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# PROVING ANTITRUST DAMAGES IN CIVIL PROCEEDINGS**
## – The Compatibility of Serbian Law with Directive 2014/104 –

***Summary***

Private competition law enforcement has been a recent phenomenon in the European Union. In the past, the EU law and member states' national laws lacked elements that contributed to the preponderance of private enforcement in the United States, such as treble and punitive damages, the procedural right of a damaged party to request discovery of evidence, collective actions, etc. The interest in private enforcement of competition law has gradually increased after Regulation 1/2003 authorised national courts to implement Articles 101 and 102 TFEU, the EU courts established private enforcement principles, and Directive 2014/104 (Antitrust Damages Directive - ADD) laid down rules to facilitate proving competition law violations and damage resulting from them. The US model evidently inspired the EU legislator. At the same time, ADD attempted to balance the private interests of injured parties and the public interest for effective public enforcement. Specific ADD provisions instigated a public debate concerning their reach and alleged confrontation with general legal principles. Even though member states have taken comprehensive measures to implement ADD, national courts need to search for an equilibrium between private and public interests. Therefore, the full effect of Directive 2014/104 is yet to be seen.

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Private enforcement of competition law in Serbia is still in its initiation phase. The Serbian Competition Protection Act 2009 proclaimed the right of damaged persons to bring actions for damages, even though this right has already existed under the general rules of civil law. The Competition Protection Act failed to stipulate material conditions and procedural rules that would facilitate private enforcement. The Serbian legislator has not yet taken steps to transpose ADD into national law.

This paper first analyses the development and principal features of the US and EU private enforcement models. After that it focuses on the ADD provisions expediting evidence collection and damage assessment. The second part of the paper analyses Serbian tort and civil procedure rules relevant to bringing actions for antitrust damages and case law on antitrust damages. The author concludes with proposals for Serbian legislators to harmonise national law with ADD.

**Keywords:** Directive 2014/104, antitrust damages, discovery of evidence, quantification of harm, private enforcement of competition law.

## DOKAZIVANJE ŠTETE OD POVREDA KONKURENCIJE U GRAĐANSKOM POSTUPKU
## – Usklađenost prava Srbije sa Direktivom 2014/104 –

### *Sažetak*

Privatnopravno sprovođenje prava konkurencije je skorašnja pojava u Evropskoj uniji. Dugo vremena pravo EU i nacionalna zakonodavstva država članica nisu imali na raspolaganju institute koji su doprineli jačanju privatnopravne zaštite u Sjedinjenim Američkim Državama, kao što su trostruka naknada štete ili kaznena odšteta, procesno pravo oštećene strane da zahteva otkrivanje dokaza, kolektivna tužba i dr. Interes za privatnopravno sporovođenje prava konkurencije postepeno je porastao nakon što je Uredba 1/2003 ovlastila nacionalne sudove da primenjuju članove 101 i 102 Ugovora o funkcionisanju EU, nakon što su sudovi EU utvrdili principe privatnopravne zaštite, a Direktiva 2014/104 (Direktiva o antitrustovskim štetama) propisala pravila kojima se olakšava dokazivanje povreda prava konkurencije i štete proistekle iz njih. Model Sjedinjenih Američkih Država je

evidentno inspirisao zakonodavca EU. U isto vreme, Direktiva je pokušala da izbalansira privatni interes oštećenih strana i javni interes za delotvorno sprovođenje prava konkurencije. Pojedine odredbe Direktive izazvale su javnu debatu u pogledu njihovog domašaja i navodne suprotstavljenosti opštim pravnim principima. Iako su države članice preduzele sveobuhvatne mere za primenu Direktive, nacionalni sudovi još uvek treba da iznađu balans između privatnih i javnih interesa. Zbog toga, pun efekat Direktive 2014/104 tek treba da se oceni.

Privatnopravno sprovođenje prava konkurencije u Srbiji je još uvek u početnoj fazi. Srpski Zakon o zaštiti konkurencije iz 2009. ustanovio je pravo oštećenih lica da podnesu tužbe za naknadu štete, iako je to pravo već postojalo po opštim pravilima građanskog prava. Zakon je propustio da propiše materijalne uslove i proceduralna pravila koji bi olakšali privatnopravno sprovođenje prava konkurencije. Srpski zakonodavac još uvek nije preduzeo korake da transponuje Direktivu 2014/104 u nacionalno zakonodavstvo.

U ovom članku analiziraju se razvoj i ključne odlike modela privatnopravnog sprovođenja prava konkurencije u SAD i EU. Rad se zatim fokusira na odredbe Direktive 2014/104 koje olakšavaju prikupljanje dokaza i utvrđivanje štete. Drugi deo rada analizira pravila srpskog odštetnog prava i građanskog procesnog prava koja su relevantna za podnošenje tužbi za naknadu antitrustovskih šteta, kao i sudsku praksu u ovoj oblasti. Autorka zaključuje dajući predloge zakonodavcu Srbije za harmonizaciju nacionalnog zakonodavstva sa Direktivom 2014/104.

**Ključne reči**: Direktiva 2014/104, antitrustovske štete, otkrivanje dokaza, kvantifikacija štete, privatnopravno sprovođenje prava konkurencije.

