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Competition Law: Facilitation or Deterrence?“

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Table of Abbreviations:

EU	European Union
TFEU	Treaty on the Functioning of the European Union (Lisbon Treaty)
TEU	Treaty on the European Union (Lisbon Treaty)
CJEU	Court of Justice of the European Union
COA	Contracts and Obligations Act of the Republic of Bulgaria

I. Introduction

Competition law is a key factor in the proper functioning of the Internal Market in the European Union. Its achievement and preservation is a key goal in the very existence of competition law, a fact that may be observed in the ruling of the Court of Justice in the Consten and Grundig case¹. Another piece of evidence for the importance of competition law is the exclusive competence of the EU to legislate in the field of competition law in regards to the Internal Market.

Infringements of competition are harmful for the society in a twofold way. First, they distort the market conditions, provoking changes that are not dictated by the market. Thus, they establish a situation in which infringers derive undue benefits. That distortion may happen through price fixing, but also through limitation of outputs, erecting barriers to entry to the market, setting quotas, etc. Such actions go contrary to public policy for preserving effective competition and consumer welfare and are thus sanctioned with the authority of state and EU institutions. At the same time market stakeholders sustain actual damage as a result of the infringement and thus have a claim for damages against the infringer(s). Therefore the enforcement of competition law is also organized in a twofold structure, where public and private enforcement coexist and complement each other.

While public enforcement sanctions infringements through state authority as part of public policy of the EU and the member states, private enforcement is aimed at repairing the damage caused. The power to regulate private relationships, including through adjudicating civil cases remains in the member states, therefore all disputes regarding claims for damages are dealt with in national courts according national procedural law.

The public enforcement of competition law is charged to the European Commission and the national competition authorities in each member state. Those

¹ Court of Justice of the European Union, Joined Cases 56 and 58-64, Judgment of the Court of 13 July 1966, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, Reports of Cases 1966 00429

bodies are provided with a wide array of tools to investigate and sanction infringements in the interest of the general public and consumers in particular and more specifically to the sound functioning of the Internal Market.

Being generally etatist in their view of government organization and regulation, member states accept the idea of the all powerful competition enforcement authority, along with the heavy fines it may impose in the public interest. In such circumstances private enforcement does not play the role it might in the US of deterring future infringements, but merely has the function to remedy the damage sustained by other actors.

While state and European Union authorities are charged with the public enforcement of competition, the private enforcement thereof remains in the hands of private parties on the grounds of civil liability. This aspect of competition enforcement deals with the consequences of the infringement in the private sphere of interest of the damaged parties, through damage claims and subsequent indemnification.

The system of public enforcement is quite well established and developed, having yielded multiple successful actions against all kinds of infringements of the rules of effective competition. Private enforcement of competition law on the other hand in the EU remains rather underdeveloped. This in its core results from the principle of distribution of competences between the EU and member states. While ensuring the single market is cohesive and sound is definitely within the competences of the EU both legislatively and in terms of enforcement, private actions are based on national civil law and more precisely the rules governing allocation and indemnification of damages and liability in private relationships as a whole. The principle of procedural autonomy of the member states is also a key delimitation factor in competences and thus influences the private enforcement of competition law.

In the current state of development of EU Law, national legal orders remain clearly independent and solely competent in certain fields of law. Member states are in full liberty to set up their substantive provisions and procedural rules in areas of their exclusive competence, as well as in areas where the Union has not yet regulated. In their actions member states are limited by the principles of autonomous interpretation, effectiveness and equivalence that aim to ensure consistent interpretation of union law in the whole EU.

Private enforcement of competition law is a field where EU exclusive subject matter competence coexists with national rules that enforce EU law. That is, infringements that have been established to breach Articles 101 and 102 of TFEU² are to be indemnified in front of national courts. This coexistence is in need of the above mentioned principles in order to persevere and reach the aims of competition policy and law in the EU.

The question of private enforcement and indemnification has for a long time been left to national law. Of course, bearing in mind the preliminary reference procedure under Article 267 of the TFEU, as well as the general role of the Court of Justice of the European Union (CJEU) to interpret EU law, the latter institution has produced decisions clarifying private enforcement. After decade long discussions on the matter of private enforcement, a legislative instrument was adopted in 2014 – the Damages Directive³. The Directive codifies existing jurisprudence of the CJEU and harmonizes certain aspects of private enforcement that are usually left to national law, such as the constitution of damages, questions of evidence, burden of proof, standing and others. A matter that has been subject to some degree of controversy is also included: the passing-on effect in its two manifestations, namely as a defense and as a justification for indirect purchaser standing.

The passing-on effect raises questions to its application and its relationship with national provisions. Among them are the issues of admissibility of the passing-on defense and the legal standing of indirect purchasers in civil proceedings. While those two aspects are provided for in the Directive, the document lacks some other measures that would ensure the attainment of the goals set forth, namely the attainment of full compensation for infringements of competition. Such measures are collective redress as well as the relationship between different decisions on the same issue, rendered by different chambers of the civil court in a member state. Lastly, the issue of autonomous interpretation of the notions provided in the Damages Directive stands unresolved.

This Thesis examines the Damages Directive and the soft law instruments of current legislation on the matter of private enforcement of EU competition law from the

² Treaty on the Functioning of the European Union (Lisbon Treaty)

³ DIRECTIVE 2014/104/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1;

point of view of national law of an EU member state, namely the Republic of Bulgaria. The focus is on the constitution of damages under the case law of the Court of Justice, codified in the Damages Directive, as well as the rules on standing and the passing-on effect. While evidence disclosure is briefly outlined as a key issue in the Directive, it remains outside the scope of examination.

Two main questions will be considered: first, whether the application of the passing-on effect, as provided for in the Damages Directive is capable of ensuring full compensation through the encouragement of affected parties to pursue a claim. Secondly, the notion of damages will be examined in light of Bulgarian civil law and the constant jurisprudence of the Bulgarian High Court of Cassation on non-contractual liability in order to establish whether in the absence of autonomous interpretation the existing legal provisions ensure the observance of the principles of equivalence and effectiveness.

In answering the two questions above, the development and current state of private enforcement of competition law will be examined. Secondly, we will focus on the key notions in jurisprudence and legislation on the matter, examining also the aims of the measures undertaken. Those measures will then be discussed in the context of Bulgarian civil law and procedure with regard on the transposition measures adopted in 2018. Finally, we will evaluate whether those measures had managed to be attained through the current state of legislation.

II. Private Enforcement in the EU. The Passing-on Effect

1. General

EU law in general constitutes a separate legal order from the member states. In that regard, the EU remains at full liberty to regulate fields of law that have been designated as exclusive competence⁴. In those instances member states are barred from adopting any measures. Such a field of exclusive competence is, inter alia, competition law⁵. Furthermore, the EU may also legislate in areas where it shares its competence with member states⁶. In those areas member states may adopt measures only to the extent to which the Union has not adopted any. The principle of distribution of competences is clarified by the principle of conferral⁷, stating that member states retain competences not conferred to the EU. Finally, the principle of sincere cooperation⁸ provides that member states and the EU are to aid each other in carrying out their respective tasks.

The EU as a legal order applicable in twenty eight different national systems is mostly characterized by substantive regulations. When establishing procedural rules, on the other hand, it mostly does so for institutions of the EU who have been established by the treaties. A vivid example in the field of competition law is Regulation 1/2003⁹, establishing the powers of the Commission as an enforcement body, the cooperation with national competition authorities, etc. Very rarely does the EU provide unanimous procedural rules applicable for national authorities¹⁰ and especially for national courts. In the absence of such rules, subject to the limitation of effectiveness¹¹ and

⁴ TFEU, Art. 3

⁵ TFEU, Art. 3, para. 1(b)

⁶ TFEU, Art. 4

⁷ Treaty on the European Union (2009), Art. 5

⁸ TEU, Art. 4, para. 3

⁹ 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, OJ L 1/1

¹⁰ Such rules would be for example the recognition and enforcement rules under REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351/1 (Brussels Ibis)

¹¹ See Craig, P., De Burca, G., EU Law: Texts, Cases and Materials, Oxford University Press, 2015, p. 231 et seq.

equivalence¹², member states enjoy procedural autonomy in setting forth the rules to ensure protection of rights conferred to individuals by EU law.

This intricate system of cooperation between member states and the EU is clearly observable in the field of private enforcement of competition law. First of all, as provided for in the TFEU¹³ the establishment of rules regarding the necessary competition in the EU is an exclusive competence of the Union. That is, member states are barred from establishing rules in that field, since effective competition is the key to the undisrupted functioning of the Internal Market.

In this setting, the European Commission is the competent body to investigate and sanction an infringement of Articles 101 and 102 of the TFEU. From public law point of view, this concludes the duties of the authority to ensure the sound functioning of the Internal Market, restoring the state of undisrupted competition. However, when it comes to damages, suffered by private parties, administrative authorities are generally not in position to act.

Actions of private persons against other private persons are in principle subject to the applicable private law. Although there have been ideas of European codification of private law¹⁴, no such efforts have yet been successful. Therefore private law remains an exclusive competence of the member states, in particular substantive and procedural rules governing liability in private context and their enforcement.

This situation also applies to private actions for indemnification due to violations of Articles 101 and 102 TFEU. Those actions are to be considered by the competent national court pursuant to Brussels Ibis Regulation, in light of the applicable law established under Regulation Rome II¹⁵¹⁶.

To exemplify the described state of affairs, let us take a hypothetical situation. A Bulgarian (B) and a Hungarian (H) entity enter into an agreement that infringes Article

¹² See Craig, P., De Burca, G., EU Law: Texts, Cases and Materials, Oxford University Press, 2015, p. 227 et seq.

