COMPENSATION OF DAMAGE CAUSED BY INFRINGEMENTS OF THE COMPETITION LAW IN REPUBLIC OF CROATIA

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Abstract

Effective competition presupposes the equality of all market participants, ensuring free competition in the market. But this equality is often put to the test by various actions of the participants, who guided by the desire for a greater profit secures unduly favourable position in relation to other participants. National lawmakers, as well as European Union, seek to protect free competition primarily by means of public law protection. However, by the practice of the Court of Justice of the European Union and Regulation No 1/2003, articles 101. and 102. of Treaty on the Functioning of the European Union (TFEU) have become directly applicable in disputes between private parties for damages pending before the national courts. Private enforcement of the EU competition rules presents a problem because of the specificity of its subject matter, but also the general differences in tort law between Member states of the European Union. Therefore, the European Union in accordance with the principle of subsidiarity has brought Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union adopted by the Council on 10 November 2014 and published in the Official Journal of the European Union on 5 December 2014. The Member States need to implement the Directive in their legal systems by 27 December 2016. Accordingly, we will proceed to compare the existing provisions of the compensation of damage in Republic of Croatia with Directive and the possibility of their implementation in the legal framework of tort law and law on the protection of competition in Republic of Croatia.

Key words: *competition law, compensation of damage, prerequisites of liability for damages, disclosure of evidence,limitation periods*

1.Introduction

Founding states of the European Union were capitalist countries of Western Europe that had a small markets and protected large monopolies. (Buxbaum, 2005) Such economies were unable to compete with other major world economies such as the US. For that reason the implementation of competition rules in Member States had to help with the creation of a common market for the purpose of functioning free trade between Member States and performing redistribution of economic resources and wealth. Ultimately, the goal was to increase economic growth and to achieve full employment in the European Union.

Today, effective competition is of great importance for the preservation of the internal market. According to Article 3 of the *Treaty on the Functioning of the European Union* (hereinafter: TFEU) Union have exclusive competence establishing of the competition rules necessary for the functioning of the internal market. That task European Union needs to achieve together with the Member States that are obligated to adopt economic policies based on the principle of an open market economy with free competition. (Art. 119. TFEU).

Competition law of the European Union is regulated by Articles 101 and 102 of the TFEU, which prohibits agreements and behaviours that are incompatible with the common market. In wider sense, European law on unfair competition includes rules on aids granted by states regulated in Art. 107 - 109 TFEU. The provisions of European competition law apply when the agreements and practices of entrepreneurs affects trade between Member States and distort competition within the common market.

The implementation of the effective competition is in the public interest, while competition is the base of national market economies and the EU's internal market that encourages trade, innovation, reduces production costs and increases productivity.

That is the reason why the protection of competition law in the European Union was initially founded as a public law protection carried out by the administrative bodies of the Union. Under the influence of European law, national member states also developed only public law enforcement of their competition rules. Germany was first of Member States that influenced by US had systematic national law on competition. Law Against Restraints of Competition (Gesetz Gegen Wettbewerbsbeschränkungen) was enacted on July 27, 1957. (Buxbaum, 2005) Private interests were protected only indirectly, while efficient competition ensures equality between competitors and higher quality, more variety and less expensive products for the consumers.

Although the European rules of competition were contained in the Treaty establishing the European Economic Community of 1957 (Art. 85 i 86. of Treaty establishing the European Economic Community), it takes more than half of century for the European Union to adopt a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Hereinafter: the Directive). By this Directive, European Union, not only harmonizes, but also creates national private competition law. The reasons for such a long-term attempt to prescribe those rules lie in the complexity and diversity of national tort rules between Member States. (Butorac Malnar, J., & Petrović, 2013) Although the Directive harmonize only national rules of competition that has an effect on trade between Member States of the European Union, for sure this directive will have an influence on the national rules of competition which has effect only in the territory of a member state.

Therefore Croatia will need to regulate a special type of tort –distortion of competition and new rules.

2. The aim of harmonization of private enforcement of competition rules in the European Union

In the Member States of the European Union, unlike the United States (Wils, 2003), private enforcement of competition rules in practice has not become efficient. (Waelbroeck, Slater, & Even-Shoshan, 2004) In the Proposal of the Directive it was stated that it is necessary to ensure the effective enforcement of the EU competition rules by optimising the interaction between the public and private enforcement of competition law; and ensuring that victims of infringements of the EU competition rules can obtain full compensation for the harm they suffered.

Therefore, the goals of the harmonization are the protection of the public interest by ensuring the effective implementation of competition rules, as well as the protection of the private interests by making right to compensation more efficient. The stated goals of ensuring effective right to full compensation, fostering undistorted competition for the proper functioning of the internal market, as well as setting out rules coordinating the public and private enforcement are laid down in Article 1 as the subject matter and scope of the Directive.