## 1. Introduction

Persons injured by competition law violations are entitled to request compensation for damages from competition law infringers. An injured party can bring an action for damages before civil courts and ask the court to determine ancillary civil sanctions. For a long time, private enforcement has been neglected in the EU and its member states. The European Commission – EC and national competition authorities of member states pursued public enforcement to protect

the public interest in maintaining and strengthening competition in the EU internal market. The interest in private enforcement has gradually increased after adopting Regulation 1/2003, authorising national courts to enforce competition law, and enacting Directive 2014/104 (Antitrust Damages Directive – ADD). The ADD aims to remove obstacles to private enforcement by harmonising national civil procedure rules. ADD rules facilitate proving the competition violation, the causal link between the violation and the damage, and the damage assessment.

The Serbian legislator has not transposed the ADD rules into national law yet. Therefore, general rules of tort and civil procedure law apply to actions for antitrust damages. This paper first analyses the role and significance of private competition law enforcement by comparing the US and EU models. After that it presents the development of private enforcement in the EU and analyses the ADD provisions facilitating the collection of evidence and assessment of damage in antitrust damages actions. In the last part of the paper, we analyse Serbian tort and civil procedure law and case law concerning actions for antitrust damages. We conclude by proposing measures to harmonise Serbian law with the ADD.

## 2. Public and Private Enforcement of Competition Law

Competition law has been traditionally enforced along two enforcement lines – public and private. Public enforcement encompasses investigating and sanctioning competition restrictions by public authorities, whether administrative bodies or criminal prosecutors and courts. Victims of anti-competitive behaviour of economic operators carry out private enforcement. Competitors, customers and consumers can bring charges before civil courts asking for compensation for damages and other civil remedies available under the relevant national law. The preponderance of public or private enforcement in various national jurisdictions resulted from the historical development of competition law, specific features of a national legal system and other factors.

For example, in the United States, the cradle of antitrust law, both public and private enforcement methods have developed almost simultaneously since the enactment of the Sherman Act in 1890. The Sherman Act defined acts in restraints of trade as criminal acts. The Clayton Act of 1914 authorised the Antitrust Division of the Department of Justice and the Federal Trade Commission to investigate and prosecute alleged violations of federal antitrust laws. At the same time, the Clayton Act allowed private parties to bring about charges seeking compensation for damages resulting from violations of antitrust laws. It is worth mentioning that this possibility existed even before the enactment of the Sherman Act

under common law principles. Several features of the US system have encouraged private enforcement of antitrust law. Firstly, the Sherman Act originally laid down the authority of a court to triple the actual amount of harm caused by antitrust law violations (treble damages). Secondly, under procedural laws of US states, courts are entitled to increase compensation for damage to sanction a violator and deter any future violations (punitive damages) (Gerber, 2007, p. 427). Thirdly, US procedural law allows parties in the pre-trial phase to request information and documents from another party, sometimes even from third parties. This procedural right increases the chances for a plaintiff to prove the causal link between the anti-competitive act and the damage (Chapman, 1978). Finally, the availability of class actions representing numerous plaintiffs in civil disputes has contributed to the increased popularity of antitrust damages charges. From 2005 to 2020, US consumers were afforded over 32 billion USD in compensatory relief through settlements (Bartholomew, 2022, p. 1335).

In Europe, public enforcement of competition law prevailed between the two world wars and after WWII. Administrative authorities were traditionally entrusted with applying competition law in most European countries that broadly followed the German and the EU model (Marković-Bajalović, 2022). Council Regulation 17/62 authorised the European Commission with powers to investigate and sanction violations of Arts. 85 and 86 of the EEC Treaty.

The mainstream legal theory emphasises differences between public and private competition law enforcement. The principal goal of public enforcement is to deter economic operators from breaching competition law (Hüschelrat & Peyer, 2013, p. 3). By imposing high fines on competition law infringers, competition authorities impound illegal profits from companies involved in anti-competitive practices. High fines deter other economic operators from applying similar practices. Private enforcement aims principally to compensate damages caused by anti-competitive actions. These damages can consist of higher (monopoly) prices that clients and consumers must pay for products sold in markets where competition is restricted. Competitors can suffer damage in the form of lost profit after being expelled from the market by the anti-competitive practices of their rivals. In short, while public enforcement protects the public interest – the need to maintain effective competition in the market, private enforcement remedies the harm induced to private persons.

Private enforcement can also assist in realising the public interest. The higher the probability of imposing the obligation to compensate damages upon competition law infringers, the greater the deterrent effect. The US example confirms this finding. Treble damages are possible under federal laws and the laws of most US states, while punitive damages are available in all but five US states (Nagy, 2022,

p. 224). Gerber explains that the private plaintiff in the US system plays a role of a "private attorney-general": "She is cast as a surrogate for the government." (2007, p. 437). The possibilities of strategic litigation, anti-competitive rival suits and free-riding on the administrative authorities' enforcement results represent the principal deficiencies of private enforcement. It is unclear, however, whether private enforcement leads to over-enforcement or under-enforcement of competition law (Hüschelrat & Peyer, pp. 8-9). Regardless of the success of private antitrust litigation measured in the millions of dollars of damages awarded, a closer look reveals that the effectiveness of private enforcement can be decreased by introducing new procedural rules less favourable to the plaintiffs (Bartholomew, pp. 1342-3). Despite these hurdles, private enforcement has prevailed in the US in recent years. While private actions accounted for only 5% before 1950, they now represent 95% of antitrust cases (Wish & Bailey, 2023, p. 6).