¹³ Art. 3(1)b TFEU

¹⁴ For example the Draft Common Frame of Reference (DCFR), Sallier European Law Publishers, 2009, ISBN 978-3-86653-097-3

¹⁵ REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199/40

¹⁶ Although it could be argued whether all actions are of non-contractual nature, especially where the damaged party is a direct purchaser, Art. 6 of Rome II provide a specific norm for competition violation.

101 of the TFEU. The relevant geographic market in the case at hand includes the whole territories of Bulgaria and Romania. The relevant product market includes the goods sold by the two entities. The Agreement constitutes a price fixing cartel that raises the prices of the goods by 30 %.

The Bulgarian Competition Authority (BCA) learns of the possible infringement and starts proceedings. Having established that the infringement affects the territories of two member states, the BCA refers the case to the European Commission. The Commission investigates and issues a decision to sanction the price fixing cartel. For the sake of simplicity, the infringing parties do not appeal in front of the General Court and thus the decision enters into force. Thus public enforcement of Article 101 is completed.

However, the purchasers of B and H in Bulgaria and Romania have suffered damages. In order to recover those damages, they need to file civil claims against B and C in order to receive an enforceable decision. To do so, they need to establish therelevant jurisdiction and the law applicable to the substantial claim. In the absence of unanimous substantive law in the EU, that will be the national law of a state¹⁷.

Let us say that in the case at hand the conflict rules of Brussels Ibis and Rome II Regulation lead to the jurisdiction of the Bulgarian civil court and the applicability of Bulgarian substantive civil law. Pursuant to Article 1 of the Bulgarian Civil Procedure Code cases in front of Bulgarian civil court are subject to the provision of that Civil Code. This is consistent with the principles of conferral and procedural autonomy, as the EU has not provided independent procedure for indemnification of civil claims resulting from competition infringements.

In adjudicating on the matter, the Bulgarian court would also have to apply the provision of EU law. Pursuant to the principle of effectiveness, in considering the case, the court has to ensure that the right of compensation originating from the infringement of EU law receives the same treatment as a right under national law. That is, all the procedural possibilities of rendering defense for the claimant and imposing a sanction on the infringer are the same as if the right giving rise to the action originated from a domestic piece of legislation.

¹⁷ Regulations Rome I and II provide for universal application. Therefore it is possible, however unlikely, that the applicable law would not be the law of a member state.

Under the principle of effectiveness, the Bulgarian court would have to ensure that the applicable national rules do not preclude the right under EU law from being efficiently applied. In other words the state of national legislation should not make granting of right practically impossible or difficult to attain.

The situation described above is somewhat simplified by the introduction of the Damages Directive. Although it does not provide for a comprehensive legal procedure to follow in pursuit of such actions, it sets forth and thus harmonizes some key issues that reflect in the proper application of EU law in the matter. The notions introduced therein however need to fit in with existing provision of national law that are very often a manifestation of domestic legal tradition. That legal tradition, which in some cases is exemplified by constant jurisprudence of national courts, renders judiciaries conservative which in turn may jeopardize the effective application of EU law. Therefore it would be useful if a greater degree of harmonization is attained in the future.

2. Mechanism of Private Enforcement

As established above, private enforcement of competition law is regulated both by EU law and national law regarding civil claims. Some aspects of the mechanism of enforcement of EU law by national courts are provided in the Damages Directive. As an instrument of EU law, it aims to harmonize some aspects of national rules to ensure the full effective applicability and enforcement of competition law. Prior to the adoption of this directive, the CJEU had developed this field of competition law through its extensive jurisprudence. Namely this case law was codified by the Directive. Some of the cases are presented and discussed below.

2.1 Case law of the CJEU

The most notable cases in the jurisprudence of the CJEU in the field of private enforcement and more specifically the passing-on effect are the cases *Courage v Crehan* and *Manfredi*. There the CJEU considered key features in private enforcement and interpreted them. That interpretation has later been codified into the Damages Directive.

a. Courage Case

The *Courage v Crehan* case¹⁸ involved two private parties that had entered into a supply agreement as part of a joint venture for the operation of leased venues (pubs). Courage was a beer brewery, at the time holding 19% of the UK beer market.

The two companies, holding 50% shares of the joint venture each, leased the venues to different tenants. While the rent was negotiable, the lease agreement included a compulsory delivery agreement with Courage under a price list set in the Agreement with Grand Metropolitan PLC /the second entity/.

Due to unpaid supply of beer, Courage sued Mr. Crehan, who had on behalf of the Joint Venture concluded lease agreements with final tenants. Mr. Crehan contested the claim on its merits, stating that the supply agreement breached Article 85 of the Treaty of the European Communities¹⁹. Furthermore, Mr. Crahan filed an action for damaged due to the infringement.

Under English law, however, parties to an illegal agreement were barred from seeking damages originating from the infringement of competition law to which they were complicit. The adjudicating court submitted questions to the CJEU, seeking to establish whether EU Law precluded national legislation limiting the right to recover damages from private parties, participating in the infringement.

While upholding the principle that no one is allowed to derive benefits from their own unlawful behavior, the Court pointed out the need to examine the circumstances of each case in order to ensure that rights granted to individuals under EU Law are capable of being enforced effectively. Indeed, national court have to examine among other issues also the bargaining power of the parties to the infringement as well as their ability to set the term of the agreement. It was pointed out that in some circumstances in particular where the infringement is constituted by a series of contracts with economically weaker parties, those parties may not have had actual choice to the conclusion or terms of e specific agreement. Therefore an absolute bar to seek damages, imposed on a party since it participated in the infringement agreement per se, would be precluded as contradicting Art. 85²⁰.

¹⁸ Court of Justice of the European Union, Judgment of the Court of 20 September 2001, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, European Court Reports 2001 I-06297;

¹⁹ Now Article 101 of the TFEU;

²⁰ Now Article 101 TFEU;

In this case, the CJEU underlined the emphasis on effective indemnification under EU law, which has developed into the principle of full compensation under what is now Article 3 of the Damage Directive. Moreover, the Court invoked the principle of effectiveness against English procedural law, demonstrating the limitations on procedural autonomy of member states.

The *Courage* case exemplifies the mechanism of private enforcement, regulated by national law under the principle of procedural autonomy and the limitations, imposed to it by the principles of equivalence and effectiveness. EU law is a particular legal order that is independent from the legal systems of member states. While there are some specific bodies charged with the enforcement thereof at Union level such as the Commission and the Court of Justice (as a court of appeal for the decision for the Commission), at regional and local levels it is for the member states to ensure its effective enforcement. In that task, member states need to secure the actual possibility for persons to exercise the rights conferred to them by EU Law, thus limiting their procedural autonomy and rendering acts of their authorities inapplicable.

b. Manfredi Case

While the *Courage* case had arisen from a stand-alone action for damages resulting from a competition infringement, the *Manfredi*²¹ case concerned a follow-on action. After the Italian competition authority discovered and sanctioned a cartel of automotive insurance providers, Mr. Manfredi and others filed claims for compensation of damages, allegedly caused by the insurance companies involved in the cartel.

Facing issues of interpretation of EU Law, the adjudicating court referred a number of questions to the CJEU pursuant to the preliminary ruling procedure under Article 267 TFEU. Among those questions, the quantification of damages as well as the standing of direct consumers who had not dealt with the infringers directly were considered.

As Mr. Manfredi and the other claimants to the dispute had not been direct purchasers from the parties infringing competition law, but had rather dealt with

²¹ Court of Justice of the European Union, Judgment of the Court (Third Chamber) of 13 July 2006, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04), *Antonio Cannito v Fondiaria Sai SpA* (C-296/04) and *Nicolò Tricarico* (C-297/04) and *Pasqualina Murgolo* (C-298/04) v *Assitalia SpA*, Reports of Cases 2006 I-06619;

suppliers that are further down in the supply chain, it was examined whether those consumers had standing in court to seek indemnification. Considering the principles of direct effect, equivalence and effectiveness, as well as the right to full indemnification of each party that suffered damages due to unlawful conduct in regards to competition law, the CJEU ruled that all persons to have sustained damage may seek compensation where a causal link exists between the damage and the infringing actions. Therefore all persons who could prove that they had been harmed by the unlawful conduct had standing to seek indemnification.

With this decision, the CJEU reaffirmed the passing on effect and its recognition under EU law. The case law has been codified in Art. 12 of the Damage Directive, allowing direct standing to parties that have been caused damages, even when they had no direct dealings with the infringers, but rather sustained damage later on in the supply chain.

2.2. EU Legislation

In the beginning of the 21st century rules for effective competition as means to ensure the sound functioning of the Internal Market in The EU had been enforced to a great success for more than 40 years. The Commission as leading authority in this matter has had numerous cases that lead to restoring competition to the benefit of the other market players and ultimately consumers. The Court of Justice had also produced concise jurisprudence on the matters of enforcement of competition, both in regards to public and private aspects thereof. However, public enforcement, which has always been the leading method of restoring competition, was far more developed in a practical manner. As opposed to that, private actions for damages resulting from competition infringements were a rare instance. However, it is still private actions for damages that can fulfill the compensatory aim thus eliminating not only the infringement, but also the consequences thereof. Therefore private enforcement is complementary to public enforcement²² in pursuing effective competition through policy enforcement.

Following the jurisprudence of the Court of Justice and observing the underdevelopment of private enforcement as an element of ensuring effective competition in the Internal Market, in the 2010s the European Commission inquired into

²² W P J Wils, 'Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future' (2017) 40(1) World Competition, 39;

the need for an instrument of EU law to be enacted. This sought to ensure cohesive application of Articles 101 and 102 TFEU as directly applicable in all Member States, especially in light of the enlargement of the EU in 2004 and 2007.

a. Green Paper²³

In 2005 a Green Paper on private enforcement of competition rules was issued in light of the direct effect of Articles 101 and 102 and the competence of their enforcement within national courts of member states. The Commission considered the “total underdevelopment²⁴” of private actions for competition infringements and sought to explore measures to facilitate full compensation of damages. Another goal, outlined as a positive side effect of full compensation, was further deterrence from future infringement, by exposing the infringers to liability that is more easily engaged²⁵. Thus it was proposed that private enforcement through claims for compensation would complement public enforcement of competition law. Furthermore, it would create conditions for effective competition and sound functioning of the Internal Market²⁶. Among the issues discussed were procedural obstacles to the full realization of liability, stemming from the differences in national legal systems, as well as the passing on effect, constitution of damages, their quantification, and the costs of proceedings.