Although, in the Directive the first given reason was the protection of private interests, Union private enforcement primarily puts in the function of the public interest as follows from the fact that the Directive was adopted on the dual legal basis. First, provisions of Article 103 of the TFEU on the protection of competition and second, provisions of Article 114 on the approximation of laws for the establishment and functioning of the internal market. So, although the Directive regulates private enforcement, the aim for harmonization is primarily the protection of public interests of the Union and its Member States to ensure proper functioning of the internal market and effective competition, in accordance with the principles of subsidiarity and proportionality.

Namely, in Directive Preamble is stated that the differences between the rules in the Member States governing actions for damages for infringements of Union or national competition law lead to uncertainty concerning the conditions under which injured parties can exercise the right to compensation they derive from the TFEU and affect the substantive effectiveness of such right.

As injured parties often choose their Member State of establishment as the forum in which to claim damages, the discrepancies between the national rules lead to an uneven playing field as regards actions for damages and may thus affect competition on the markets on which those injured parties, as well as the infringing undertakings, operate.

Uneven enforcement of the right to compensation in Union law may result not only in a competitive advantage for some undertakings which have infringed Articles 101 or 102 TFEU but also in a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is enforced more effectively.

Therefore, injured private persons and national courts when applying the rules of private protection, have a preventive role in the protection of public interest, specifically, the protection of competition and preservation of the internal market by maintaining competitive economy.

But also Preamble of the Directive explains protection of private interests and states that it provide equal conditions for the companies operating in the internal market, improve conditions for the consumer's exercise of rights arising from the internal market, increase legal certainty and reduce the differences between Member States with regard to national rules governing actions for damages for the infringement of competition law of the Union and national competition law when applied simultaneously with the EU law. (Para. 9. of the Preamble of the Directive)

Furthermore, the Articles 101 and 102 TFEU produce direct effects in relations between individuals and create, for the individuals concerned, rights and obligations which national courts must enforce. Thereby, the Directive protects subjective rights under Union law, in order to achieve social justice and the application of the basic legal *principle* of *prohibiting* the causing of *damage*, from which derives the right to compensation. The Directive does not mention the principle of prohibiting the causing of damage (lat. neminem laedere) as the basic principle of law on obligations, but speaks about right on compensation of full damage. Last, but not least, this Directive, partially harmonize national tort laws, as part of private law, for which there is still no political will for complete harmonization.

3. The development of the right to compensation for infringements of competition rules in the European Union

The Court of Justice of the European Union has developed an interpretation according to which Articles 101 and 102 TFEU (ex 81. 1 and 82) produce direct effects. (BRT v SABAM, 1974) This principle was later adopted in the Regulation No. 1/2003. By this regulation it is created a parallel system of protection of competition law of the Union, because, now, national courts are competent to directly apply the European competition rules. Thus, it is open the possibility for private persons to require before national courts the damage that occurs by infringements of competition law, on the basis of directly applicable provisions of the Treaty. Therefore, Union, after the creation of the national modern public rules of competition, now creates national law on private protection for infringements of competition rules.

The right of every consumer, undertaking or public authority to claim compensation for damages suffered by an infringement of competition law was initially recognized by the European Court of Justice in the case Courage and Crehan of 2001, C-453/99 and later is was confirmed in the judgment Manfredi from 2006, C-295-298/04. The importance of the judgment Courage and Crehan was in supporting the first action for damages based on the directly applicable provisions of the Articles on Competition Law in Treaty. The Court stated that according to the jurisprudence, the Treaty creates its own legal system which is integrated into the legal systems of the Member States and which their courts are obligated to apply. In the earlier case BRT and SABAM of 1974, C-127/73 the Court held that the provisions of competition law produce direct effects in relations between individuals and create rights which national courts are obliged to protect. Actions for damages which are submitted to the national courts can significantly contribute to the maintenance of effective competition in the Union. In the absence of Union rules, the national domestic legal system of each Member State needs to prescribe the detailed procedural rules to protect the rights of individuals belonging to them directly from European Union law, in accordance with the principle of equivalence and the principle of effectiveness.

In Manfredi case (C-295-298/04) Court confirmed findings of Courage and Crehan case and stated that previous case law of the European competition law should be applied parallel with national law, while Articles 81. and 82.of the Treaty (now 101. and 102) produce direct effects in relations between individuals and give individuals rights which national courts are obliged to protect.

In Manfredi case, the Court discussed also other issues that after the decision in Courage and Crehan remain open, as a causal relationship, period of limitation and the possibilities of awarding special damages that have criminal effect (punitive damages).