## 3. Development of Private Enforcement in the European Union

The EU competition law enforcement system, established by Regulation 17/62, effectively limited private enforcement. Arts. 85 and 86 of the EEC Treaty (Arts. 101 and 102 of the Treaty on the Functioning of the EU – TFEU) did not foresee the possibility of civil actions for damages caused by a breach of competition rules. This issue was left to the member states' national laws, which differed very much regarding the scope and effectiveness of civil protection. In some member states, like Germany, the issue was controversial regarding availability and personal reach (Ullrich, 2021, p. 608). In Spain, commercial disputes involving damages for anti-competitive behaviour mostly concerned vertical agreements and abuse of dominance (Marcos, 2018, p. 3).

Under Regulation 17/62, the Commission had the power to individually exempt agreements from the general prohibition set out in Art. 85(1) of the EEC Treaty. Thus, civil actions were possible concerning agreements not being notified to the Commission for an exemption or the Commission issuing a negative decision regarding a notified agreement. Harmed persons could sue for damages only if the Commission's administrative decision confirmed a competition rules violation or the violation was manifest and easy to prove.

The Court of Justice of the EU – CJEU fostered private enforcement of EU competition law in the case C-453/99 *Courage*. The case concerned the nullity of a lease agreement containing a clause obligating the tenant to exclusively buy a specified quantity of beer from the landlord during the validity of the lease agreement. The landlord sued for damages since the tenant did not fulfil this

obligation. The defendant advanced the nullity of the agreement argument by advocating that the exclusivity clause violated EU competition rules. The issue arose as to whether a party to an illegal agreement may seek protection from civil actions by invoking the prohibition of the agreement under competition law. The UK court referred the case to the CJEU, asking for a preliminary ruling. The CJEU answered positively to this question, stressing that any individual can rely on a breach of the Treaty rules on competition, even where he is a party to a contract liable to restrict or distort competition within the meaning of that provision (para. 24). The CJEU went on to say in paras. 26-27:

"The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community."

The CJEU also dealt with the issue of indirect damages in the context of a competition law violation. In the *Kone* case, C-557/12, the CJEU answered whether a damaged party could ask for compensation for damages consisting of higher prices it had to pay for goods, even though it did not buy them directly from a member of a prohibited cartel but from a seller who benefited from higher prices imposed by cartel members on the same market (so-called 'umbrella effect'). The CJEU stressed in para. 33 of the decision that "the full effectiveness of Art. 101 TFEU would be put at risk if the right of any individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto, whose pricing policy, however, is a result of the cartel that contributed to the distortion of price formation mechanisms governing competitive markets."

Council Regulation 1/2003 opened the door for private enforcement of EU competition rules in two ways. Firstly, it authorised in Art. 6 national courts of the member states to apply Arts. 81 and 82 of the EC Treaty (TFEU Arts. 101 and 102). Secondly, it eliminated the parties' obligation to notify an agreement to the EC to obtain an exemption under Art. 81(3) of the Treaty (Art. 101(3) TFEU). It left the parties to assess whether their agreement falls under Art. 81(1) prohibition. Concerning private enforcement, it meant that parties to the agreement and

third parties needed not to wait any more for the EC to decide whether the agreement contravened Art. 81(1). Parties could sue directly in court, asking the court to nullify the agreement, while third parties could sue for damages resulting from the execution of the prohibited agreement.

Regulation 1/2003 did not lay down detailed rules for enforcing competition rules in national courts. It remained the subject of the national law of member states. Besides, it was unclear whether Arts. 81 and 82 of the EC Treaty (101 and 102 TFEU) provided a legal basis for the compensation of damages claim. The CJEU acknowledged that Treaty articles are directly applicable. However, it has never explicitly said that an individual could base his claim for damages upon them (Hauser & Otto, 2021, p. 148). The CJEU committed to establishing substantive law principles to ensure the uniform application of EU competition law before national courts. For example, in the case C-724/17, *Vantaan v. Skanska*, the CJEU stated that the concept of undertaking also applies when determining persons liable for damages caused by infringing competition laws. This means that a company group can be found responsible for damage resulting from a violation of competition law of one of its members.

On the procedural side, EU law has established two general requirements, also observed in civil proceedings related to actions for antitrust damages: the principles of equivalence and effectiveness. Regarding the equivalence principle, national rules governing competition law enforcement in civil proceedings must not be less favourable than other rules related to similar domestic actions. The second principle concerns access to justice for victims of competition infringements. National rules should not make enforcement of EU competition law practically impossible or effectively difficult (Nagy, 2022, p. 226). These principles also extend to national substantive rules, such as rules regarding proving a causal link between a competition infringement and damage.

## 4. Directive on Antitrust Damages

In 2014, the European Parliament and the Council adopted the Antitrust Damages Directive – ADD to lay down rules ensuring the effective and consistent application of Arts. 101 and 102 TFEU through private enforcement. Every person who has suffered harm from an infringement of competition law can effectively exercise the right to claim compensation. The ADD Art. 3 guarantees injured persons full reimbursement, including repayment of actual loss and loss of profit, plus interest payment. At the same time, the ADD prohibits overcompensation in the form of punitive, multiple and other types of damages.

