

The Type of Liability in Private Enforcement in Selected CEE Countries Relating to the Implementation of the Damages Directive

by

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Abstract

The article is devoted to the type of liability in selected CEE countries, namely those covered by the national reports drafted for the 2nd International Conference on Harmonization of Private Antitrust Enforcement: Central and Eastern European

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Perspective. The paper starts with preliminary remarks concerning the role of the type of liability in private enforcement of competition law and the Damages Directive. In the following sections of the article, the author discusses the manner of adopting the aforementioned element as a result of the implementation process in CEE Member States. The article is mainly based on the content of the relevant national reports, with a few references to issues beyond their scope. In the summary, the author formulates brief conclusions with respect to the implementation manner of the type of liability as well as provides general remarks concerning the role of the type of liability in competition-based private enforcement cases.

Résumé

L'article est consacré au type de responsabilité dans certains pays d'Europe centrale et orientale, c'est-à-dire dans les pays couverts par les rapports nationaux rédigés pour la Deuxième Conférence Internationale sur l'Harmonisation de l'Application Privée du Droit de la Concurrence : la perspective d'Europe centrale et orientale. Le document commence par des remarques préliminaires concernant le rôle du type de responsabilité dans l'application privée du droit de la concurrence, ainsi que dans la Directive Dommages. Dans les sections suivantes de l'article, l'auteur parle de la manière dont laquelle l'élément susmentionné a été adopté dans les pays d'Europe centrale et orientale suite au processus de la mise en œuvre de la Directive. L'article est principalement basé sur le contenu des rapports nationaux pertinents, avec quelques références aux problèmes dépassant leur cadre. Dans le résumé, l'auteur formule de brèves conclusions sur la manière de la mise en œuvre du type de responsabilité et fournit des remarques générales sur le rôle du type de responsabilité dans les actions privées en droit de la concurrence.

Key words: private antitrust enforcement; type of liability; CEE states; implementation; Damages Directive.

JEL: K15; K21; K42

I. Introductory issues

Long before the Damages Directive¹ was adopted, or even any works on said document started, it was quite obvious for many lawyers and academics that any person who suffered a damage resulting from an infringement of competition law has the right to compensation. This is because, in the vast

¹ Directive 2014/104/EU of the European Parliament and of the Council of 26.11.2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 05.12.2014.

majority of European countries, the general rule of non-contractual civil liability stipulates that if a breach of law results in a damage to any person, that person should have the right to legal redress (see application of this rule in selected European states Wolski, 2016, p. 69–95). The legal systems of EU Member States differ in their particular solutions, but the aforementioned principle of civil liability does not seem to be questioned.

Liability for damages has been added to the field of private antitrust enforcement. As a consequence, in spite of doubts and ambiguities relating to the legal ground of competition-based claims, eventually the European Union and the national courts of its Member States came to the same conclusion. Any person suffering damage caused by an infringement of competition law must have the right to redress it (see Polish case *Jurkowska*, 2008, p. 59–79). Once the main rule of liability for a competition law infringement was decided, the injured parties have started seeking compensation based on the civil liability regime of a given Member State. This process was taking place even if a particular EU country did not have specific liability addressed directly to an infringement of competition law at that time. This was true mainly, or even exclusively for so-called Western European states (such as the UK, the Netherlands and Germany) because in most CEE countries private enforcement of competition law did not, in effect, exist. Recently, the situation changed somewhat, but a difference in the development of private antitrust enforcement between the aforementioned parts of Europe is still significant.

In spite of relatively similar perceptions of liability for damages resulting from a competition law infringement, there are still several differences between the civil liability regimes among the Member States (see Wolski, 2016, p. 69–95, see also Lithuanian and Slovak examples Stanikunas and Burinskas, 2015, p. 239–240, and Blažo, 2015, p. 261–262 and p. 271–272 respectively). Apart from less significant variations, one of the main differences rests in the type of liability applicable to private enforcement cases. Such notion (type of liability) usually includes the principle of liability – strict or based on fault referring to negligence or lack of due care – as well as several presumptions. The latter is sometimes omitted, but has great significance. Those presumptions decide if the burden of proof that the infringer is at fault is placed on the plaintiff or on the defendant. Therefore, it substantially affects the course of the proceedings and sometimes its final result too.

