoption of the Directive 2014/104 / EU is the first concrete step taken by the EU in raising the level of protection against anticompetitive acts. This has ensured the decentralization of competences with regard to enforcement of EU competition law, thus giving NCA's greater powers. The competences of NCA's in the future should be further enhanced by the implementation of Directive (EU) 2019/1 by the Member-States. In addition, the EU gives emphasis on the effective and efficient consumer protection by introducing class action as a means for collective redress. The passing of the Proposal Directive is still in motion, but its adoption and implementation by Member-States is expected in the near future.

Although it is still too early to discuss any concrete benefits of the implementation of the directives, it is expected that the number of detected and sanctioned cartels by NCA's will increase in the coming years and that consumers will be able to receive proper indemnification for the harm suffered. Unlike the EU, so far there have not been any amendments to the existing national legislation which would reflect these global trends, but are expected within the near future.

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