### *4.1. Disclosure of Evidence*

Most of the ADD is devoted to solving procedural issues identified as the main obstacles to effective private enforcement. As already noted, harmed persons wishing to bring charges for recovery of damages face the problem of proving a causal link between an unlawful action of a competition law infringer and the damage caused. Most evidence is in the infringer's or third party's possession. It is often difficult, if not impossible, for the injured party to obtain this evidence by relying upon the member states' general rules of civil procedure. To solve this problem, the ADD has laid down rules on the disclosure of evidence. Art. 5(1) provides that national laws of member states must stipulate measures providing for the right of a claimant to request from a court to order the defendant or a third party to disclose relevant evidence in their possession, provided that the claimant has presented the court with a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages. Even though many member states already had rules on the disclosure of evidence, the ADD has widened their scope. For example, courts in Spain are now authorised to allow requests to discover evidence in the pre-trial phase (Marcos, 2018, p. 28). Germany and Portugal also opened the possibility of asking for evidence in a pre-trial stage. This possibility has already existed in Ireland, England, and Wales (Rodger *et al*., 2019, p. 488). However, this is not the case in Lithuania, where access to evidence in pre-trial situations is impossible (Malinauskaite & Cauffman, 2018, p. 501). Besides, while member states' national laws normally enable a party to ask for a specific evidence item, the ADD in Art. 5(2) authorises parties to request 'categories of evidence'.

Several principles, such as equivalence, effectiveness, and proportionality, frame the parties' right to ask for the discovery of evidence. In the *Pfleiderer* case, C/360/09, the CJEU referred to the principles of equivalence and effectiveness when instructing the German court on balancing the rights of the parties and the public interest. In the para. 31 of the decision, the CJEU stated that national courts should conduct a "weighing exercise" case-by-case basis, according to national law and considering all relevant factors in the specific case. The ADD went further by specifying in Art. 5(3) elements that national courts need to consider when deciding to allow the disclosure of evidence:

a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;
b) 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;

c) whether the evidence the disclosure of which is requested contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.

The proportionality principle becomes relevant when a national court decides upon a request to disclose evidence containing confidential information. On the eve of the ADD adoption, the issue arose before the EU courts concerning balancing between the right of a harmed person to obtain evidence needed to support its damage claim and the protection of the public interest in cartel cases. The confidentiality of leniency applicants' statements is pivotal to safeguarding cartel participants who notify a competition authority about the existence of a cartel and ensuring the effectiveness of cartel investigations. The General Court highlighted this concern in the *AXA Versicherung* case, T/677/13:

> "Leniency programmes are useful tools to uncover and bring an end to infringements of the competition rules, thereby contributing to the effective application of Articles 101 and 102 TFEU. Furthermore, the effectiveness of these programmes could be compromised if documents relating to leniency proceedings were disclosed to persons wishing to bring an action for damages. The view can reasonably be taken that the prospect of such disclosure would deter persons involved in an infringement of the competition rules from having recourse to such programmes."

The General Court established in the *Pilkington* case, T-462/12, para. 87, that a potential disclosure of information should not go beyond what is necessary to protect the interests of the persons concerned. In the *Donau Chemie* case, C/536/2011, the CJEU ruled that national courts can disclose even documents related to the leniency application, and they may not systematically reject access to these documents. The CJEU stated in paras. 46 and 48:

> "Given the importance of actions for damages brought before national courts in ensuring the maintenance of effective competition in the European Union, the argument that there is a risk that access to evidence contained in a file in competition proceedings which is necessary as a basis for those actions may undermine the effectiveness of a leniency programme in which those documents were disclosed to the competent competition authority cannot justify a refusal to grant access to that evidence."
>
> "It is only if there is a risk that a given document may actually undermine the public interest relating to the effectiveness of the national leniency programme that non-disclosure of that document may be justified."

The ADD laid down in Art. 5(4) a general rule that national courts should have a right to order the discovery of confidential information. At the same time, they must dispose of effective measures to protect such information. Based on Art. 5(7), a national court must provide parties from whom the disclosure of the information is sought with an opportunity to be heard before it orders disclosure.

The right to request the disclosure of evidence also extends to evidence kept by a competition authority. However, the ADD departed from CJEU case law by introducing several limitations on the right to request a competition authority to disclose confidential information.

Firstly, a court may order the disclosure of several categories of evidence (so-called 'grey list') only after the competition authority has closed its proceedings to not jeopardise an investigation:

- information prepared by a natural or legal person specifically for the proceedings of a competition authority;
- information that the competition authority has drawn up and sent to the parties in the course of its proceedings;
- and settlement submissions that parties have withdrawn.

Secondly, the ADD prohibits in Art. 6(5)(6) disclosing leniency statements and settlement submissions ('black list'). Some member states, like Belgium, even expanded the ban on disclosing leniency statements by prohibiting access to all documents and information submitted by a leniency applicant rather than just leniency statements (Malinauskaite & Cauffman, 2018, p. 504). The courts are entitled to protect injured parties from defendants possibly abusing this limitation. Based on Art. 6(7) ADD and upon a reasoned request of a claimant, the national court will examine whether the content of evidence exempted from disclosure complies with the notions of leniency statements and settlement submission as defined in Art. 2 of the ADD. The courts may ask competition authorities to assist in making this examination.