Having this in mind, the main aim of this paper is to go through the implementation process of the Damages Directive in CEE Member States in order to find out how the Damages Directive might affect the type of liability in those countries applicable to private antitrust enforcement cases. This is also to learn whether, in a given Member State, its type of liability will change, or not as a result of the implementation process. The paper mainly covers the

principle of liability in competition-based damages cases and presumptions therein. Wherever possible, due to the content of the national reports mentioned below, the paper presents the current state of play against the legal background existing before the transposition of the Damages Directive.

The content of the paper is based on national reports prepared for the 2nd International Conference on Harmonization of Private Antitrust Enforcement: Central and Eastern European Perspective.² Therefore, its scope is limited to information included in these reports. However, while these may not always have to be comprehensive, this is not to say that some of the reports did not include information relating to the type of liability. For this reason, there was a need to ask some post-report questions to the authors of these reports in order to complete the missing information. This has been done and the current version of this paper contains relatively comprehensive information about the type of liability in the CEE countries covered by the national reports.

II. The Damages Directive and the type of liability

The Damages Directive, in particular in its Preamble, generally aims to encourage and facilitate the effectiveness of private antitrust enforcement as the second pillar of the enforcement of competition law. For those reasons, the Damages Directive mentions the notion of ‘effectiveness’ multiple times.³ However, in relation to rules of civil liability applicable to private antitrust enforcement in Member States, recital No. 11 of the Damages Directive clearly stipulates that ‘Where Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive’. Therefore, there is no need to amend these rules, except those expressly mentioned in the Damages Directive,⁴ under the condition that those rules fulfil the principles of effectiveness and equivalence. As a consequence, the Damages Directive does not say too much about types of liability, except the aforementioned principles and presumptions. The

² The conference was held in Supraśl, 29–30 June 2017; it was organized by the Faculty of Law, the University of Białystok and Centre for Antitrust and Regulatory Studies, University of Warsaw. The reports are included in Piszcz, 2017. For the reason that each particular national report includes relevant list of literature used by its author when drafting the report, that literature has not been repeated in this article.

³ See for example recital No. 4, 5, 8 or 11.

⁴ For example, presumption of damage caused by a cartel infringement.

presumption of damage caused in the case of a cartel can play an important role in practice, once the transposition process has been completed.⁵ This means that Member States could, in turn, decide to change or to stay within their existing legal frameworks relating to the type of liability. As we can see from the following parts of this paper, Member States used such opportunities in various ways; some of them altered or adjusted the type of liability applicable in their countries, some did not. If the aforementioned goals of the Damages Directive are fulfilled, the way a given State implements the Directive should not be questioned.

III. CEE member states and types of liability in private antitrust enforcement⁶

1. Bulgaria⁷

In Bulgaria, the Damages Directive is to be implemented via amendments to the Protection of Competition Act⁸ ('PCA'),⁹ namely a bill for amendment to the PCA.

The first section of the new PCA chapter on 'Liability for Damages' contains general rules confirming the right of any party that has suffered damages, as a result of violations committed under the PCA, to seek indemnification from the tortfeasor, irrespective of the nature of the infringement. The second section of this chapter includes detailed rules on liability for damages caused by antitrust violations. The main innovation of the Directive is the presumption that cartel infringements cause harm,¹⁰ which shifts the burden of proof in favour of the claimant. This presumption is rebuttable under Bulgarian law.

Regarding the types of liability in competition-based damages cases, from a theoretical point of view – as in practice it almost does not exist – liability is based on a variation of standard tort liability. Fault is presumed in both tort and contractual regime. Consequently, the injured party needs to prove only that a tortfeasor disregarded the requirements of due diligence. Thus, the concept of tort under Bulgarian civil law does not contain any elements

⁵ As stated in Art. 17(2) of the Damages Directive.

⁶ In the following parts of the paper the type of liability in selected CEE States is presented in an alphabetical order.