The Modernisation Regulation 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 encourages and promotes private enforcement. Thus, the Preamble of the Regulation states that national courts have an essential part to play in applying the Union competition rules. When deciding disputes between private individuals, they protect the subjective rights under Union law, for example by awarding damages to the victims of infringements. The Article 6 of the Regulation expressly prescribes that national courts have the power to apply Articles 101 and 102 of theTreaty. Therefore, only national courts of the Member States are obligated for enforcement of private protection, while Court of Justice of the European Union has jurisdiction only to give preliminary rulings concerning. However, is necessary to ensure uniform application of competition law of the Union, for the reason of legal certainty. In the paragraph 21 of the Preamble of the Regulation is stated that consistency in the application of the competition rules also requires that arrangements need to be established for cooperation between the courts of the Member States that apply Articles 101 and 102 of the Treaty and the Commission, whether applying these rules in lawsuits between private parties, acting as public enforcers or as review courts and that is relevant for all courts of the Member States. The Article 11 of the Regulation provides that the courts of the Member States may ask the Commission for information or for its opinion on points concerning the application of Union competition law. Furthermore, the Regulation prescribes the obligation of Member States to forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 101 or Article 102 of the Treaty, without delay after the full written judgment is notified to the parties. The Commission and the competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 101 or Article 102 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. In order to ensure compliance with the principles of legal certainty and the uniform application of the Union competition rules in a system of parallel powers, conflicting decisions must be avoided. Therefore, when national courts rule on agreements, decisions or practices under Article 101 or Article 102 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. (Masterfoods Ltd v HB Ice Cream Ltd, 2000) This obligation is without prejudice to the rights and obligations under Article 267 of the Treaty (ex Article 234). Which means that if the decision of the Commission did not decide the European Court, the national court considers that the Commission decision is invalid; it may proceed under Article 234 of the Treaty and to request that the Court previously decided on the validity of that act. When competition authorities of the Member States rule on agreements, decisions or practices under Article 101 or Article 102 of the Treaty, which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.

The European Commission on 19 December 2005 adopted a Green Paper on damages actions for breach of the EC antitrust rules (hereinafter: Green Paper) and a comparative study (the Commission Staff Working Paper). In the Green Paper, the Commission has identified the main barriers to achieving a more efficient system for damages actions and proposed various options to resolve these problems. Furthermore, she supported the actions after the finding of an infringement by the competition authorities (follow-on actions) and actions that are submitted before such a decision (stand-alone actions).

On 2 April 2008 the European Commission adopted a White Paper on damages actions for breach of the EC antitrust rules (hereinafter White Paper) and supporting documents -Commission Staff Working Paper (the SWP) and Impact Assessment Report (the IAR), which should be read in parallel with the White Paper. „The SWP“ explains proposals contained in White Paper and acquis communautaire, while „the IAR“ analyses potential welfares and costs of different options. The White Paper implements principles from the case Courage and Crehan C-453/99 and joined cases C-295-298 Manfredi/04 by which any person who has suffered damage for infringement of competition law have right to compensation. (Rodin, 2009)

Directive of the European Parliament and of the Council 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 was adopted on 10 November 2014. While White Paper, in its title mentioned only European competition law, the Directive applies to infringements of national competition law, but only when they may affect trade between Member States in terms of the provisions of Art. 3. 1.of Regulation 1/2003.

4. Compliance of Croatian legal system with the Directive

4.1. Prerequisites of non contractual liability for damages caused by infringements oft he competition law

Considering that Law on Protection of competition does not prescibe in details how the damage from infingement of competiton rules is compensated, other than one general article which regulates the responsability of the undertaking for infingement of rules of the Competition Act or articles 101. or 102. TFEU, we will be using the general rules of the Law of Obligations on compensation for harm in order to determine the basis and prerequisites of non-contractual liability.

For the formation of noncontractual relations following prerequisites have to be fullfiled: the existance of entities (tortfeasor and injured party), harmful action of the tortfeasor, damages suffered by the injured party, causality between the harmful act and the damages and the illegality of the harmful act.

4.1.1. Entities associated with responsibilities for infringement of competition rules

The role of the tortfeasor will always be attributed to the undertaking which distorts the competition on the relevant market whether by abusing dominant position or by signing prohibited agreements.

Definition of undertaking as potential tortfeaser is precisely defined in article 3. of the Law on the protection of competition which states that the undertaking shall mean companies, sole traders, tradesmen and craftsmen and other legal and natural persons who are engaged in a production and/or trade in goods and/or provision of services and thereby participate in economic activity. This term undertaking shall also apply to state authorities and local and regional self-government units where they directly or indirectly participate in the market and all other natural or legal persons, such as associations, sports associations, institutions, copyright and related rights holders and similar who are active in the market.