Thirdly, in line with Art. 6(11) ADD, national competition authorities should be able to submit their observations, upon their initiative, to a national court to assess the proportionality of disclosure of evidence included in the authorities' files in light of the impact such disclosure would have on the effectiveness of the public enforcement of competition law. Member states need to set up a system whereby a competition authority is informed of requests for disclosure of evidence when one of the parties in the court's proceedings is involved in that competition authority investigation. Most member states have created mechanisms by which courts will notify the national competition authority or the EC of a

request to access documents included in its files and invite it to submit comments (Rodger *et al.*, 2019, pp. 490-491). By giving competition authorities the right to submit observations, the ADD aims to ensure the balance between the effectiveness of public enforcement and protecting the private interests of damaged parties. It is reasonable to assume that competition authorities will tend to preserve the effectiveness of public enforcement, and the courts will be inclined to respect their opinion to the detriment of private enforcement (Chirita, 2017, p. 156). For example, the EC *de facto* derogated the ADD provision, allowing the discovery of withdrawn settlement submission by its Notice on the conduct of settlement procedures. Recital 35 of the Notice says that the EC will grant access to settlement submissions only to parties to whom it addressed a statement of objections which have not requested settlement. The EC will not grant other parties, such as complainants, access to settlement submissions. The Notice remained in force after the ADD adoption despite conflicting provisions.

The ADD gave the green light to competition authorities to rely almost exclusively upon a leniency regime and settlements to detect and sanction cartels and other serious competition infringements (Chirita, 2017, p. 169; Migani, 2014, p. 104). It is worth remembering that, before the enactement of the ADD, the General Court blocked the EC's opportunistic rejection of access to files to persons seeking compensation for damage resulting from competition infringement in its judgment in *Hydrogene Peroxide v. Commission*, T-437/08, based on the following arguments: 1) the interest of a company which took part in a cartel in avoiding actions for damages cannot be regarded as a commercial interest and, in any event, does not constitute an interest deserving protection (para. 49); 2) the refusal of disclosure of any document likely to undermine the EC's cartel policy because of the fear of applicants of being the prime targets of actions for damages is not acceptable, since it would amount to permit the EC to avoid the application of the Transparency Regulation (Regulation 1049/2001), without any limit in time, to any document in a competition case merely by reference to a possible adverse impact on its leniency programme (paras. 60-70); 3) nothing in the Transparency Regulation leads to the supposition that EU competition policy should enjoy, in the application of that regulation, treatment different from other EU policies (para. 72); 4) leniency and co-operation programmes are not the only means of ensuring compliance with EU competition law since actions for damages can make a significant contribution to the maintenance of effective competition in the EU (para. 77).

The courts may order the release of the parts of the evidence which do not fall under exemptions specified in Art. 6 of the ADD. This power aims to protect the interests of a damaged person. Whenever a document or another piece of

evidence contains information prohibited from disclosure and other information, the court will consider the possibility of disclosing parts of the document revealing non-confidential information.

Finally, where a claimant has obtained evidence solely through access to the file of a competition authority, this evidence shall be deemed inadmissible in actions for damages. Again, the ADD distinguishes categories of evidence concerning their admissibility in courts. Under no circumstances can courts admit as evidence leniency statements and settlement submissions obtained by parties who had access to the file of a competition authority (Art. 7 para. 1). Evidence categories from the 'grey list' are inadmissible in courts until the relevant competition authority has closed a proceeding by adopting a decision or otherwise (Art. 7 para. 2). Other evidence obtained through access to files can be used in courts only by persons who executed the right to access file and their successors (Art. 7 para. 3).

The effectiveness of the right to request disclosure of evidence is guaranteed by the court's power to impose penalties upon a party or a third person not complying with the court's order (Art. 8).

### *4.2. Effect of a Decision Determining Competition Infringement on Civil Proceedings*

Based on ADD Art. 9(1), a final decision of a competition authority or a reviewing court establishing a competition law infringement constitutes irrefutable proof in proceedings concerning actions for damages. A claimant can present a final decision of a competition authority of another member state determining competition infringement before a national court as at least *prima facie* evidence that an infringement of competition law has occurred (Art. 9 para. 2).

Art.16 of Regulation 1/2003 already made the EC's decisions binding on national courts and national competition authorities to ensure consistent application of the EU competition law by national authorities. Building upon Regulation 1/2003, the ADD interferes with the validity of national administrative authorities' decisions before national courts by obliging courts to accept final administrative decisions as irrefuttable proof of a competition violation. ADD commentators observed that this rule was not in line with the constitutional principles of separation of powers and independence of judges in force in many member states (Rodger *et al*., 2019, p. 495).

Despite these concerns, many member states copy-pasted ADD Art. 9(1) into national law. For example, the Croatian Law on Proceedings for Compensation of Damages from Competition Law Infringements from 2017 established in Art. 11 that a final decision of the Competition Protection Agency determining a

competition law infringement or a decision of the High Administrative Court of Croatia confirming the Agency's decision constitutes an irrefutable proof to bring actions for damages. Even before the ADD transposition into Croatian law, Croatian courts considered the decisions of the Competition Protection Agency as *de facto* binding (Pecotić-Kaufman, 2012, p. 32).