⁷ This section of the article is based on the Bulgarian national report, Petrov, 2017.

⁸ Protection of Competition Act (State Gazette No. 102 of 28.11.2008, in force as of 2.12.2008).

⁹ CPC Annual Report for 2015, adopted by decision no. 366 of 26.05.2015, p. 53.

¹⁰ Art. 17(2) of the Directive, reflected in the proposal for a new Art. 113(1) PCA.

of subjective intention, unlike in other fault-based jurisdictions. While it thus seems to fall within the strict liability type – in Bulgaria it is defined as fault-based liability. This enables defendants to prove that they have taken all reasonable steps to prevent third party damage or that the injured party did not act prudently and did not take adequate steps to mitigate damages. The rules outlined above have been already applied by courts to cases which arose out of the infringement of competition law, namely the PCA.

2. Croatia¹¹

Croatian lawmakers assumed that a separate act implementing the Damages Directive is the most suitable manner for the achievement of legal clarity, certainty and transparency, namely the Act on actions for damages arising out of antitrust infringements (hereinafter, the Act on antitrust damages). The Act on antitrust damages is a *lex specialis* in relation to the general provisions of the Civil Procedure Act¹² (hereinafter, CPA) and the Obligations Act¹³ (hereinafter, OA). This means, in turn, that any issue not regulated by the Act on antitrust damages falls under the general rules of civil procedure and civil law.¹⁴

As mentioned in the second chapter of this paper, the Damages Directive does not prescribe what type of liability is to be applicable in cases of antitrust damages. However, the Damages Directive expresses clearly the principles of effectiveness and equivalence of private antitrust enforcement. In spite of this, the Croatian Act on antitrust damages opts for strict liability, while the general tort rule of liability is based on presumed fault. This is an extraordinary solution, due to the fact that under Croatian general tort law, strict liability is an exception to the general rule of presumed fault. According to the general rule of Article 1045 OA, a person who has caused damage is liable for it, unless he has proved that the damage has not occurred as a result of his fault (lack of duty of care). Strict liability is, in turn, limited to situations relating to the specific nature of the harm and the protected right, such as acts that may substantially affect the health of people or cause a substantial amount of loss. Harm caused by a cartel can be recognized, in particular cases, as the latter, due to the substantial amount of loss involved. However, other types

¹¹ Remarks included in this part are based on the Croatian national report, Butorac Malnar, 2017.

¹² Civil Procedure Act, Official Gazette – Narodne novine 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08, 57/11, 148/11, 25/13, 89/14.

¹³ Official Gazette – Narodne novine 35/05, 41/08, 125/11, 78/15.

¹⁴ Art. 4 of the Act on antitrust damages.

of antitrust infringements and strict liability therein are very questionable for both legal and economic types of reasons (for more see Croatian national report Butorac Malnar, 2017, p. 62–63). In spite of the many arguments in favour of fault-based liability, the group working on draft of the Act on antitrust damages decided to apply strict liability with no exonerating reasons. The aforementioned working group referred to the spirit of the Damages Directive as a decisive argument favouring strict liability. The Croatian Act on actions for damages arising out of antitrust infringements was finally enacted by the Croatian parliament on 30 June 2017.¹⁵

3. The Czech Republic¹⁶

In the Czech Republic, the Damages Directive is to be transposed via the Act on Compensating Damages in the Area of Competition Law (hereafter, ‘Damages Act’).¹⁷ The draft of the Damages Act was adopted by the Government and submitted to the Parliament in December 2016. The Ministry of Justice opposed amending the new Civil Code and as a result of a compromise a new, self-standing act shall be adopted for the purposes of implementing the Damages Directive, amending, if necessary, the Competition Act.¹⁸ Therefore, the type of liability applicable to private antitrust enforcement remains unchanged – it is generally fault-based with a presumption of negligence. Consequently, the plaintiff does not have to provide evidence of the defendant’s fault. On the contrary, the defendant is found liable unless he proved that he was not at fault (he did exercise due diligence).