On the other hand, there is a more diverese group of entities which can apper in the role of the injured party. This will proimarily include tortfeaser's competitors but also the consumers.

As an example of the diversity of various injured parties, we shall mention one of the most prominent infringements of competition rules which occurs in case of cartel price fixing and coordinating other trading conditions.

Injured parties resulting from a cartel agrement will primarily include tortfeaser's direct purchasers. Their damages are obvious in the difference between the cartel price and the price that would otherwise have prevailed had there been no cartel agreement.

However, harmful effects of cartel agreements may be extended to the other market participants including the indirect purchasers, who do not purchase products directly from cartel memebers, but from cartel's direct purchasers. Finally at the end of the chain there will be consumers which will represent the largest group of injured parties, but not the most interested in compensation of damages as the damages will individually become significantly reduced which will in turn reduce the interest for compensation.

4.1.2. Harmful action of the tortfeaser (undertaking)

Harmful action is any act or omission by the tortfeaser which causes harm to the injured party. (Vedriš & Klarić, 2012) In case of infringement of competition rules these will be those actions of the undertaking which caused damages to the other entities in the relevant market.

The Law on the protection of competition identifies two main types of prohibited behavior by the undertaking that may result in damages: signing prohibited agreements and abuse of dominant position.
Agreements between undertakings with the purpose or effect of distortion of competition in the relevant market are prohibited and their nullity is explicitly prescribed. Such are the agreements in which undertakings directly or indirectly fix purchase or selling prices or any other trading conditions; limit or control production, markets, technical development or investment; share markets or sources of supply; apply dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage; make the entering into contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts (Art. 8. of the Law on Protection of Competition)

Second group of prohibited behaviour by the undertakings includes abuse of dominant position. An undertaking can be presumed to be in a dominant position when, due to its market power, it can act in the relevant market to a considerable extent independentlyof it's actual or potential competitors, consumers, buyers or suppliers and this is particularlythe case when an undertaking has no significant competitors in the relevant market, and/or holds a significant market power in relation to its actual or potential competitors. However, the mear assumption of the existance of dominant postition does not automatically imply undertaking's responsability. Only the actaul abuse of such position may cause damage to the competition, which is why abuse of position of one or more undertakings in the relevant market is strictly prohibited. (Art. 13. of the Law on Protection of Competition). Rather than explicity listing which situations may lead to abuse of dominant position and prohibited agreements, the law provides examples, which is justified considering the diversity and variability of actions by the undertaking, which in the case of abuse may fall into the broad definition of prohibited behaviour by the undertaking.

4.1.3. Damages as a result of infringement of competition rules

Croatian Law of Obligations and the Directive are for the most part reconciled in terms of the definition of damages and the scope of the compensation. As previously noted, provisions related to compensation of damages are not found in Law on Protection of Competition as *lex specialis*, but in general rules of compensation of damage in Croation Law of Obligations. Law of Obligations defines damages as loss of a person's assets (pure economic loss), halting of assets increase (loss of profit) and violation of rights of personality (non-material damages). Considering that the Art. 2 of the Directive prescribes full compensation of damages caused by infringement of competition laws which includes the right of compensation for actual loss and for loss of profit, plus the payment of interest, determining damages in croatian courts should not present a significant problem. Although the Directive does not prescribe the obligation of compesating non-material damages, the latter is prescribed in the general rules of Law of Obligations under which it can be compensated following the positive result of the lawsuit. Legal entities in RH enjoy protection of rights of personality, in this case, freedom to conduct business. Based on it's assessment of the gravity of the injury and the circumstances of the matter, the court may award, due to violation of rights of personality, a just monetary compensation regardless of the compensation of material damages, and even in the absence thereof. (Art. 1100 (3) of the Law of Obligations). However, considering that natural persons can also appear as injured parties (craftsman, sole traders, freelancers and other) they are protected and entitled to compensation of damages resulting from infringment of competition rules, same as legal persons. We may conclude that as per laws of Republic of Croatia provide a scope of compensations for damages even broader than the one forseen in the Directive, as it includes, in addition to the material, nonmaterial damages for the infringement of which the court may award monetary compensation regardless of the compensation of material damages, and even in the absence thereof.

4.1.4. Causality between the harmful act and the damages resulting from infringement of competition rules

Not every harmful action comitted by the undertaking will be recognized as damages to the injured party, but only those in which causality between the harmful action and the damages can be determined. Specifically, this means that the injured party needs to prove that the damages that he suffered are a direct consenquence of the infingement of competition rules caused by the undertaking.