Italian Law No. 114 of 9 July 2015 (*Legge Delega*) authorised the Government to implement the ADD. The Government adopted a Legislative Decree in 2017. The Decree stipulated that an Italian Competition Authority's final and conclusive decision and a judgment issued by administrative courts reviewing the competition authority decision shall have a binding effect before national courts. The conclusive effect is limited to the factual analysis of a competition law infringement (Caiazzo, 2016, p. 111). The Decree extended the powers of administrative courts concerning the scope of judicial review of decisions of the competition authority. The courts are now authorised to verify the facts and technical analysis fully. This novelty is important since Italian administrative law had traditionally restricted administrative courts' powers to a legality review of an administrative decision. The ECHR, in the case *A. Menarini Diagnostics S.r.l. v. Italy*, No. 43509/08, 27 September 2011, remarked on the limited scope of judicial review of administrative decisions in Italy. The Italian Cassation Court took the stance in the *Acea-Suez* decision No 2013/2014 that the administrative court must verify facts and relevant technical profiles upon which a decision of the competition authority is based. However, when such technical profiles involve discretional evaluations – for example, the definition of the relevant market – such review should be limited to verify if the decision taken by the authority is reasonable, rational and congruent and if the authority has not exceeded the discretional limits. Under the new legal framework established by ADD, it has become impossible to follow the old model of limited judicial review in administrative disputes, considering that a final decision of the administrative court serves as irrefutable evidence concerning the existence of competition infringements before civil courts. At the same time, the defendant's procedural rights in civil proceedings are not restricted since the defendant could already present exculpatory evidence in proceedings before the competition authority and administrative court.

The ADD is silent as to whether the binding effect of a final administrative decision determining competition law infringement extends to the issue of the infringer's guilt. In many national jurisdictions, infringer's *culpa* is the essential element of liability for damage, except for cases of strict liability. In line with the CJEU judgment in *Hoffmann-LaRoche v. Commission*, case 85/76, an infringement of EU competition law is an objective concept. It is not necessary to prove fault to constitute responsibility for competition violations. However, the EC will

consider guilt among aggravating factors when determining a fine amount based on Guidelines on the method of setting fines, para. 28. It remains unclear whether a claimant in damages proceedings can invoke a competition authority decision as proof of an infringer's guilt (Bukovac Puvača, 2021, p. 16). Spanish professor Marcos states that "the binding effect of the competition authority's prior decision extends to all the features of the declared findings and resolutions related to the infringement included therein: facts, infringing parties, proof of their behaviour and assessment of the prohibition infringed" (2018, p. 20). Indeed, this opinion is consistent with the ADD preamble explanation concerning the scope of the binding effect of decisions of competition authorities and reviewing courts (Recital 34).

*Ratio legis* of the norm constituting the binding effect of a decision determining competition law infringements is legal certainty, consistent application of EU competition law and effectiveness and procedural efficiency of damages actions. However, this does not mean that a damages court is prevented from determining additional facts not included in a decision concerning competition law infringement. Besides, a damaged person must prove a causal link between a competition infringement and damage suffered.

### *4.3. Causal link*

The ADD devoted several articles to the issue of indirect damages. Under Art. 12, anyone who has suffered harm can claim compensation, irrespective of whether he is an infringer's direct or indirect purchaser. When an indirect purchaser claims compensation for damage, he bears the burden of proof that a price overcharge was passed on to him and the scope of such passing on (ADD Art. 14 para. 1). The price overcharge represents the difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law (ADD Art. 2 recital 20).

The rule constituting an obligation for a damaged party to prove the causal link is generally in line with member states' national laws. National courts of member states developed case law recognising the right to claim damages to an indirect purchaser. For example, the German Supreme Court held in KZR 75/10 (FRG) No. 46, 28 June 2011, that indirect purchasers should be able to bring damage claims against cartel members. Each cartel member is jointly and severally liable for damage caused to a direct or indirect purchaser. However, a defendant can object to the damage claim of the direct purchaser by proving that he had passed on the damage to indirect purchasers (passing-on defence). The burden of proof of the passing on of the overcharge lies with the defendant. The trial judge can estimate

the damage caused by the cartel (Kersting & Dworschak, 2012, p. 777). In the case *Gouessant*, No. 540, the French Cassation Court admitted indirect purchasers the right to claim damages based on the general rules of French tort law. The Court stated that it was for the claimant (a direct purchaser) to prove that he internalised an overcharge, i.e., he could not pass it on to indirect purchasers.

Under ADD Art.14(1), the burden of proof concerning the existence of damage, its amount, and the presence and the amount of passing-on lies with a claimant. Aiming to increase the effectiveness of damage actions, the ADD has introduced a rebuttable presumption that the passing-on occurred. The presumption resulted from the *communis opinio* that direct buyers of a dominant seller or cartel members usually pass on an overcharge by increasing prices charged to their buyers. The French Cassation Court in *Gouessant* has confirmed this opinion. Under ADD Art. 14(2), it will be deemed that an indirect purchaser has proved the passing-on if he has shown the following:

a) the defendant has committed an infringement of competition law;
b) the infringement 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 infringer can rebut the presumption if he credibly demonstrates to the court's satisfaction that the actual loss has not been passed on (or not entirely) to the indirect purchaser.

The EC issued the Guidelines to facilitate calculating the amount of overcharge. The Guidelines present economic theories explaining the incentives for passing on overcharges, methods, and evidence used to prove the overcharge passing-on and its amount. Proving the occurrence of passing-on and its amount requires presenting the court with complex economic evidence, effectively preventing successful damages claims. For this reason, ADD Art. 12(5) obliges member states to provide national courts with the power to estimate, under national procedures, the share of any overcharge that was passed on.

### *4.3. Quantification of Harm*

A general rule of civil law states that a claimant must prove the existence and amount of damages. Regarding antitrust damages actions, the exact calculation of damages is hardly possible. The quantification of damages implies a

comparison of the actual position of the injured person with the position this person would have been in without the infringement. Making this comparison presupposes knowing with certainty how market conditions and the interactions between market operators would have evolved in the scenario where the infringement would not have occurred.