4. Estonia¹⁹

Estonian lawmakers decided to implement the Damages Directive via amendments to the Competition Act²⁰ (hereinafter, CA), the Code of Civil

¹⁵ See Narodne novine 69/2017, http://narodne-novine.nn.hr/clanci/sluzbeni/2017_07_69_1607.html.

¹⁶ This part of the article is based on the Czech Republic national report, Petr, 2017.

¹⁷ Proposal of the Damages Act is accessible in Czech at: <http://www.psp.cz/sqw/text/tiskt.sqw?O=7&CT=991&CT1=0> (13.03.2017).

¹⁸ Act. No. 143/2001 Coll., on the protection of competition, as amended.

¹⁹ Remarks relating to Estonia are based on the Estonian national report, Parn-Lee, 2017.

²⁰ In Estonian: Konkurentsiseadus, passed on 5.06.2001, entry into force on 1.10.2001. English version available at: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/519012015013/consolide> (4.03.2017).

Procedure²¹ (hereinafter, COCP) and the Code of Criminal Procedure²² (hereinafter, CCP). Therefore, no separate legal act is to be adopted. With respect to the type of liability, the Estonian Law of Obligations Act²³ (hereinafter, LOA) has to be taken into consideration first. According to this law, liability is fault-based. This means that to be liable the defendant must be at fault in a particular case, competition law infringements included. However, similarly to many of the aforementioned jurisdictions, fault of the defendant is presumed if the claimant proved the damage, the illegal action of the defendant and the causal link. As a result, the law does not require the plaintiff to prove the defendant's fault. Having said that, the presumption is rebuttable and the defendant can prove that he was in fact not at fault.

5. Hungary²⁴

Not surprisingly, private enforcement of competition law was theoretically possible in Hungary from the moment when the Hungarian Competition Act came into force; since then anticompetitive agreements and the abuse of a dominant position were prohibited. This possibility was based on Hungarian Private Law and the right for compensatory damages as a general right under that law. According to the Hungarian Civil Code 'Anyone causing damages to another person by infringement of law shall compensate therefor. They are exempted from liability if they prove that they behaved as it is generally expected in the given situation' (section 6:579 of the Civil Code). This section establishes the general rule of liability in non-contractual damages. Obviously, proving culpability is a crucial part of the litigation. However, in the case of Hungary, the burden of proof is not on the plaintiff, but on the party having caused the damage. The defendant has the possibility to prove that he or she has not failed to meet the standards of behaviour that would generally be expected in a given situation.

²¹ In Estonian: Tsiviilkohtumenetluse seadustik, passed on 20.04.2005, entry into force on 1.01.2006. English version available at: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/504072016003/consolide> (4.03.2017).

²² In Estonian: Kriminaalmenetluse seadustik, passed on 12.02.2003, entry into force on 1.07.2004. English version available at: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/531052016002/consolide> (4.03.2017).

²³ In Estonian: Võlaõigusseadus, passed on 26.09.2001, entry into force on 1.07.2002. English version available here: <https://www.riigiteataja.ee/en/eli/524012017002/consolide> (4.03.2017).

²⁴ This section is based on the Hungarian national report, Miskolczi Bodnár, 2017.

The current model of liability in competition-based damages cases is still governed by the Civil Code. As stated in Article 88/C (1) of the Hungarian Competition Act, the norms of the Hungarian Civil Code must be used. Those are the general rules of delictual damages based on fault. Fault is presumed and the defendant may rebut that presumption.

6. Latvia²⁵

In Latvia the rules applicable to competition-based damages claims are set forth in the Latvian Competition Law and Latvian Civil Procedure Law²⁶ (hereinafter, CPL). Therefore, the draft implementing the Damages Directive contains amendments to the Competition Law,²⁷ as well as amendments to the CPL²⁸ (hereinafter, Draft CPL and collectively referred to as the Amendments). The Amendments drafted by the Ministry of Economics were not, however, submitted to the Latvian Parliament.

With respect to the type of liability applicable to competition-based damages claims in Latvia, it is generally based on fault.