In regards to the passing on effect, it was observed that while in theory it allows for avoidance of unjust enrichment and a better stance for indirect purchasers to enforce their rights, it could also avert reaching the goal of full compensation²⁷. That is, invoking the passing on defense, a defendant may fend off the claim of a direct purchaser. Later, an indirect purchaser may fail in pursuing an action against the same infringer, thus effectively freeing them of their liability to fully indemnify all affected parties. Notably, collective redress and standing of consumer organizations were discussed as means to address the lack of incentives of consumers with small claims, that essentially arises out of the recognition of the passing-on effect.

²³ Green Paper – Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final (19 December 2005)

²⁴ Study on the conditions of claims for damages in case of infringement of EC antitrust rules, available on the Commission’s website at: http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/index_en.html, quoted in the Green Paper, p. 4

²⁵ Green Paper, p. 3

²⁶ Ibid.

²⁷ Green Paper, p. 7

b. White Paper²⁸

The Green Paper was followed by the White Paper on private enforcement of competition. In it the Commission further underlined the need for effective indemnification of all parties to sustain damages as a leading principle of private enforcement of competition law. While not departing from the idea of the compensatory function of civil liability, the Commission concludes that more efficient means of seeking compensation from competition infringers would ultimately also have a deterring effect for infringers²⁹.

In regards to indirect standing, it is submitted that it follows from the principle of direct compensation³⁰. As standing of indirect purchasers originates from the passing on effect, it was seen as a proportionate balance of interest to allow infringers to evoke it as a defense, thus avoiding unjust enrichment of claimants. Reciprocally, indirect purchasers were to take advantage of a shifted or lightened burden of proof in light of their principal difficulties to establish the necessary causal relationship to provide them standing. However, the fact that indirect standing leads to small and scattered claims by small businesses and consumers, was again addressed through the means of collective redress through opt-in clauses or entrusting consumer organizations with represented claimants in a single claim³¹.

While full compensation is in line with the civil legal principles of members states, namely those banning unjust enrichment and deriving benefits from one's own illegal actions, in practice it proves hard to actually achieve full indemnification. The Commission acknowledged that there are a number of procedural and substantive barriers in national legal orders that effectively render full indemnification impossible³².

2.3. The Damages Directive

After a decade long discussion³³, the Damages Directive³⁴ was enacted in 2014 as a means to coordinate public enforcement of competition law and private enforcement

²⁸ White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final (2nd April 2008)

²⁹ White paper, p. 4

³⁰ White Paper, p. 9

³¹ White Paper, p. 5

³² White Paper p. 3

³³ S Peyer, 'The Antitrust Damages Directive – much ado about nothing?' in M Marquis and R Cisotta (eds), *Litigation and Arbitration in EU Competition Law* (2015) 33.

thereof³⁵. While public enforcement is well developed through the *acquis communautaire* and union legislation, namely Regulation 1/2003, private enforcement is the field of jurisdiction of national courts. In ensuring a cohesive application and effective enforcement of EU law, national laws were approximated to facilitate the pursuit of private actions, both follow-on and stand-alone. Many of the measures considered in the Green Paper and later on in the White Paper of the Commission eventually could be found in the text of the Directive. Such are the passing-on effect, indirect standing of consumers, rules regarding evidence and burden of proof, etc. Others like collective redress and the role of consumer organizations were discussed, but did not find a place in the enacted version.

The Damages Directive is applicable to actions between private persons, seeking to establish damages suffered as a result of an infringement of EU competition law. More precisely, the directive does not apply to infringements on national competition law³⁶, as it falls outside the scope of competence of the EU. Furthermore, only private parties may rely on the provision of the Damage Directive, as Member States and their organs are generally liable for damages caused to private individuals pursuant to Art. 4, para. 3 of the TEU.

The Damages Directive outlines three main goals: to ensure effective compensation to victims of competition infringements³⁷, to facilitate those actions³⁸ and to coordinate private and public enforcement³⁹.

In order to achieve full compensation, effective enforcement on all levels of the supply chain is vital. In pursuing that aim, the Directive harmonizes different procedural and substantive aspects of private claims for recovering damages, thus complementing the public enforcement of competition law. Bearing in mind the *ratione materiae* of the Directive, namely damages arising out of infringements of Articles 101 and 102 TFEU

³⁴ Council and European Parliament Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (2014), OJ L349/1

³⁵ Recital 6, Damages Directive

³⁶ Recital 10, in fine.

³⁷ Damages Directive, Art. 1, para. 1

³⁸ Facilitation of actions is outlined as a consequence of full compensation, Art. 1, para. 1, second sentence;

³⁹ Art. 1, para. 2 Damages Directive;

rather than national law, the rules strive to provide for a level playing field⁴⁰ for parties in all member states, whose courts have jurisdiction over these disputes. The harmonized rules regard the constitution of damages, any time limitations to claims, burden of proof allocation, access to evidence, etc. Implicitly harmonization of action for damages resulting from infringements of the TFEU's directly applicable rules is also in favor of legal certainty as a core legal principle under EU law.

The second goal, facilitation of parties in pursuing more claims for damages, is in theory also addressed by the same harmonized elements found in the Directive. While it is true that those provisions could have a limited positive effect in easing the procedural position of claimants, the benefits remain rather abstract and removed from other realities that may sway the decision of a party to pursue a claim. Such issues are mainly the cost of proceedings and their proportion to the expected benefits to be derived in case the action for damages is successful. Examining the findings of the Commission and other stakeholders, provided in the Green and White Papers preceding the enactment of the Directive, it appears that other measures such as collective redress and standing of consumer organizations to represent a class of claimant in the proceedings were seen as appropriate. It is argued below that namely those two propositions would be immensely more effective in facilitating claims and thus full compensation as they adequately address the incentives of SMEs and consumers to seek indemnification.

The third goal – improved coordination of public and private enforcement, stems from the practicalities of providing evidence in civil proceedings for damages. As commonly known, due to the grave consequences, infringements of Articles 101 and 102 of the TFEU are usually secret. That is why the Commission relies predominantly on the leniency policy to discover and sanction cartels. The effectiveness of the leniency policy, however, is based on the incentives for infringers who apply to the Commission in exchange for information and provision of evidence. Private enforcement on the other hand also requires information and evidence, that in cases of follow-on actions have already been known, as a whole or partly to the Commission. In order to ensure the functioning of the leniency policy it is important to preserve the incentives for leniency applicants, but to facilitate private enforcement potential claimants should also be aided through provision of access to evidence. Furthermore, most member states have general

⁴⁰ Recital 7, Damages Directive;

rules for public transparency that entitle citizens to receive access to certain public documents. The Directive strives to balance out those two competing interest in establishing rules on evidence disclosure⁴¹, access to the competition authority file⁴² and the leniency file⁴³. Those issues, however, remain outside the scope of the present analysis and will therefore not be discussed in greater detail.

2.4 Key Issues in the Directive

The Directive deals with a number of key issues, among which are the disclosure of evidence (Chapter II); procedural aspects such as limitation periods, effects of decisions of courts and competition authorities, distribution of liability between infringers (Chapter III); the passing-on effect (Chapter IV). Quantification of harm (Chapter V) and settlements (Chapter VI) are also outlined. The right to full compensation⁴⁴, as well as the principles of equivalence and effectiveness⁴⁵ are also explicitly proclaimed in the first chapter as leading principles. Safe for the disclosure of evidence, those issues, their implication in national law and likelihood to achieve the goal of the Directive will be discussed below.

a. Damages

The principle of full compensation is proclaimed under Article 3 of the Damages Directive. While the goal of deterring infringements of competition was also enlisted in the documents that lead to the adoption of the Directive, full compensation has become the main focus of harmonization. Full compensation that is comprehensive and cohesive throughout the member states requires a definition of damages as a leading notion in private enforcement. In the Manfredi case, the CJEU clarified that notion in the context of competition law infringements. Following the principle of effectiveness, which lies at the basis of enforcement of EU law by national authorities, the court ruled that in each case the damages awarded must be constituted by three elements⁴⁶: actual lost, lost profit and interest. This jurisprudence has been codified in the Damage Directive. In the following paragraphs each component of damages will be examined from EU Law point of view and later compared to national law. Finally, the transposition of those

⁴¹ Art. 5 Damages Directive;

⁴² Art. 6 Damages Directive;

⁴³ Art. 7 Damages Directive;

⁴⁴ Art. 3 Damages Directive;

⁴⁵ Art. 4 Damages Directive;

⁴⁶ Manfredi Case, Para. 95

components of the Directive into national law and their compliance with the principles of effectiveness and equivalence will be examined.

i. Sustained Loss

The sustained loss by a party is constituted by the difference in the price that has been paid by the damaged party and the price that would have prevailed had the market not been distorted by unfair competition. In economic terms, the sustained loss is characterized by the overcharge effect. That is, the amount in price which was charged to purchasers, resulting solely or predominantly due to the infringement of competition law. In the example provided above in II.1 (General) (the collusion between a Bulgarian and Hungarian entity), the sustained loss of the direct purchaser is equal to the 30% overcharged by the two entities.

ii. Lost Profit

The lost profit is also a key component in the overall damages sustained by the parties. It is characterized by the volume effect in economic terms, i.e. the inevitable shrinking in demand due to the raise in price. While the sustained loss may be passed on further down the supply chain, the lost profit is an individual characteristic of each firm in the supply chain and therefore cannot be passed on. In the example provided above, the volume effect, or the lost profit coincides with the diminished sales/turnover due to the reluctance or inability of further customers to purchase the goods concerned.

iii. Interest

Injured parties are also entitled to interest on their losses as a form of just indemnification. The nature of the interest as provided under the Directive does not raise serious issues as to its application and interpretation.

b. Autonomous interpretation?