ADD Art. 17(1) requires member states not to introduce rules which would render the exercise of the right to damages practically impossible or excessively difficult. The ADD facilitates the execution of this right by laying down two rules. The first rule concerns the power of national courts to estimate damages. The second rule stipulates a rebuttable presumption that cartels cause harm (Art. 17 para. 2). The German Supreme Court ruled in KZR 25/14, 12 July 2016, that the presumption of the existence of harm logically implies that there are damages. A trial court is entitled to apply civil procedure rules, allowing it to estimate damages. Three member states expanded the scope of presumption by defining the amount of harm caused. Hungarian and Latvian laws stipulated that cartels cause an overcharge of 10%, while Romanian law provided a presumption that an overcharge amounts to 20% (EC, 2020). Swedish law allows courts to estimate damages if it is impossible or excessively difficult to quantify, but also if collation of evidence would cause costs or inconvenience disproportionate to the damage's size and if the claim for damages concerns a small sum (Rodger *et al*., 2019, p. 500).

In 2013, the EC produced a Practical Guide on quantifying harm in actions for damages based on breaches of Arts. 101 or 102 TFEU. The Guide specifies methods and techniques for calculating harm, including damages caused by a rise in prices, loss in sales volume, and loss of profit suffered from exclusionary practices. Some member states, for example, Lithuania, obliged courts to follow the Practical Guide, even though the Directive does not stipulate this requirement (Malinauskaite & Kauffman, 2018, p. 510).

## 5. Antitrust Damages in Serbian law

The Serbian Competition Protection Act – CPA stipulates in Art. 73 the right to claim damages resulting from an infringement of competition law determined by the Commission for Protection of Competition – CPC decision in civil proceedings. CPA does not regulate the circle of persons entitled to claim damages and the conditions for the execution of this right. The only exception is the rule contained in Art. 73 para. 2: "A decision of the Commission does not make a presumption that damage occurred, but it has to be proved in court's proceedings." Besides, the CPA does not regulate the CPC decision's effects in civil court

proceedings. In general, Art. 73 of CPA refers to rules of tort law concerning the enforcement of the right to ask compensation for damage resulting from a violation of competition law.

Serbian Law on Obligations – LO lays down rules on damages. Art. 16 sets a general prohibition of harmful acts: "Everyone has a duty to refrain from acts causing harm to another person." Art. 154 para. 1 LO establishes a presumption of guilt. A person causing harm to another person must compensate for this harm unless he proves that harm was caused without his guilt. However, a special law can stipulate that liability for damage exists regardless of guilt (strict liability) (Art. 154 para. 3 LO). Art. 73 CPA is silent regarding the fault as the necessary element of liability for antitrust damages. In the light of Art. 154 para. 3 LO, it is impossible to interpret CPA as constituting a right to compensation for damage caused by competition infringements as strict liability.

Serbian law recognises the right to full compensation. Art. 155 LO defines damage as material damage – a decrease of someone's property (*damnum emergens*) and prevention of its increase (*lucrum cessans*), and immaterial damage – causation to another person of physical or mental pain or fear. Based on Art. 189 para. 1 LO, a harmed person has a right to ask compensation for simple damage (*damnum emergens*) and lost profit (*lucrum cessans*). Under Art. 190 LO, a court determines compensation by taking into account circumstances that have arisen after the damage was caused, in the amount needed to bring the material situation of a damaged person into the state in which it would have been if a harmful act or omission had not occurred.

A damaged person bears the burden of proof of a causal link between a harmful act and damage. Serbian law has long recognised the right to claim direct and indirect damages. The Supreme Court of Serbia passed the ruling Gž 2736/66 in 1966:

> "An injurer is liable for every harm that can be attributed to his actions, that is, all direct and indirect consequences of his act. If an action causes harm, it is therefore indifferent whether the harm is direct or indirect – a further consequence of an act and/or omission of the injurer, but in this case, it is necessary to determine whether the occurred harm is an indirect consequence of the injurer's act."

With regard to the causality link between a wrongful act and indirect damage, the Serbian legal mind accepts the theory of adequate causation. It is considered that damage is a consequence of a cause that produces appropriate harmful effects under ordinary circumstances (Ivošević, 1994, p. 438; Radišić, 1988, pp.

203-210, Đurđević, 1995). The role of causation is especially significant in the area of strict liability. The causation is, at the same time, a condition and legal basis of strict liability (Salma, 1997, p. 227).

A plaintiff must also prove the occurrence and amount of damage. In practice, courts rely on expert witnesses to calculate damages. Punitive damages are only exceptionally allowed in Serbian law. In line with Art. 189(4) LO, when a thing is destroyed or damaged by a criminal act performed intentionally, a court can determine an amount of compensation according to the value that the thing had for the damaged person. A prevailing part of the Serbian legal theory considers this provision to define yet another type of material damage. It does not entitle a damaged person to ask compensation for pain suffered from a loss of a thing that had sentimental value for him (*pretium affectionis*) (Karanikić Mirić, 2011, pp. 74-75).

Art. 232 of the Serbian Civil Procedure Act provides authority for a court to determine the amount of compensation based on its free assessment under a condition that it is impossible to determine the exact amount of compensation, or it can be done only under disproportional difficulties. The principle of fairness justifies the rule: an action of a damaged person should not be refused only because of issues related to proving the amount of damage. The scope of the court's authority relates only to damage calculation. The court still needs to verify the existence of the very right to compensation (Poznić & Rakić-Vodinelić, 2015, p. 362).