7. Lithuania²⁹

Lithuanian private enforcement of competition law has been governed by the Law on Competition of Lithuania ('Law on Competition'), the Civil Code of Lithuania ('Civil Code') and the Code of Civil Procedure of Lithuania ('Code of Civil Procedure'), even before the country joined the European Union in 2004.

The Law on Competition, adopted in 1999, has established a general right for injured persons to bring damages compensation claims before national courts. However, before Lithuania's entry into the European Union, this right was limited only to harm caused by competition law infringements. Furthermore, since 1 July 2001, the Civil Code established the principle of general delict (Article 6.263 of the Civil Code) including four cumulative elements of civil liability: (i) unlawfulness (infringement of competition law); (ii) damage; (iii) causal link between the infringement and the damage, and (iv) fault. The

²⁵ This part of the article refers to the Latvian national report, Jerneva and Druvieta, 2017.

²⁶ In Latvian: *Civilprocesa likums*.

²⁷ Draft law No. VSS-441, approved by the Meeting of State Secretaries on 8.09.2016.

²⁸ Draft law No. VSS-866, approved by the Meeting of State Secretaries on 8.09.2016.

²⁹ This section of the article is based on the Lithuanian national report, Mikelenas and Zasciurinskaite, 2017.

latter is presumed, but the presumption is rebuttable (Articles 6.246–6.248 of the Civil Code).

Following the Code of Civil Procedure applicable in competition-based damages cases, the burden of proof of civil liability for the infringement of competition law rests on the claimant, but as mentioned above, fault is presumed. It is also generally accepted that a claim is proved if there are no reasonable doubts as to whether the available evidence is substantial, relevant or admissible.

In the course of the implementation process a general decision was taken not to make any amendments to either the Civil Code or the Code of Civil Procedure. Instead, all the amendments and supplements, both substantive and procedural, were to be made only in the Law on Competition. The new Law came into force on 1 February 2017. It shall be regarded as *lex specialis* with respect to the Civil Code and the Code of Civil Procedure as well as to other laws.

With respect to the type of liability, fault as a cumulative element for the application of civil liability has been presumed under Article 6.248 (1) of the Civil Code. As a result, the claimant shall be relieved of both the duty to prove fault and the fact that he has suffered damages due to a cartel. However, this presumption concerns only cartel infringement. It is rebuttable and the defendant has a right to prove that no damages have in fact been caused because of the cartel. This shall not be applicable to damages suffered due to other restrictive agreements and the abuse of a dominant position.

8. Poland³⁰

In Poland, it was decided to implement the Damages Directive via a self-standing Act on Claims for Damages for Infringements of Competition Law as of 21 April 2017 (hereinafter, ‘the Act’). The new law came into force on 27 June 2017. It contains necessary amendments to the Polish Act on Competition and Consumers Protection, the Civil Code (hereinafter, ‘CC’) and the Code of Civil Proceedings (hereinafter, ‘CCP’) respectively, in particular those required by the Damages Directive.

With respect to the type of liability in competition-based damages claims, tort-based liability has not been questioned, even before the Damages Directive was adopted. These claims belong in the Polish legal system to tort liability based on fault. For this reason, Article 415 of the Civil Code was

³⁰ This chapter refers mainly to the Polish national report, Piszcz and Wolski, 2017.

indicated as the main legal ground of private enforcement of competition law in Poland. In order to disperse any doubts, in particular in relation to claims of indirect purchaser, but also to create liability based on a presumption of fault, the Polish lawmakers decided to create a separate basis of liability addressed directly to the aforementioned claims. Article 415 of the Civil Code, laying down the main principle of tort-based liability, stipulates that ‘the person who has inflicted damage to another person by her/his own fault shall be obliged to redress it’. This wording creates ambiguity with respect to claims being brought by indirect purchasers. This is because Polish doctrine is rather firm on the fact that bringing a damages claim by an indirectly injured party is not allowed based on Article 415 of the Civil Code. This could mean, in turn, that bringing a competition-based damages claim by indirect purchaser would not be possible, contrary to Article 14 of the Damages Directive. As a result, Article 3 of the Act stipulates clearly that the infringer is obliged to redress damage caused by the infringement of competition law to anybody, unless he is not at fault. This directly expresses the liability of the infringer to any person who suffered damages resulting from the infringement of competition law. As a consequence, the relevant rules of the Damages Directive have been properly transposed. The principle of liability, namely fault, remains unchanged.