Considering the specificity of the subject matter, that is, the complex inner workings of makets in which this competition takes place, proving this presumption of responsibility can be extremely challenging for the injured party. The undertaking will be able to contest the causality by proving that the damages are not caused by their actions but for instance market anomaly which is not caused by the infingement of competition rules, poor business decisions or actions of third parties.

Proving causality between the infingement of competition rules and damages can be especially difficult for indirect purchasers, consumers which most commonly appear as injured parties, particularly with one of its gravest instances such as cartel.

This is because they must prove that the undertaking's action which caused the market anomaly also caused damages to them, even though the two are not directly related.

They are directly related to tortfeasor's direct purchasers who passes on all or a portion of their loss to them, by charging them for a product price which was increased as a result of tortfeasors' cartel agreements.

Assistance in this matter can certainly be found in the stipulation in article 14 of the Directive, which states that in the case of passing on of overcharges the burden of evidence lies with the accused, hence, the tortfeasor.

Proving that the overcharges were passed on from direct to indirect purchaser also proves causality between the indirect purchaser and tortfeaser, which further proves that the infringement of competition rules by tortfeaser caused damages to the indirect purchase.

4.1.5.Illegality and tortfeaser's fault

Illegality as presumption of responsibility presumes divergence between certain behavior and the legal rule which protects a certain property from harm which is caused by such behavior.

Every behavior which is contrary to legal rules is llegal, hence, every infingement of competition rules is illegal as well. However, in order for such illegality to become a presumption of responsibility it has to cause legaly recognized damages.

Furthermore, in those legal systems which accept the concept of fault as a subjective element of illegality, tortfeaser's fault is also required as presumption of responsability.

Such rules can be found in Croatian Law of Obligations which proscribes responsability based on fault, in particular, preconceived fault.

According to Art. 1045 of Law of Obligations: A person who has caused damage to another person shall compensate for this damage, unless he has proven that the damage has not occurred as a result of his own fault.

Liability based on preconcieved fault means that the burden of evidence lies with the tortfeaser who needs to prove that he is not guilty. For the injured party, it is sufficient to prove that the harmful act comitted by the totrfeaser caused him damages, while the fault of the tortfeaser is preconceived.

The mildest degree of guilt, common negligence (*culpa levis*) is assumed. Such negligence is exhibited by the torfeaser who acts without applying the standard of care which would be used by a orderly and conscientious businessman or reasonable host. Considering that the undertaking's actions in the market represent their professional activity, a higher degree of guilt should be called for in performance of their work, so called "reasonable professional" standard of care.

Liability criteria set in this manner, should alleviate injured party's position in proving damages, considering that the undertaking as tortfeaser will face difficulties in contesting the preassupmtion of guilt, for which they will need to prove that, they applied a higher standard of care, meaning that of reasonable professional, when taking potentialy harmful action.

This would imply that in taking any action which may potentially represent an infringement of competition rules, the undertaking aplied the level of care of a reasonable professional, which would minimize the possibility to cause any damages.

Interestingly, the Directive does not regulate the degree of guilt of the tortfeaser, or for that matter the liability based on guilt at all, but leaves that to the national legislature.
The White paper which preceded the Directive, introduces the term "genuinely excusable error" as a standard of care. In the case of proving thorfeaser's fault, it should be proven that the infingement of the competition rules was caused by genuinly excusable error, in which case the tortfeaser would be free from liability for damages.

An error would be excusable if a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition.

Although such definition of liability represents liability based on preconceived fault, it is essentially very similar to objective responsability since it will be difficult for the tortfeaser to free himself from liability, considering that he will have to prove that he acted with a high level of care while participating in the market competition.

The mildest degree of fault is preconceived, which is the common negligence. Every higher degree of fault needs to be proven by the injured party.

4.2. Limitations for bringing actions for damages

Directive also regulates the definition of limitations which is the instrument of material law regulated by Croatian Law of Obligations. In theory it is defined as the passing of time after which the debtor may default on his obligation due to passive attitude of the creditor since maturity until the passing of time detemined by the law. (Gorenc, 2005)Purpose of limitation is on one hand to caution the creditor to be active in realizing his rights, since the passive attitude might lose him the possibility of collecting his receivables. On the other hand, it would be extremely hard for the debtor to be indefinitely expecting when the creditor may call upon him to fulfill his obligation, so the legislator protects him with limitations. Directive suggests to the memeber states to introduce or harmonize rules to determine when the limitation period begins to run, the duration thereof and the circumstances under which it is interrupted or suspended. They shall also ensure that the limitation periods for bringing actions for damages are at least five years.