Serbian courts have the power to request a party in the procedure to submit a document for which another party claims it is in her possession. The effectiveness of this power is seriously undermined by the right of the requested party to deny submission of the document if the submission would expose her to significant material damage (CPA Art. 241, in connection with Art. 249 para. 1). The court can order a third party to submit a document only if she is obliged to do it by law or the document content is common to her and the party in the proceeding (CPA Art. 242 para. 1).

Article 12 of the Civil Procedure Act entitles civil courts to solve preliminary issues autonomously. Whenever a court's decision depends on a preliminary issue of whether a legal right or relationship exists, a court can solve this issue provided that another court or organ has not rendered a decision and special laws do not prescribe differently. A decision of a court concerning the preliminary issue produces effects only in a dispute in which it was raised. An important exception to this rule is when a party requests a court to decide upon a preliminary issue in a judgment petite. In such a case, a final court's judgment solving the preliminary issue becomes *res iudicata*. Legally binding criminal court's judgments bind civil courts. The same is valid concerning legally binding civil court judgments.

The Civil Procedure Act is silent regarding the effect of a legally binding act of an administrative authority in civil proceedings. The Supreme Court of Serbia took the stance in the case Rev. II 619/05, 20 October 2005, that a final and conclusive administrative act binds a civil court. The Serbian legal theory takes an identical position by interpreting Art. 12 *argumentum a contrario*: a court cannot decide upon a preliminary issue if another court or organ has already finally settled it (Poznić & Rakić-Vodinelić, 2015, pp. 343-344).

Serbian courts have occasionally dealt with actions for antitrust damages. In the renowned case concerning the nullity of the agreement concluded between the City of Novi Sad and a private bus terminal company, Prev. 58/2013, Pzz 1/2013, 9 May 2013, the Supreme Cassation Court – SCC decided on the legality of the lower courts' decisions determining the right to damages resulting from non-performance of the agreement.

A private investor bought a bus transportation company in the privatisation process. The company operated a bus terminal in the City of Novi Sad. It concluded an agreement with the City of Novi Sad obliging to effectively guarantee the company the exclusive right to operate the inter-city bus terminal in the territory of Novi Sad. The existing inter-city bus terminal operated by another public bus terminal company should have stopped providing services to inter-city transporters. The City of Novi Sad did not perform the obligation, and the company sued for damages consisting of the profit lost due to the continuation of the operation of the public company bus terminal. In the role of a defendant, the City of Novi Sad pleaded the nullity of the agreement. The lower courts found that the parties agreed to establish the monopolistic position for the claimant and that this agreement was contrary to the imperative norms of Serbian law. Art. 14 LO prohibits parties in contract relationships from creating rights and obligations by which any person establishes or uses a monopolistic position in the market. The agreement also infringed Art.2 of the Competition Protection Act from 2005. The lower courts declared the nullity of the agreement and recognised the claimant's right to damages.

The SCC decreased the compensation determined by the lower courts by referring to LO Art. 104 concerning the consequences of nullity. In the case of nullity of an agreement, each party must return to the other what it received under the agreement. However, if the nullity resulted from a violation of imperative norms, public order or good customs, a court can dismiss, partially or entirely, the request of an unconscientious party. When applying Art. 104 LO, the court considers the conscientiousness of each party, the significance of the threatened good or interest, and ethical norms. The SCC found that both parties were unconscientious since they knew or ought to have known they contracted

the illegal clause. For this reason, it decided to dismiss the claimant's request for compensation of damages partially. The SCC explained that, under these circumstances, it was fair that both parties partly suffered damages.

It should be emphasised that Art. 104 LO does not relate to the right to damages. It sets up a duty of parties to a null agreement to return to each other what they gave under the agreement. Art. 108 LO lays down an obligation for a party guilty of the nullity to compensate damages to another party. Even though the SCC found both parties guilty, it admitted the claimant's action for damages partially by invoking the analogous application of Art. 104 LO.

## 6. Conclusion

Serbian law allows private enforcement of competition rules under general tort and civil procedure provisions. An injured person can bring a standalone or follow-on action for damages caused by competition law infringements. Suppose the Commission for Protection of Competition has rendered a decision finding a competition law infringement, and its decision has become final. In that case, injured persons can invoke the decision before a civil court as proof of an unlawful act. A claimant still needs to prove the causal link between the illicit act and damage and the amount of damage. A defendant's guilt is presumed. In standalone actions, the claimant must prove that the defendant breached competition rules. Under Serbian tort law, asking for compensation for indirect damages is possible. Courts are entitled to estimate damages when the exact amount is impossible or extremely difficult to prove. Punitive damages are generally not allowed.

Despite the broad consistency of Serbian civil law with the EU private enforcement rules, Serbian legislators need to stipulate specific substantive and procedural rules to facilitate private enforcement of competition law and harmonise with ADD. General rules on torts and civil procedure show typical deficiencies similar to those that had existed in the national laws of the EU member states: a limited right to ask for the discovery of evidence, lack of clear rules on the binding effect of the competition authority final decisions, lack of legal presumptions concerning the existence of harm and the causal link between cartel infringements and damage, etc. Enacting specific regulations streamlining private enforcement would also contribute to more effective public enforcement since competition law violators would face the risk of paying high fines cumulatively with damages.

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