Article 3 of the Act includes a presumption of fault which does not exist under Article 415 of the Civil Code. As a result, according to the Act, the infringer shall bear the burden of proof that her/his fault did not exist in a particular case. This is another difference worth noting when comparing tort-based liability arising from Article 415 of the Civil Code and that created in Article 3 of the Act applicable to private enforcement of competition law.

Article 7 of the Act contains a presumption of damage caused by an infringement of competition law which goes further than that stipulated in Article 17(2) of the Damages Directive. According to the aforementioned provision of the Act, it is presumed that any types of infringements of competition law causes damage; according to the relevant provision of the Damages Directive this presumption concerns only cartels. As stated in the reasoning of draft Explanatory Notes accompanying the Act, the Damages Directive does not oppose the solution employed in Poland. Additionally, according to the aforementioned draft Explanatory Notes, there is a need to help injured parties (to bring competition-based damages claims) with relation to the premises of liability of the infringer in the case of other, than cartels, infringements of competition law too. It is worth mentioning that both of the aforementioned presumptions are rebuttable according to Article 234 CCP.

9. Romania³¹

The first Romanian competition law (Law 21/1996) included a specific provision underlining the right of victims of competition law infringements to obtain compensation for the damages they incurred. As stated in the Law 21/1996, 'Apart from the sanctions applied in accordance with this law, the right of the physical and legal persons to obtain full compensation for the damages produced through an anticompetitive act prohibited by this law remains reserved'. This principle was supplemented in 2010 and 2011 with several specific provisions, meant to create a specific framework for the private enforcement of competition rules.

The rules implementing the Damages Directive were adopted through a Government Ordinance. This includes provisions with respect to the quantification of the damage, presumption that anticompetitive agreements and concerted practices cause damage and the possibility of the Romanian Competition Council to assist the court in such matters as *amicus curiae*. As a result, liability in competition-based damages claims is based on fault and the rebuttable presumption that an infringement of competition rules caused damage.

10. Slovakia³²

Slovak lawmakers decided to transpose the Damages Directive into the text of a brand new act dealing with private enforcement, namely Act No. 350/2016 Coll. on Some of the Rules of Enforcement of Claims for Damages Arising from Violation of the Law of Economic Competition and Amending and Changing Act No. 136/2001 Coll. on Protection of Economic Competition and Amending Act of the Slovak National Council No. 347/1990 Coll. on Organization of Ministries and Other Central Bodies of State Administration of the Slovak Republic as Amended as Amended (hereafter, 'the Act 350/2016').

According to § 21 of the Act 350/2016, other rules for competition damages claims are to be referred to the Commercial Code³³ and to Civil Disputes Code (*Civilný sporový poriadok*).³⁴ However, any provisions of the Commercial Code and the Civil Disputes Code that are contrary to Act 350/2016 are not applicable in the case of competition law enforcement.

³¹ This part is mainly based on the Romanian national report, Mircea, 2017.

³² This part of the article refers to the Slovak national report, Blažo, 2017.

³³ Act No. 513/1991 Coll. Commercial Code as amended.

³⁴ Act No. 160/2015 Coll.

Notwithstanding the above, in Slovakia damages resulting from competition law infringements are covered by the rules of the Commercial Code since the Act 350/2016 is a *lex specialis* regulation in relation to the Commercial Code. Liability for damages under the Commercial Code is based on principles of strict liability. The transposition of the Damages Directive does not change substantial civil or commercial law.