As established above, the Damages Directive operates with notions that are typically reserved to the national legal order of the member states as they are outside the scope of competence of the EU, namely lost profit, actual loss and interest. In the current case however the directive enlists⁴⁷ them as elements of full compensation as

⁴⁷ Art. 3 of the Damages Directive

means to achieve the goal of consistent enforcement of competition law throughout the EU.

Notions, established by EU law are in principle subject to autonomous interpretation. That principle stems from the fact that EU law constitutes a legal order, separate from that of the member states. Therefore, in order to ensure consistent application of EU law provisions, their meaning and interpretation should be unanimous throughout the member states. This effect is achieved through the allocation of the competence to interpret EU law solely to the Court of Justice of the EU.

Through the codification of the Damages Directive, the notions of damages and its constituent elements are now regulated by a legal act of the EU. Does that mean that they are to be interpreted autonomously or are those notions still construed under the national legal systems, subject to the limitations of the effectiveness and equivalence principles? In answering those questions, one should consider closely the subject-matter regulated by the Directive, its recitals and provisions, as well as general principles of EU law.

On the one hand, the Directive aims to synchronize procedural rules in Member States in order to ensure the effective exercise of the right to full indemnification⁴⁸. However, damages, actual loss, lost profit and interest are all notions of a substantive nature rather than procedural. Are they to be construed as notions under EU law or do they remain within national law?

To answer this question, it is helpful to examine the clarifications, provided in Recitals 11 and 12 of the Damages Directive in regards to the application of these notions. While it is stated that in the absence of Union law, actions for damages are within the scope of national law, subject to the limitation of effectiveness and equivalence, the Directive still provides for substantive guidelines on such claims.

For example, Recital 12 of the Directive delves into the notion of interest as a component of damages. There it is set forth that interest should be due from the time when the harm occurred until compensation is paid. This clarification on the time period is of substantive nature and would usually remain within national civil legislation. Therefore, it could be concluded that the European legislator aims to establish

⁴⁸ Recital 4, Damages Directive

autonomous notions under the Directive and not merely apply national ones with the delimitation of the principles of effectiveness and equivalence. In any case, the autonomous interpretation of damages under the Directive could deal in a practical way with preexisting jurisprudence of national courts, such as the one of the Bulgarian High Court of Cassation discussed below on lost profit potentially jeopardize effectiveness in indemnification.

2.5. The Passing-on Effect

The passing-on effect is a central notion of the Damages Directive. As elaborated above, it was a controversial topic for discussion in the time that led to the adoption of the Damages Directive. The matter of the passing-on effect now constitutes a major difference between US antitrust law and private enforcement of competition law in the EU.

The US Supreme Court considered the passing on effect in the *Hannover Shoe*⁴⁹ and *Illinois Brick*⁵⁰ cases. There it was established that recognizing the passing on effect could lead to practical difficulties in the enforcement of antitrust law, as the quantification and distribution of damage would prove very difficult. From that standpoint the standing of indirect purchasers was also excluded pursuant to the conclusion that the purpose of antitrust enforcement is better suited by strengthening the positions of the direct purchaser rather than dispersing damages through the passing-on defense.

The CJEU however took a different approach. In the cases, discussed above, namely *Manfredi*, it elaborated that rights granted by EU law need to be effectively and efficiently enforced. Therefore all persons to have sustained damage due to a breach of EU law, are entitled to a legal remedy. Therefore the standing of indirect purchasers follows from their rights as legal subjects of EU law, rather than the rationale of facilitating private enforcement. The European Commission followed that line of case-law including the passing on effect in the White Paper and later in the final draft of the Damages Directive.

⁴⁹ *Hannover Shoe v. United Shoe Machinery*, US Supreme Court, 17 June 1968. 392 U.S. 481. supreme.justia.com/cases/federal/us/392/481/

⁵⁰ *Illinois Brick Co. v. Illinois*, US Supreme Court, 9 June 1977, 76 U.S. 404. supreme.justia.com/cases/federal/us/431/720/

The passing on effect is observed when infringements happen within a supply chain, i.e. when a good or service are purchased and sold multiple times before they reach the final consumer. For example a certain raw materials' price rises due to a price fixing cartel of the producers of that raw material. A rise in the price of the raw material causes damages to the direct purchasers of that raw material, as it raises their production costs. Purchasers in turn may absorb that damage partially or wholly through retaining their prices. Another alternative is to raise them and transfer some or the entire price rise to their customers, i.e. indirect purchasers of the infringer. The rise in price due to infringement is called overcharge and constitutes the actual loss, resulting from the infringement. The other aspect of damages, the lost profit, characterized by the volume effect, is firm specific. It results from the shrinking of sales due to the raise in price and therefore cannot be transferred down the supply chain⁵¹. The interest as an ancillary obligation to the actual damage cannot be passed on as such, but follows the respective parts of the damages in their allocation within the supply chain. For this reason in the next exposition we will focus on the overcharge.

Unjust enrichment lays in the foundation of the passing on effect⁵². That is, a direct purchaser may not be indemnified for damage (actual loss) that has been passed down in the supply chain, as they had not actually sustained that damage. In other words, while the firm paid the overcharge imposed by an infringing party, it did not absorb it, but passed it down to its purchasers.

This phenomenon has two expressions in private enforcement of competition law. First, the infringer, a defendant in an action for damages may have the claim rejected on grounds that the claimant did not suffer damages. The claim may also be quantified in a manner more in favor of the defendant due to the fact that some of the overcharged has been transferred. This is the so-called passing on defense, or the use of the passing on effect as a “shield”⁵³.

⁵¹ Benoît Durand, Iestyn Williams, *The importance of accounting for passing-on when calculating damages that result from infringement of competition law*, ERA Forum (2017) 18:79–94, DOI 10.1007/s12027-017-0458-3, p. 85

⁵² Jaremba, U., Lalikova, L. *Effectiveness of Private Enforcement of European Competition Law in Case of Passing-on of Overcharges: Implementation of Antitrust Damages Directive in Germany, France, and Ireland*, Journal of European Competition Law & Practice, 2018, Vol. 9, No. 4, p. 229

⁵³ Magnus Strand, *Indirect Purchasers, Passing-on and the New Directive on Competition Law Damages*, European Competition Journal, 10:2, 2014, 361-386, DOI: 10.5235/17441056.10.2.361, p. 376

Even if the defendant is able, however, to succeed in fending off the claim of the purchaser in this case, that does not change the overall damage that has objectively been sustained throughout the supply chain. Therefore, while the claimant would not be awarded damages in the amount of the entire overcharged, that damage still exists and has been passed on to other stakeholders further down the supply chain. In that event the principle of full compensation dictates that those direct purchasers obtain standing in court to seek the overcharge that has been passed on to them. This aspect is known as using the passing-on effect as a “sword”⁵⁴, justifying standing and legal interest to seek indemnification from an infringer.

The extent of the passing on effect is contingent upon certain conditions in the relevant market⁵⁵. Such factors are whether the overcharge is industry wide or firm specific, the level of development of the competition in the market, the elasticity of the prices of the goods/services concerned, whether the overcharge is in the fixed or marginal costs of affected stakeholders. The passing on effect is most likely to occur when the overcharge is industry wide, as most or all of the competitors in the same level of the supply chain would have to adhere to the same market changes by assuming the similar conduct – either to reduce output or to raise their prices. At the same time, if the market is characterized by strong competition further down the supply chain, no individual firm could afford to raise prices or shrink output without losing revenue to a competitor.

It follows that when the overcharge is firm specific, damaged parties are more likely to absorb the overcharge in order to retain their position in the market. On the other hand, when there is an industry wide overcharge, most stakeholders are likely to raise prices simultaneously and thus pass on the damage to the next level of the supply chain⁵⁶. Finally, when consumers are likely to buy the goods/services even in the event of substantial rise in price, i.e. inelastic prices, stakeholders at different places of the supply chain are likely to raise their own prices and pass on the damages sustained.

⁵⁴ Ibid, p. 381

⁵⁵ Benoît Durand, Iestyn Williams, *The importance of accounting for passing-on when calculating damages that result from infringement of competition law*, ERA Forum (2017) 18:79–94, DOI 10.1007/s12027-017-0458-3, p. 81

⁵⁶ RBB Economics LLP; Cuatrecasas Gonçalves Pereira, Study on the passing-on of overcharges, Final report – Study, European Union 2016, p. 30

Besides the overcharge effect, as a result to the rise in prices demand shrinks for the good/service concerned. This leads to firms realizing fewer sales and thus earning less revenue. While the increase in prices will augment their margin of profit, the resulting drop in sales may absorb or even surpass any additional revenue they receive due to the higher prices. This is known as the volume effect and corresponds to the lost profit section of full indemnification. The presence of volume effect is also conditional: it is less likely to be present with goods with inelastic prices⁵⁷, but could be of significant importance with firm specific overcharges. While the overcharge could be passed on, the volume effect cannot and is absorbed by the purchaser concerned.