Art. 10 (2) states that limitation periods shell not begin to run before the infingement of competition law has ceased and the claimant knows, or can reasonably expect to know of the behavious and the fact that it constitutes an infringement of competition law, of the fact that the infringement of competition law caused harm to him and the identity of the infringer.This approach to setting limitations is in its essence a subjective limitation which is justified by the dificulties which the injured party faces when uncovering the most severe forms of infringements of competition rules, as well as the restrictions in gathering evidence related to these infingements. During the course of limitation period there is a possibility that such circumstances may arise which would cause the limitation period to end and at the expiration of which the limitation period would begin anew (interruption), or circumstances the expiration of which the limitations would continue to run and the elapsed time would be factored in (suspension).
The Directive suggests to the member states to ensure the suspension or interruption of limitations if the body responsible for competition brings actions to investigate or proceede in respect of the infringement of competition law to which the action for damages relates.

Seeing that there is only one single circumstance in Croatian obligation law which leeds to interruption of limitations, which refers to actions brought by creditor, one should take actions brought by the body in charge of competition as grounds for interruption.On the other hand, suspension of limitations would be brought on by the situation in which the parties are in the process of settling the dispute in which case reaching the settlement or withdrawing from it would cause the limitation to continue to run.

Although the institute of limitations it thouroughly regulated by the Law of Obligations, we believe that it would be more appropriate to place the limitations stipulations which relate to taking actions for damages caused by the infringement of competition rules in the section of Law on Protection of Competition which regulates the compensation of damages. This would consolidate the matter related to infringement of competition rules in one place in addition to causing the stipulations related to limitations, as a part of *legis speciali*, to supercede the general provisions from the Law of Obligations.

4.3. Compliance of Croatian rules of civil procedure with the Directive

In the Directive "action for damages" is defined as a procedure under national law by which a claim for damages is brought before a national court by an alleged injured party, or by someone acting on behalf of one or more alleged injured parties where Union or national law provides for that possibility, or by a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim. This is a civil law matter that is subject to the rules of civil procedure, which are in the Republic of Croatia regulated by the Law on Civil Procedure, as a general law.

The biggest obstacle to effective implementation of private competition rules is difficult to prove the damage and quantification of harm. For example, in cases of infringement of competition law, the key evidence may be hidden and placed at the other or third party, and are not well known to the claimant. Therefore, the greatest contribution of harmonization of national legislation is facilitating proving the damage, by laying down detailed rules on disclosure of evidence and rules of quantification of damages.

The Directive distinguishes two situations for the disclosure of evidence: first, disclosure of evidence from defendant and third parties and second disclosure of evidence included in the file of a competition authority. Comparing the requirements of the Directive and Articles 232 to 234 of the Law on Civil Procedure, which contain provisions on disclosure of evidence, it can be concluded that the provisions of the Law on Civil Procedure are partly in compliance, but not completely. According to Art. 2 (13) of the Directive, 'evidence' means all types of means of proof admissible before the national court seized, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored. In Croatian Law on Civil Procedure provisions on disclosure of evidence contained in Art. 232 to 234 apply to each "object" (Art. 229) and document (Art. 230). Therefore, all "evidence" described in the Directive can be subsumed under Art. 232 to 234. Unlike Directive, Law on Civil Procedure differently regulates issues on the disclosure of evidence from the defendant, third party and public bodies. According to Art. 233 (2) parties have a duty to provide evidence only in certain situations, when they point out that evidence, if they are obligated to submit or show that evidence by law or if it is evidence that is common to both parties. In other cases, a party can denied to submit the evidence. According to the Law on Civil Procedure, the third party is required by court order to submit proof that he is legally obliged to show or submit, or evidence that is common for that person and the party that calls for that proof. While, in the disputes on antitrust damages, injured party may call for, the evidence of the defendant or third party that is not considered a joint document, it follows that in this part Croatia will need to harmonize Law on Civil Procedure with the Directive so to prescribe the duty of disclosure "of relevant evidence which are under the control of the defendant". The Law on Civil Procedure only gives the opportunity for third parties to be heard before a national court orders disclosure of evidence, while the Directive stipulates that in is necessary to give that opportunity to all, including parties.