11. Slovenia³⁵

In Slovenia, the Damages Directive is to be implemented via the law amending the existent Prevention of Restriction of Competition Act (Sl. *Zakon o preprečevanju omejevanja konkurence, ZPOmK-1*) of 2008.³⁶ This will be the eighth amendment to ZPOmK-1 (for a historical background of Slovenian competition law and the substance of the amendments to ZPOmK-1 see Fatur, Podobnik and Vlahek, 2016, p. 27–32) and it will take the form of a new Act Amending and Supplementing the Prevention of Restriction of Competition Act (Sl. *Zakon o spremembah in dopolnitvah Zakona o preprečevanju omejevanja konkurence (ZPOmK-1G)*). An important element of the amending act is the new Part VI entitled ‘Certain rules of private enforcement of breaches of competition law’ encompassing Articles 62 and 62a–62o. The latter paragraphs are inserted into ZPOmK-1 replacing the existent Part VI titled ‘Court Proceedings’ and its Article 62.

Apart from the specific regime governing damages claims set out in ZPOmK-1, more fundamental substantive and procedural rules (that is, the Code of Obligations (Sl. *Obligacijski zakonik (OZ)*)³⁷ and the Civil Procedure Act (Sl. *Zakon o pravdnem postopku (ZPP)*)³⁸ are relevant in competition damages claims. General provisions of the OZ and the ZPP apply to all those issues of antitrust damages actions which are not covered by EU law and/or by Article 62 of ZPOmK-1.

With respect to the type of liability, according to general rules of Slovenian law of obligations (Article 131(1) of OZ), fault of the defendant is presumed. As a consequence, in order to escape liability, the defendant must prove that the damage would have existed even without his/her fault (he/she was not

³⁵ This chapter is mainly based on the Slovenian national report, Vlahek and Podobnik, 2017.

³⁶ Official Gazette RS, Nos. 36/08, 40/09, 26/11, 87/11, 57/12, 39/13 (Constitutional Court’s decision), 63/13, 33/14 and 76/15. ZPOmK-1 entered into force on 26.04.2008.

³⁷ Official Gazette RS, No. 83/01, with further amendments.

³⁸ Official Gazette RS, No. 26/99, with further amendments. For further details as to the act, see Galič, 2014.

at fault). As regards the defendant's fault, case-law sometimes limits it to negligence only. The aforementioned rule applies to competition damages claims too, according to the renewed Article 62(1) of ZPOmK-1. However it is worth noting that the same rule existed prior to the implementation of the Damages Directive and prior to the insertion of Article 62 into the ZPOmK-1 of 2008.

IV. Conclusions

As mentioned in the previous parts of this paper, recital No. 11 of the Damages Directive stipulates that where Member States provide conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and the Damages Directive. This means, in turn, that Member States are not expressly obliged under the Damages Directive to significantly change their existing model of liability, even if it is based on fault. However, there are many arguments, based on both European Commission documents and jurisprudence, which suggest that it is really difficult to prove that the infringer was not at fault in competition-based claims. This particularly regards cartel cases.

Having in mind the types of liability applicable in CEE Member States, as outlined in the relevant national reports, we can come to the conclusion that the implementation process did not affect significantly pre-existing models. Member States usually kept their existent type of liability, adjusting them somewhat, in particular according to the requirements of the Damages Directive. These adjustments usually concerned presumptions, such as the presumed harm resulting from a cartel infringement.

As a result, the vast majority of the CEE States covered by the aforementioned national reports opted for a fault-based model of liability, but some of them decided to apply a presumption of fault. Two countries stand out from the overall group, namely Croatia and Slovakia, which applied strict liability to competition-based damages cases. The Bulgarian example is quite interesting too. Theoretically, it is based on fault, but arguments exist which suggest that the Bulgarian model is an example of strict liability.

As the final conclusion, it is worth remembering that the type of liability, the principle of liability included, does not seem to be crucial for the effectiveness of private enforcement of competition law. In particular in cases like cartels, abuse of a dominant position or other types of hard-core restrictions, it is very

difficult for the infringer to prove that such violations have not been committed intentionally. As a result, it seems that the specific type of liability adopted by a particular Member State as part of the Damages Directive implementation process – fault-based or strict – will not significantly affect the final result of the implementation.

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³⁹ As stated in footnote No. 2, other references to bibliography are included in the relevant national reports. See Piszcz, 2017.

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