Through the Damages Directive, private enforcement of competition law is envisaged using the mechanism of establishment of damages and their distribution throughout the supply chain by accounting for the passing-on effect. In order to function properly, an individual evaluation of damages, passing on and other factors are required as to reach full compensation and to avoid unjust enrichment of any party to the dispute. While in theory this approach is clearly justified by classical notions of procedural law such as standing and legal interest in an action, in practice it leads to complication due to the chain of actions required to achieve full compensation, i.e. restoration of the balance of properties and interests damaged due to the infringement.

a. Passing-on Defense

As already elaborated one side of the passing-on effect is the possibility to use it as a “shield” against private action. That defense rests entirely on the principle of unjust enrichment. That is, if a direct purchaser has passed on some or all of the damages further down the supply chain, they have not actually suffered damage to the extent they claim. Therefore awarding them with compensation for something they did not suffer contradicts the compensatory function of private enforcement. Furthermore, not accounting for any passing-on would also have a negative effect on the standing of indirect consumers, preventing them from seeking damages from the infringer rather than the direct purchaser who received compensation for the entire damage. In order to take advantage of the passing on defense, the defendant bears the burden of proof.

⁵⁷ Benoît Durand, Iestyn Williams, *The importance of accounting for passing-on when calculating damages that result from infringement of competition law*, ERA Forum (2017) 18:79–94, DOI 10.1007/s12027-017-0458-3, p. 86

The practice result from the successful invoking of the passing-on defense would be the rejection of a claim in whole or partially due to the fact that the claimant had not actually suffered damages to the extent they claim. The judicial act that finalizes this dispute would bind the parties that took part in it, preventing them from raising the same dispute. The problem here would arise when the passing-on defense was successful. That would mean that the infringer has to compensate the claimant for the damages that they managed to prove. In order to restore the full amount of damages, the infringer needs to be sued also by the other stakeholders further down the supply chain. However, they would not be bound by the original decision that recognized the passing on defense in the first place. That may lead to a number of discrepancies in decisions on the same dispute, resulting from different quantification or even different degrees of success of the different claimant to the same dispute. Both those aspects will be elaborated on below.

b. Quantification of damages

Quantification of damages is a rather complex task that has to account for all the components of damage. In a mathematical perspective, actual damages are established as a result of the overcharge minus the passing-on effect if such has been proven, plus the volume effect. In order to compensate the lost opportunity due to damages, interest is added as an ancillary obligation⁵⁸.

In allocating damages, the national court has the role of quantifying the damages sustained, on the basis of the evidence produced in the course of the proceedings. The right to a fair trial, provided for in the European Convention on Human Rights⁵⁹, as well as the Charter of Fundamental Rights of the EU⁶⁰ calls on courts to carry out an evaluation of the evidence provided by the party and rule on the facts independently. Courts as judicial institutions have the discretion and obligation to establish the facts of the case and carry out quantification of damages to the extent that they have been proven. Therefore, in a chain of proceedings on indemnification of damages arising from competition infringement each court would carry out the quantification pursuant to

⁵⁸ Martin Hellwig, Private Damage Claims and the Passing-On Defense in Horizontal Price-Fixing Cases: An Economist's Perspective, Max Planck Institute for Research on Collective Goods, Kurt-Schumacher-Str. 10, D-53113 Bonn, p. 6

⁵⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art. 6

⁶⁰ Charter of Fundamental Rights of the European Union, (2007/C 303/01), Article 47

their own internal persuasion and the concrete facts presented by the parties within the proceedings.

Although rules on quantification are not harmonized, in order to ensure cohesive application of EU law, the Commission issued a Practical guide⁶¹ in order to aid national courts. The basis of quantification of damages due to competition infringement is assessing the post-infringement situation against a counterfactual scenario where competition rules had not been breached⁶². This raises a number of practical issues in regard to the construction of the scenario, as well as the reliability of the conclusions. Construing a counterfactual scenario is necessarily based more on assumptions rather than facts. In this regard it is important to base the following economic analysis on sound data, which due to inaccessibility or unavailability may not always be present. Therefore there cannot be a single established value of damage, as different considerations in the counterfactual scenario will lead to different outcomes.

In that case it is very realistic that different courts would come to different conclusions based on the same case in the event of a chain of individual actions within the same supply chain. As a result contradictory decisions may arise, which in light of the effects of judicial decisions is highly undesirable⁶³. Finally, the economic analysis based on the counterfactual scenario is very complex and may entail a significant raise in cost for the parties for expert witnesses and multiple conclusions on quantification.

Although it is attempted to solve the latter problem with quantification by introducing the figure of the national competition authority as an *amicus curiae* in damages proceedings, this measure is not sufficient. The figure of *amicus curiae* is quite foreign to the legal systems of some member states, including Bulgaria where legal tradition does not provide for any participants in civil proceedings who do not have a direct legal interest. Only the state prosecutor may participate in some civil cases, but not to aid the court in adopting a decision, but rather to represent the interest of the public⁶⁴. Therefore it is unclear how this figure will contribute to achieving the aims of

⁶¹ Commission Staff Working Document Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of The European Union, {C(2013) 3440}

⁶² Ibid., p. 10

⁶³ That conclusion can be drawn also from the rules provided for *lis pendens* in the Brussels Ibis Regulation.

⁶⁴ This possibility is provided for in cases dealing with legal capacity of natural persons, as well as some family law cases.

the Damages Directive through the reliance of the national court on the competition authority⁶⁵.

c. Indirect Purchaser Standing

The second aspect of the passing-on effect is the legal standing of indirect purchasers to bring claims for compensation, resulting out of competition law infringements. The presence of legal standing requires two cumulative requirements to be fulfilled, namely the claimant should have legal interest and should be the “holder of rights” that had allegedly been infringed⁶⁶. In the case of the passing-on effect, indirect purchaser standing follows from the principle of full compensation. That is, as also pointed out by the CJEU in the Manfredi case, all persons who have sustained damage have the right to seek redress to satisfy their legal interest.

Indirect purchaser standing requires a chain of actions against the same infringer, considering the same violation. The result of such a setting is that civil courts need to produce different judgments on the same case. In such circumstances, especially in stand-alone actions, conflicting decisions may occur. In the Damages Directive indirect purchaser standings is provided for in Art. 14. Its mechanism of application relies on a rebuttable presumption in favor of the claimant. The claimant has legal standing where they are able to demonstrate that the defendant has committed an infringement of competition law that has resulted in an overcharge and the indirect purchaser has purchased goods from a direct purchaser. This presumption is procedural in nature as it deals with the legal standing as a condition sine qua non in the beginning of proceedings. It does not, however, deal with the distribution of the burden of proof, nor the relation between different judicial decisions on the same dispute. Therefore the legal situation of a claimant, who is an indirect purchaser, remains the same, notwithstanding any other proceedings that have taken place before, including where the passing-on defense has successfully been raised. In extreme cases that could mean that if the indirect purchaser does not manage to prove their claim in the course of proceedings, the claim will be rejected even if another chamber of the court had ruled beforehand in

⁶⁵ Marco Botta, *The Principle of Passing on in EU Competition Law in the Aftermath of the Damages Directive*, European Review of Private Law 5-2017 [881–908], P. 891

⁶⁶ European Parliament, Standing up for Your Right(s) in Europe, 15 August 2012, PE 462.478, [www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462478/IPOL-JURI_ET\(2012\)462478_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462478/IPOL-JURI_ET(2012)462478_EN.pdf), p 13.

proceedings between the infringer and direct purchasers that damages had indeed been passed on down the supply chain.

The passing on defense is based on the idea that the overall damage in actual loss in the whole supply chain is relatively unchanged. That is, as infringers overcharge their direct purchasers and those pass on the overcharge further down the chain, whether or not they absorb some of the damage the final sum of the overcharge is the same, when passed down to indirect purchasers is constant. This would also be the case when the overcharge is not in the final good or service, but rather in a raw material or another factor in the fixed cost of the purchasers. Therefore, the passing on defense is of a substantive legal nature as its invocation influences the merits of the dispute.

On the other hand the presumption, established in art. 14, para 2 of the Damages directive provides standing to indirect purchasers to claim damages in front of civil courts. While Art. 14, para. 1 allocates the burden of proof of the passing on and its extent to the claimant, providing them with the presumption in Art. 14, para. 2 to facilitate them in proving their standing. The first paragraph however requires claimant to not only prove that the passing on occurred, but also to prove the extent thereof. Therefore claimants are still required to prove in civil proceedings to what extent the suffered damages in order to receive compensation. Therefore it could be considered that the presumption under Art. 14, para 2 is purely procedural in nature. Its invocation does not influence the merits of the dispute unless the claimant provides sufficient proof of the extent of damages suffered.

Secondly, it needs to be borne in mind the incentives of potential claimant to sue. As claims get smaller, the cost are relatively the same. Therefore final consumers are least likely to sue for damages in the absence of a special procedure to allow them to unite resources in pursuit of their claims. However class actions as introduced by the Bulgarian legislator with the Civil Procedure Code in 2007 are inefficient, as they require efforts and means generally inaccessible to consumers. If they decide to act on that possibility, they will likely have to be supported by the non-governmental sector.

It should also be pointed out, that the presumption in Article 14, para. 2 of the Damages Directive could be considered to be focused mainly on follow-on actions. As the Directive provides for a binding power of decision of competition authorities on the facts of infringement, the situation of an indirect purchaser in a stand-alone action is

considerably weaker. Instead of relying on the outcome of investigations and proceedings within the realm of public enforcement, they would be required to prove both the infringement as such, the participation of the infringer therein, the existence of an overcharge as a result of the infringement and their participation in the same supply chain. This puts an indirect purchaser in a nearly impossible position, pointing to the fact that stand alone actions under these circumstances are rather impractical.

d. Conflicting decisions

Private enforcement relies on the judiciary of a member state to award damages through a decision of a judicial nature. As those claims are in definition between private parties, it is the civil courts of member states that are charged with that task.