However, under Directive court should not always be obliged to accept request for disclosure of evidence, but only request of a party that contains specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification. In doing so, the courts have to consider whether the request is justified according to the extent to which the claim or defence is supported by available facts and evidence, the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure and whether the evidence the disclosure contains confidential information, especially concerning any third parties. Even so, if the evidence contains confidential information, the national courts should have the power to order the disclosure where they consider it relevant to the action for damages, but they need to have at their disposal effective measures to protect such information. By Croatian Law on Civil Procedure, proving includes all facts that are important for making decision, and the court decides which of the proposed evidence will accept for proving the relevant facts (Art. 220). The right to withhold evidence because of the confidential information is contained in the Art. 237. Law on Civil Procedure, and in relation to third parties in Art. 238. Law on Civil Procedure. In practice, when the courts are making decisions on what evidence will accept, they apply all the criteria contained in the Directive, making sure that the facts of the case are exactly and completely found. However, the Law on Civil Procedure does not contain provisions on the right of ordering the disclosure of confidential information and measures for their protection, so in that part it is needed to harmonize our law.

Furthermore, the Law on Civil Procedure in the event that the party unjustifiably refuses to give or show evidence, or contrary to the court's opinion, denies that he has the evidence, gives to the court power to decide what meaning have that behaviour of a party, which is in accordance with the provisions of Art. 8(2) of the Directive.
With regard to the behaviour of a third party, Law on Civil Procedure prescribes that order for disclosure may be seized, even before the finality of the decision.

Rules on disclosure of evidence contained in the Directive are minimum rules, so Member States may maintain or introduce rules which would lead to wider disclosure of evidence. Rules on disclosure of evidence included in the file of a competition authority, which are defined in Article 6 and 7 of the Directive, are brand new and special rules governing the coordination of public and private enforcement of competition rules and it is therefore necessary to implement them in whole in our domestic law.

Further, Article 9 of the Directive also determines the relationship between public and private enforcement and prescribes mandatory effect of decisions of national competition authority and review courts. The final decision taken in another Member State, may be at least *prima facie* evidence that an infringement of competition law has occurred. That provisions are, however, without prejudice to the rights and obligations of national courts under Article 267 TFEU.While Law on Civil Procedure only prescribes mandatory effect for criminal judgments that finds defendant guilty (Art. 12.), these special provisions of Article 9 of the Directive will be also necessary to implement in Croatian law system.

Furthermore, the Directive introduces another institute specific for private enforcement of competition law, and that is "the passing-on of overcharges". The Directive obliges states to introduce national procedural rules to avoid overcompensation, which does not include compensation for loss of profits. However, according to the Directive, national courts should have power to estimate, the share of any overcharge that was passed on, which corresponds to the provisions of Art. 223 Law on Civil Procedure. Furthermore, it should be added that the special provisions on passing-on defence and indirect purchasers of Art. 13 and 14 of the Directive correspond to our general rule on burden of proof under Art. 219 C 1 of the Law on Civil Procedure. Article 13 of the Directive prescribe as follows: „Member States shall ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties."

Article 14 (1) of the Directive prescribe as follows: „Member States shall ensure that, where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether, or to what degree, an overcharge was passed on to the claimant, taking into account the commercial practice that price increases are passed on down the supply chain, the burden of proving the existence and scope of such a passing-on shall rest with the claimant, who may reasonably require disclosure from the defendant or from third parties."

Very significant is that Directive introduce a legal presumption that the indirect purchasers are deemed to have proven that a passing-on to that indirect purchaser occurred where that indirect purchaser has shown that: (a) the defendant has committed an infringement of competition law; (b) the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and (c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them. The defendant can rebut this presumption by demonstrating credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the indirect purchaser.

Further, The Directive contains provisions on the quantification of harm. The demands stated in Article 17 of the Directive correspondent to the right of the court to make a decision at its own discretion on the amount of damage when it cannot be determined or can, only with disproportionate difficulties contained in Art. 223. of the Law on Civil Procedure. However, the Directive takes into account the difficulties to prove infringement of competition rules and introduces a rebuttable presumption that the legal violations committed in the form of cartels cause damage.

Also here Directive stipulates coordination of public and private enforcement and provides that national competition authority on the request of the national court can help to the national court in determining the quantity of harm.

5. Possibilities for implementation of the Directive in the Croatian legal system

The Republic of Croatia, influenced by recommendations in White Paper, has amendment Law on Protection of Competition in 2009 introducing the provision of Art. 69 (2) which prescribes jurisdiction of commercial courts in cases of damages actions. However, the Law on Protection of Competition does not contain any other material or procedural provision relating to the private enforcement of competition rules. Until now, private individuals before national courts could exercise the right to compensation under the general rules of tort law. Still, in practice such protection is not accepted, because it is difficult for individuals by civil procedure law to prove distortions of competition and the harm they suffered.

With the entry into force of the Directive, the Republic of Croatia, as well as the other Member States of the European Union, will have to implement her in their legislation within two years of publication. While in the purpose of implementation, it is necessary, to introduce in our legal system new special rules, the question is; whether Croatia will keep existing approach of regulating the private protection only by general provisions on compensation of damage contained in the Law of Obligations or will accept one of the other two approaches: regulation in a special law or a combination of special and general law.

Analysing rules that also regulate the right to compensation from the unlawful conduct of undertakings and traders on the market, such as the rules against unfair business practices and unfair competition as well as intellectual property rights, leads to the conclusion that in the Croatia rules on compensation of damage in disputes between market participants - undertakings/ traders and between undertakings/ traders and consumers are regulated in special

laws with subsidiary application of the general rules contained in the Law on Obligations in Art.1045-1100. According to the authors, there are no special reasons in this matter, to not follow such solutions.

The Law on Protection of Competition, as a special law *ad materium* contains provisions that define all concepts and institutes of competition law, so the legally simplest and most logical method will be to introduce rules on private enforcement from Directive in that Law. On the other hand, the existing general rules in the Law on Obligation that are in compliance with the Directive is not necessary to transfer in special law on competition, but to prescribe the subsidiary application of those rules.

However, it should be added that the Directive contains rules on disclosure of evidence, the previous question, quantification of damage, the passing-on of overcharges. In Croatia the general procedural rules in civil matters are contained in the Law on Civil Procedure. Special rules contained in the Directive which differs from our general rules contain in the Law on Civil Procedure also need to be implemented in a separate law on competition law. For example, those solutions are contained in laws which prescribe protection of intellectual property rights and protection of consumers.Therefore, the competition law should be comprehensive act that would contain all the special material and procedural rules for the private protection.

Nevertheless, the adoption of such a regulation will require changing the title of the existing Act. The basic function of competition law was originally protection of free competition, as the protection of the public interest, which is why our law governing this matter is called "Law on Protection of Competition". Introducing rules of private enforcement in that Act, creates new aim- protection of the private interests of competitors and consumers, so the current title would no longer be adequate for its content.

The Directive remains open questions of collective protection and the possibilities of trade and consumer collective associations to seek protection in the event of distortions of competition. Such protection of consumers is adopted int he Law on Protection of Consumers in part IV, head II. In the White Paper, the Commission states that there is a need for mechanisms allowing aggregation of the individual claims of victims of antitrust infringements first through representative actions, such as consumer associations, state bodies or trade associations and second opt-in collective actions, in which victims expressly decide to combine their individual claims for harm they suffered into one single action. Namely, consumers and small businesses, especially those who have suffered relatively small harm and are often because of the cost, uncertainty, risk and burden of proof discouraged to bring an action. However, although the Preamble (13) of the Directive states that it does not require Member States to introduce mechanisms of collective legal protection for the implementation of Articles 101 and 102 TFEU, the definition of an action for damages under Art. 2 of the Directive include also such protection.

Article 2 (4) defines „action for damages“ as an action under national law by which a claim for damages is brought before a national court by an alleged injured party, or by someone acting on behalf of one or more alleged injured parties where Union or national law provides for that possibility, or by a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim.

Accordingly, there is no obstacle for national Member State to prescribe such rules, as rules that provide broader protection than the protection prescribed in the Directive. We believe that collective associations could have significant preventing role in controlling undertakings in applying competition law and ensure effective protection of private interests before the civil courts.

6. Conclusion

Croatian Law on Protection of Competition contains only provisions of the public law protection, which seeks to protect competition, which derives from the name of the Law. Analyzing the material and procedural provisions of Croatian law, the authors come to the conclusion that the fundamental rules of the Croatian legal system correspond to the requirements of the Directive. However, it is necessary to bring in our legal system the rules arising from, primarily specifics of competition law such as the causal link with the direct and indirect purchases, the passing on of overcharges, and secondly rules which incurred by prescribing the coordination of public law and private law protection such as prescribing interruption of limitation period when a competition authority takes action for the purpose of the investigation, disclosure of evidence of competition authorities, and binding of the competition authorities' decisions when they occur as a preliminary issue.

Because of the obligation to implement the Directive, it is recommended that the Republic of Croatia bring in those provisions of private law protection into the Law on Protection of Competition which represent *legem specialem* compared to Croatian Law of Obligations and the Law on Civil Procedure, as *leges generales*. Unlike the current regulation, Croatia should get a unique, systematic Competition Act (ad materium) which would contain public law and private law rules and the coordination of these rules. It would secure protection of the public interest and on the other hand, the protection of private rights arising from the principle of prohibition of causing damage. To achieve more efficient protection of the rights of entrepreneurs (undertakings) and consumers who have suffered damages, according to the authors, it is required to provide broader protection under Croatian law, afforded by the Directive, and to prescribe collective protection of those entities.

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