Decisions of a judicial nature are characterized by *res judicata* – one of their central qualities. In its essence, *res judicata* precludes the same dispute from being reconsidered between the same parties. Under Bulgarian procedural law *res judicata* arises when a judgment enters into force. The issued decision is thereafter binding on both parties in regard to the main dispute in the case. While the parties may have raised different concerns and facts in the course of proceedings, the adjudicating court will merely use them to justify the final outcome of the case in its motives. The main dispute is solved in the operative part, which establishes the actual legal situation between the parties and orders them to comply with it. Facts that have been proven in the course of proceedings are indispensable to the motives of the court, but are not mandatory for other court chambers, official authorities or third parties. Therefore, *res judicata* covers only what has been established in the operative part of the decision and not what the court described in the motives⁶⁷. This follows from the principle of independence of judges in their function, allowing them the opportunity to always consider the facts proven and adjudicate on basis of their view on them.

This procedural institute raises the question of what is to happen in a stand-alone action where a defendant invoked the passing-on effect and managed to prove it? Clearly, the claim would be rejected at least in part due to the principle of unjust enrichment as the claimant would not have suffered actual damage. In that case the claimant and the defendant would be bound by the decision in regard to what has been

⁶⁷ Stalev, Zh. And others, Bulgarian Civil Procedure, Ciela, Sofia, 2015, p. 349

awarded. Simultaneously, the *res judicata* of the decision would preclude the parties from seeking compensation above what has been awarded in the proceedings between them.

At the same time, through the passing on effect, more than one party may have standing to sue the infringer due to passing on. Therefore a second (or third) dispute shall arise, concerning the same infringer and the same infringement. Formally speaking the scope of the second proceedings is different, as it is between different parties; however it still concerns the same unlawful act, namely the competition infringement. In the event that an action has already been completed between the infringer and a direct purchaser, the indirect one would either be de facto bound by the *res judicata* of the same judgment or the court risks rendering a decision that conflicts the already existing one.

While this problem could be solved by constructions based on procedural theory, such as the possibility to include a third party to a proceeding in order to bind them by the judgment, it could lead to disproportionalities in the application of private enforcement throughout the Member States. Therefore this issue should best be addresses either by the European legislator or the CJEU when they are presented with a possibility.

2.5. Influencing factors for the decision to pursue a claim

From the perspective of a potential claimant, the decision to pursue a claim is influences mainly by a cost-benefit analysis⁶⁸. As court proceedings usually involve a significant investment of both time and money, the party sustaining damage is likely to pursue a claim only if the perspective outcome of the dispute settlement is greater than those expected costs. The analysis is carried out at individual level as part of the decision making process of the claimant and is therefore highly dependent on that party's circumstances and perception of their chances in dispute resolution⁶⁹.

⁶⁸ William M Landes, 'An Economic Analysis of the Courts' (1971) 14 Journal of Law & Economics 61–107; Richard A Posner, 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 Journal of Legal Studies 399–458; Steven Shavell, 'Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs' (1982) 11 Journal of Legal Studies 55–82, cited by Sebastian Peyer (2016) Compensation and the Damages Directive, European Competition Journal, 12:1, 87-112, DOI: 10.1080/17441056.2016.1221168

⁶⁹ Sebastian Peyer (2016) Compensation and the Damages Directive, European Competition Journal, 12:1, 87-112, DOI: 10.1080/17441056.2016.1221168

The costs of making the decision to pursue a claim are comprised of different components. First of all, those are the monetary aspects – court fees, attorney remuneration, expert witnesses, and interim relief if applicable. Those costs vary between Member States, but in any case, are likely to be significant. For example, as quantification of damages, and especially lost profit, relies heavily on complicated economic analysis, cases may require multiple expert conclusions within the same trial. This burdens claimants with additional cost, therefore increasing the chance of them not making the decision to pursue a case.

The benefits of pursuing a case against competition infringers are equal to the compensation that will be awarded in case of a successful claim or a settlement. Their amount depends, among other factors, on the place of the claimant in the supply chain, whether they managed to prove their claim and whether the defendant was successful in invoking the passing-on defense. Benefits are therefore likely to be greater for purchasers more close to the infringers in the supply chain and less significant towards the end of the chain. On the contrary, costs of individual proceedings are relatively constant. While the costs fees would be less significant in smaller claims, attorney fees are still likely to be similarly burdensome.

In an infringement where there has been a significant passing on of overcharge, for example where the affected products have low elasticity in price, the damage would still be small on an individual level, as it will be dispersed between a large number of final purchasers. Therefore the most vulnerable stakeholders to suffer an infringement, namely consumers, are least likely to pursue a claim.

As established, the Directive focuses on some of the issues that sway potential claimants such as the evidence and standing, however the vital aspect of costs remains wholly outside the scope of the directive. This is also the case for collective redress. While the Commission has in place some soft law instruments, they remain insufficient to ensure the cohesive application of EU law in all Member States, therefore undermining the aim of the Directive. This issue could be better resolved with concrete provisions in future versions of legally binding acts of the EU.

III. The Damages Directive and Bulgarian Law

1. Subject matter and procedural law in Bulgaria

As the EU has not provided for a single framework of civil liability, arising out of infringement of EU law, national institutions are charged with its application on grounds of national civil law. The next passage includes a brief overview of Bulgarian civil legislation concerning liability between private persons, as is the case with infringements of competition law to examine whether the current state thereof is adequate in providing for an effective and equivalent application of rights provided for in EU law.

The Damages Directive is transposed into Bulgarian law with the addition of Chapter 15 in the Competition Protection Act⁷⁰. Although the transposition period for the directive expired in 2016, the new provisions were introduced and entered into force in January 2018⁷¹. So far there has been no jurisprudence on the matter, so the above mentioned principles of equivalence and effectiveness need to be examined in the light of the current state of legislation concerning general non-contractual liability.

2. Legal grounds for damages in the absence of the Damages Directive

Bulgarian law, like most continental systems, divides civil liability into contractual and non-contractual⁷². Contractual liability arises when the party to a contract fails to perform any obligations under said contract adequately or in a way that satisfies the creditor. In such cases the creditor has a claim against the debtor based on the existing contractual relationship. Non-contractual civil liability arises generally in three cases: delict, negotiorum gestio and unjust enrichment. There are other instances of non-contractual liability, provided in other legislative acts, but such cases usually refer to the general rules of one of the three notions above. The most important two instances of non-contractual liability under Bulgarian law for the aim of this thesis are delicts and unjust enrichment, with which we shall deal below.

⁷⁰ Enacted through State Journal 102, 28th November 2008, last amended through State Journal 7, 18th January 2018

⁷¹ Official Journal of the Republic of Bulgaria Nr. 2/2018;

⁷² Contractual liability is set forth in art. 79 of the COA. Instances of non-contractual liability are regulated by Art. 45-54 (delicts), Art. 55-59 (unjust enrichment), Art. 60-62 (negotiorum gestio);

2.1 Delicts

The Bulgarian legal system recognizes the notion of the general delict⁷³. This principle is contained in Art. 45 of the Contracts and Obligations Act⁷⁴ (COA), which imposes on all persons the general obligation not to cause harm to other individuals. Furthermore, the provision requires infringers of this general obligation to fully indemnify any persons who have suffered damages as a result of the infringement.

The general philosophy behind the regulation of delicts in Bulgarian law is to indemnify persons for any damages they sustained through the unlawful conduct of another party⁷⁵. Therefore there is no preventive or punitive function of non-contractual civil liability, i.e. it is not aimed at deterring private individuals from causing harm. As a result punitive damages of any sort are seen as impermissible under Bulgarian law, as they conflict with the ban of unjust enrichment. In reaching this result, the Bulgarian legislation establishes a clear balance of interest between the infringer and the party sustaining damages, not giving priority of one over the other. The punitive and general prevention functions of engagement of liability are left entirely to the other forms of liability, namely criminal, administrative and disciplinary. All those liabilities have in common the fact that the entity to impose the measures is empowered by legal provisions that explicitly confer the ability and legal grounds for any sanctions.

A delict is characterized by five cumulative features that need to be established beyond doubt in order for the right of indemnification to set in. First of all, there needs to be an explicit action or lack of one. In the latter case, liability may only arise when the subject had a legal obligation to act, but did not do so. Secondly, the action (or lack thereof) needs to be unlawful. The unlawfulness may originate from an explicit provision of law, the violation of a specific obligation, or could be derived from the general rule not to harm others⁷⁶.

Thirdly, the infringer has to carry out the action in a faulty manner. As the Commission observes in the Green Paper⁷⁷, some member states require proof of fault

⁷³ Konov, T., *Grounds for Civil Liability, Selected Essays*, Ciela, Sofia, 2010, p. 109

⁷⁴ Enacted through State Journal 2, 5th December 1950, last amended through State Journal 42, 22nd of May 2018.

⁷⁵ *Ibid.*, p. 31

⁷⁶ *Ibid.*, p. 81 et seq.

⁷⁷ GREEN PAPER, *Damages actions for breach of the EC antitrust rules*, COM(2005) 672 final, Brussels, 19.12.2005, p. 6

in order to award damages. Bulgarian law establishes a rebuttable presumption⁷⁸ for the presence of fault in favor of the injured party, since proving fault as a subjective element of liability is especially difficult sometimes. The defendant may exculpate themselves by proving either that the subjective or objective elements of fault were not present, or there is no causality between the actions and the damages⁷⁹.

The next elements of a delict are the damages that arose. The presence of actual damages is generally a requirement for engaging civil liability. If such damages are lacking, liability may be engaged only if a special legal provision exists⁸⁰. Bearing in mind the function of civil liability under Bulgarian law⁸¹, such an instance is a rare exception. Finally, there needs to be a causal link between the action and the damages that arose.

Causality under Bulgarian law, and therefore the extent to which damages are indemnified, is limited by the adequate theory⁸². That is, an infringing party is liable for all damages that are a direct result of the infringing action to a foreseeable extent. Damages are considered foreseeable when they are a typical result of an infringement and it is likely that the same damages would arise in the same circumstances⁸³.

Bulgarian law envisages three components of material damages: actual lost⁸⁴ (*damnum emergens*), lost profit⁸⁵ (*lucrum cessans*) and legal interest⁸⁶. Those components are applicable for both forms of civil liability – contractual and non-contractual. The COA also envisages the possibility of indemnification of immaterial damages, however as such are not explicitly considered under the Damage Directive, they remain outside the scope of interest.

⁷⁸ Art. 45, para. 2, Contracts and Obligations Act

⁷⁹ There also exist instances where fault is not an element of a delict – objective liability. Such liability exist for example where a party is by law or contract responsible to oversee others – Art. 48 and 49 COA;

⁸⁰ As damages are seen as a constitutive element of a delict, those instances are very rare.

⁸¹ See below

⁸² Kalaydzhiev, A., Contract Law, Cibi, Sofia, 2010, p. 415

⁸³ International Arbitration Case 42/1999, cited in the Jurisprudence of the Arbitration Tribunal of the Bulgarian Commercial Chamber 2000-2001, Sofia, 2002, p. 65-66;

⁸⁴ Art. 82 COA

⁸⁵ Ibid.

⁸⁶ Art. 86, para. 1: This norm is a general rule, entitling creditors to interest in case of late payments of any sort of monetary obligations. Para. 2 of the same provision establishes the amount of the legal interest – to be set by the Ministerial Council of Bulgaria.

Actual lost constitutes the negative change in the estate of the party, sustaining infringement that has actually occurred and could be measured. While there are issues with its quantification in civil proceedings, it is largely clear and straight forward.

The same statement is true for interest. In cases of delicts interest is due from the date of occurrence of the harm until full indemnification is provided. It is important to note that legal interest as a component of damages does not have punitive or preventive objective. Rather, it is a mechanism to compensate the creditor for the lack of opportunity to take advantage of their assets while the debtor was delaying performance.

The second component, lost profit, proves to be most problematic in light of the requirements of the directive for full indemnification. Lost profit constitutes the difference between the estate of the creditor post-infringement and what that state would be in a counterfactual scenario where damage has not been sustained⁸⁷. Two consequences follow from this definition, both in connection to awarding lost profit in civil proceedings. First, in order for the damages to be deemed to have actually occurred and therefore to avoid unjust enrichment of the creditor, there need to be certainty for the profit, that the latter would have received⁸⁸. That is, lost profit is considered to have occurred only when the creditor expected their estate to be augmented with a degree of legal certainty⁸⁹. Furthermore, lost profit is not present when it arises out of diminished output of the firm and therefore diminished market performance thereof⁹⁰. From this follows the second consequence: as a claimant in civil proceedings is required to prove the extent of their damages by presenting actual facts, demonstrating the volume effect, which by definition is based on a counterfactual analysis and economic theory, may be very difficult. This theoretical and jurisprudential limitation to lost profit, although not necessarily backed up by concrete legal provisions, jeopardizes the fulfillment of full indemnification as envisaged in the Damages Directive. However, if such a case arises the civil court would be obliged by the principle of effectiveness to disregard the above

⁸⁷ Internal Arbitration Case 56/1993, cited in the Jurisprudence of the Arbitration Tribunal of the Bulgarian Commercial Chamber 1989-1995, Sofia, 1996, p. 69-70;

⁸⁸ This is pursuant to the constant jurisprudence of the Bulgarian High Court of Cassation. See Case 2065/1959, Second Civil Chamber, Case 1696/1974, First Civil Chamber, Case 13/1997, Fourth Civil Chamber;

⁸⁹ See International Arbitration Case, cited in the Jurisprudence of the Bulgarian Commercial Chamber 2000-2001, Sofia, 2000, p. 75

⁹⁰ Case 197/1997, Fifth Civil Chamber, High Court of Cassation, cited in the Jurisprudence of the High Court of Cassation of the Republic of Bulgaria, Civil Chambers 1997, Sofia, 1999, p. 196-171;

explained limitations to lost profit. It is yet to be seen what the approach of the court would be, as there have not been any cases under the Directive and the corresponding provisions in the Competition Protection Act.

2.2 The Passing-on in Bulgarian Law

The Republic of Bulgaria has a continental legal system, heavily influenced both by the German and French legal traditions. As such, Bulgarian law provides for a general delict, i.e. a general obligation aimed towards all legal subjects, requiring them to abstain from causing damage to another person. In case they fail to fulfill their obligation, they are required to provide full compensation to the injured party, aiming to restore the status quo prior to the infringement. Moreover, as pointed out above, the indemnification does not serve a deterring function – the injured party is not entitled to receive any form of punitive damages. The deterring function is solely preserved for criminal and other forms of liability outside the civil domain. Therefore the scope of the indemnification is limited by the principle of unjust enrichment.

This outline of civil liability also speaks to the position of the passing-on effect in Bulgarian law before the Damages Directive. Although there is no specific jurisprudence on the matter, the way it would be dealt with if any such issue arose, is dictated by the general principle of civil liability and its correlation with unjust enrichment.

In regards to the passing-on defense, the prohibition on unjust enrichment⁹¹ means that the injured party cannot be awarded damages in the amount that it had not been able to prove in the course of legal proceedings. That is, if a party claims damages in court, it bears the burden to prove the extent of the damage and would receive such amount, if any, that has been demonstrated to result from the infringement. In such cases the defendant could organize their defense in either demonstrating that the alleged infringement does not constitute a delict in order to render the whole claim unsuccessful or to prove that the damage has not resulted by the infringement partly or wholly. Therefore if the defendant proves that the claimant has in fact passed on the damage further down the supply chain, the claimant will not be awarded damages in the originally claimed amount. This situation does not deviate greatly from the provisions

⁹¹ Art. 55 of the COA;

of the Damages Directive, neither in the possibility to engage the passing on defense, nor in the burden of proof as it remains with the defendant⁹².

In terms of the indirect purchaser standing, however, the situation is not as clear. In theory, in order to be qualified to file a claim in court, one needs to have *locus standi*. As established above, locus standi requires the claimant to have personal legal interest to file and support a claim in court. This interest is derived from the fact that the claimant has rights on the subject matter of the trial and is therefore an absolute procedural prerequisite to allow proceedings to move from the formal stage onwards.

In the case of the passing-on effect, justification of the legal standing of indirect purchasers could prove quite problematic in Bulgarian civil procedure. The passing on effect is a complicated economic concept, which requires a comprehensive expert analysis to prove. While a claimant in theory may succeed in proving it and thus justifying legal standing, this could be quite risky in terms of resources, as they do not know whether their claim would be even allowed, let alone successful. This problem becomes more substantial when claimants towards the end of the supply chain are concerned. This is due to the fact that they are often entitled to smaller claims, which even if successful, would not justify the costs incurred.

2.3 Procedural aspects

Bulgarian civil procedural theory establishes the objective and objective limitations of the *res judicata* of a decision. It includes only those persons who were party to the dispute, only in regards to the claims they presented and manages to prove. Those claims are set forth in the operative part of the decision, which formally is the only part thereof to be extended *res judicata*. The considerations of the court, all and any fact that were deliberated, as well as objections on the part of the defendant are elaborated in the motives of the adjudicating court and not in the operative part. Therefore they do not hold the status of *res judicata*.

This procedural construction raises the following issue: the passing on defense is raised by an objection of the defendant, as it is not construed to be a separate legal claim. Therefore it will be included in the motives of the court and not in the operative part of the decision. On the other hand the legal standing would implicitly be included

⁹² Art. 154 of the Civil Procedure Code.

in the operative part merely by the fact that the adjudicating court lawfully renders a decision between the parties concerned. In such a situation the two aspects of the passing-on effect would be enclosed in different parts of the decision and would have different consequences from a legal standpoint.

Moreover, as elaborated above, the Damages Directive creates a possibility for conflicting decisions based on a chain of individual claims without addressing the procedural consequences thereof. The Bulgarian Legislature attempts to address this issue in Article 110 of the Competition Protection Act: it is set forth that in the evaluation of the damage claims certain circumstances need to be considered. Among them are: the presence of other claims for damages arising out of the same infringement, any judgments on such claims, as well as publicly available information on public enforcement. This provision, however, does not imply any notions that would actually oblige the court to consider those facts, as well as any repercussions if the court does not do so. In not using the language of civil procedure in order to expand the objective *res judicata* of judgments dealing with damage claims or to bind the court with certain facts, Article 110 remains purely instructional to the court. This does not address the possibility of conflicting decisions on the same infringement.

When this setting is put in the perspective of the *res judicata* of each judgment and its extents, it is easy to see how it could lead to multiple decisions conflicting on the merits of the dispute. For example, the adjudicating court, while examining a case between an indirect purchaser and the infringer may quantify damages that are exceeding what was considered to have been passed on by another court adjudicating a dispute between the infringer and a direct purchaser. The other scenario is also possible: a indirect purchaser is awarded less damages than what has been accepted to have been passed on to them in another dispute, to which they weren't a party.

On the other hand procedural theory already has an instance where this issue is dealt with, namely decisions within family law. Through a special provision in the Civil Procedure Code⁹³ *res judicata* of those decisions has an *erga omnes* effect rather than just between the parties. This approach, with some alterations, could also prove adequate to resolve the issue of conflicting decisions in a chain of civil cases, without collective redress or representation.

⁹³ Civil Procedure Code, Article 298, para. 3

This situation raises a question: would it be possible, and if yes, prudent, to extend the subjective limitations of *res judicata* to include also other stake holders within the chain of supply? On the one hand, this could solve the problem with conflicting decisions and unjust enrichment for any party, resulting from it. On the other hand the number of stake holders in a supply chain may be far too great. Extending *res judicata* to all of them would be equal in effect as providing an act of judicial nature, such as a decision, with legislative characteristics. Furthermore, the elements of *res judicata* may not be in the interest of all parties. As a result they would be limited in their legal right to a fair trial, as they will be deprived from the opportunity to be heard in regard to their rights and legal interest. A balance of this situation is possible through the means of collective redress. Thus, not only issues of quantification and evidence would be resolved, but also the aggregation of claims that may be too small to justify individual actions on the part of indirect purchasers that are further down the supply chain.

Another solution could be the elaboration of the current regime on collective redress. It could be instead more useful to combine private actions in a class action case. The Procedural Code allows such a possibility, but due to procedural difficulties and costs, it is rather hard to pursue this path. Therefore, indemnification is left to private individuals, which produces and augments the risk of conflicting decisions on the same infringement.

3. Collective redress

3.1 EU Recourse

While collective redress remained outside the scope of the Damages Directive, it is dealt with by the European Commission through soft law: a Commission Recommendation on common principles on injunctive and collective redress mechanism⁹⁴, following a public consultation⁹⁵ on the matter. In those documents the

⁹⁴ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law

⁹⁵ Commission Staff Working Document – Public Consultation: Towards a Coherent European Approach to Collective Redress (Brussels 2011);

Commission issues recommendation on Member States on how to organize collective redress mechanisms for EU granted rights under their own legal systems. The purpose of the recommendation is to facilitate such actions in fields where multiple subjects are likely to be affected by the same infringement, such as competition law, consumer protection, data protection⁹⁶, etc.

The recommendation defines collective redress as the means for two or more individuals or an organization thereof to seek a common judicial relief in the event that their rights and interest have been impeded due to a mass harm situation⁹⁷. This definition includes both injunctive relief and actions for damages⁹⁸.

The Recommendation sets forth general principles of collective redress on which the member states should base their legislation. Among them are provisions on standing of stakeholders⁹⁹, an opt-in regime where individual claimants have to affirmatively state their participation¹⁰⁰, scrutiny of admissibility in order to ensure no-abuse of procedural rights¹⁰¹, information on collective redress, etc.

As a soft law instrument, the Recommendation is rather abstract. Furthermore, it is not legally binding on Member States, nor is it capable of conferring right on individuals. To this point collective redress remains unregulated in regards to EU law infringements, which weakens positions of smaller stakeholders. In competition law context, this ultimately hinders the prospects of smaller stakeholders to achieve full compensation in mind with the disproportionate costs they have in individual proceedings. Furthermore, the possibility of invoking the passing on defense and thus fending off claims of purchasers upper in the supply chain without addressing the deterring factors for further indirect purchasers, lack of harmonized provisions for collective redress jeopardizes the attainment of the aims set in the Damages Directive. To exemplify this statement, in the next section we examine Bulgarian legislation on collective redress and its suitability to ensure effective compensation.

3.2 Bulgarian Legislation

⁹⁶ Commission Recommendation, Recital 7;

⁹⁷ Recommendation, para. 3 (a);

⁹⁸ Recommendation, para. 3 in fine;

⁹⁹ Recommendation, para. 4

¹⁰⁰ Commission Recommendation, Recital 13, para. 21;

¹⁰¹ Recital 21;

Collective redress is regulated in Bulgarian civil procedure in Articles 379 – 388 of the Civil Procedural Code. While it was first enacted in 2007, to this day collective redress remains largely underdeveloped¹⁰². This is due to the high procedural threshold for admissibility: a claimant or organization acting on behalf of a group of claimant need to establish that they objectively possess the financial and other means necessary to defend the common interest adequately¹⁰³. This limitation stems from another particularity, namely the objective limitations of the *res judicata* of decision on collective actions, which will be explained below.

Departing from the Recommendation of the Commission, collective redress is characterized by the opt-out approach, where potential stakeholders are notified of the collective claim through means of mass information. Subsequently, within a specific period provided in the notification, they may choose to adopt three lines of action: to explicitly state they wish to participate, to exclude themselves and pursue the action individually or to assume a passive position¹⁰⁴.

The claimants are defined in an abstract manner as a group/class of individuals. By definition that group/class can be clearly defined in advance. However the members thereof may not be specifically known and enumerated, as some of them are unknown. If the members of the class/group are known specifically in advance, then the claim would not be classified as collective redress but rather as a collusion of individual claims¹⁰⁵ within the same proceedings. This approach is rather impractical, as a large number of claimants in an individual case render the administration of proceedings difficult.

Collective actions have another key particularity in regard to the *res judicata* of the decision: the subjective limits thereof cover not only those who affirmatively opt in, but also those, who remained passive. Only parties that stated in a timely manner that they wish to pursue an individual claim are excluded from the effects of the decision. Therefore *res judicata* of decisions on collective actions have an *erga omnes* effect. That is also the rationale behind the elevated standards for admissibility, as the proceedings could influence adversely the interest of a large class of persons.

¹⁰² Stalev, p. 774

¹⁰³ Art. 381 Procedural Code;

¹⁰⁴ Stalev, p. 774

¹⁰⁵ Stalev, p. 773

This construction of collective redress under Bulgarian law is not beneficial to attaining the aim of the directive as it renders the pursuit of a claim very difficult and resource consuming. Rather than addressing the cost concerns of smaller stakeholders, it elevates procedural thresholds to admissibility.

V. Conclusion

While the Damages Directive aims to be a comprehensive document on private enforcement of competition law in the EU, in its current state it could not achieve the aims set out therein. This is due to the fact that it omits to address certain issues that undoubtedly influence potential claimants in their decision to pursue a claim, as well as other purely procedural aspects that may get in the way of full indemnification.

The Directive provides for the recognition of the passing-on effect in its two manifestations: the passing-on defense and indirect purchaser standing. Those two aspects in combination lead to the possibility of multiple private legal actions based on the same infringement. At the same time the Directive does not provide any guidance on how to solve the practical issues of *res judicata* of different decisions in those private actions. Every chamber of the court is by definition independent and impartial, basing its decisions solely on the evidence and facts presented in the course of trial. Different parties may, however, experience difficulties in providing evidence thus failing to prove their claim. Therefore if a defendant has been successful in raising the passing of defense in an action of a direct purchaser and a later action by an indirect purchaser proves unsuccessful, the infringer will effectively be absolved of the obligation to fully indemnify all the parties, sustaining damages. Furthermore, this situation becomes direr if no indirect purchaser raises any claim, due to high costs or lack of other incentives to do so. As those issues are also not addressed in the Directive through provisions on costs or collective redress, the result is likely to run contrary to the aims Directive. Therefore, the answer to the first research question raised is that in the absence of a more precise consideration of deterring factors for indirect purchasers, as well as the relationship of different decisions on the same dispute, the Directive is likely not only to fail in achieving its goals, but also to actually deter indirect purchasers to pursue private actions against competition infringers.

Secondly, if the interpretation of the notion of damages remains within national law, the likelihood of inconsistent interpretation of EU law is quite high. In particular, Bulgarian jurisprudence on the matter of lost profit in its current state fails to provide for effectiveness. While it is true that the matter of evidence of lost profit is mostly procedural, thus falling within the scope of procedural autonomy, it renders full compensation through the awarding of damages for lost profit nearly impossible. Furthermore, it does not reflect the nature of lost

profit as established in different legal documents, including the Directive, the Study on quantification of damages and other soft-law documents.

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VII. Annex

Abstract:

Enforcement of competition law in the European Union is organized in a two-fold structure – public and private enforcement. While public enforcement of competition law is well established, private enforcement is rather underdeveloped. The principles of conferral, distribution of competences and procedural autonomy dictate that private enforcement is allocated to national courts of member states. In order to ensure the cohesive application of EU law in all Member States, the Damages Directive was enacted in 2014. The goal of full compensation is provided as a key component. The Directive also provides for applicability of the passing-on effect, but without harmonizing some key aspects such as the relationship between conflicting decisions, as well as costs and incentives to pursue a civil claim. Thus in its current state, the Directive is more likely to deter the attainment of the goals of full compensation rather than promote it. A second aspect, examined in the thesis is whether the notion of damages as provided for in the Damages Directive is to be construed autonomously. It is suggested from the point of view of Bulgarian legal tradition, that referring to the interpretation of certain notions under national law may ultimately defeat the purpose of harmonization and trump the application of the principles of effectiveness and equivalence.

Zusammenfassung:

Die Durchsetzung des Wettbewerbsrechts in der Europäischen Union ist in einer zweigliedrigen Struktur organisiert - öffentliche und private Durchsetzung. Während die öffentliche Durchsetzung des Wettbewerbsrechts gut etabliert ist, ist die private eher unterentwickelt. Die Grundsätze der Übertragung, der Verteilung von Zuständigkeiten und der Verfahrensautonomie sehen vor, dass die private Vollstreckung den nationalen Gerichten der Mitgliedstaaten zugewiesen wird. Um die kohärente Anwendung des EU-Rechts in allen Mitgliedstaaten sicherzustellen, wurde

die Schadensrichtlinie in 2014 erlassen. Das Ziel der vollständigen Entschädigung wird als Schlüsselkomponente bereitgestellt. Die Richtlinie sieht auch die Anwendbarkeit des Weiterleitungseffekts vor, ohne jedoch einige Schlüsselaspekte wie das Verhältnis zwischen widersprüchlichen Entscheidungen sowie Kosten und Anreize zur Verfolgung zivilrechtlicher Ansprüche zu harmonisieren. In ihrem derzeitigen Zustand wird die Richtlinie eher dazu führen, dass die Erreichung der Ziele der vollständigen Entschädigung eher verhindert als gefördert wird. Ein zweiter Aspekt, der in der Arbeit untersucht wird, ist, ob der in der Schadenersatzrichtlinie vorgesehene Schadensbegriff autonom auszulegen ist. Aus Sichtpunkt der bulgarischen Rechtstradition wird darauf hingewiesen, dass die Auslegung bestimmter Begriffe im nationalen Recht letztlich den Zweck der Harmonisierung verfehlen und die Anwendung der Grundsätze der Effektivität und der Äquivalenz übertrumpfen kann.