Private Enforcement Comparison in Selected EU Member States*

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Summary: Untill the end of December 2016, the Damage Directive 2014/104/EU shall be implemented into Czech law, as well as into national laws of all EU Member States. The new Directive should facilitate private claims based on infringement of competition law, known as "private enforcement". Although private enforcement is already available in all Member States, its implementation in practice is limited and uneven, due to numerous factual as well as legal barriers for potential claimants. The principle aim of this article is to evaluate the actual experience with private enforcement in selected EU Member States, namely in the Czech Republic, France and Hungary, on the basis of a thorough comparative analysis of several issues known to cause problems for private enforcment in practice.

Keywords: private enforcement, competition law, Damage Diretive 2014/104/EU, comparison of EU Member States, the Czech Republic, Hungary, France.

1. Introduction

Private competition enforcement is nowadays in most EU Member States negligible and it can hardly be compared to the number of private enforcement cases and actions brought to courts in the United States, where this type of competition enforcement represents more than 90% of all competition enforcement cases. As such, the width of American competition jurisdiction is unique world-wide.

In recent years, the European Commission has been trying to greater the application of private competition enforcement by national courts of all Member States, although not very successfully. Focusing on the role of the private competition enforcement was also one of the fundamental aims of the modernization of competition law in 2004, but as it seems, Europe still tends to the public competition enforcement, or even to the criminal competition enforcement in

* This article is an outcome of the Palacký University project IGA 2016 (title: Private enforcement of competition law in selected EU Member States, SPP 917100304/31).

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particular EU Member States. In accordance with statistics that are regularly published by the European Commission, there was only a slight upward trend in the number of judgments issued by national courts in the frame of private competition law actions. For example, in 2004 the European Commission was informed of 29 judgments, in 2005 of 43 judgments, in 2006 there were totally 30 cases and in 2007, the European Commission was informed about 50 issued private competition enforcement judgments.

Private enforcement on the internal market of the European Union is not only underdeveloped, but also very uneven. Between 2006 and 2012, two thirds of all EU Member States reported no private competition enforcement action, which would be followed by the Commission decision. As statistics show, national courts apply private competition enforcement mainly in the United Kingdom and in Germany. The reason why there is a greater number of private competition enforcement actions brought to courts in the United Kingdom and in Germany lies mainly in legislation.

Some legal systems of EU Member States are favorable for the damaged party of legal proceedings, for example due to easier access to evidence, specialized courts, collective enforcement or thanks to a substantive legislation (higher compensation, longer limitation periods, etc.). For this reason, in Europe there is still so-called "forum shopping" place, since the choice of "favorable" jurisdictions with more favorable legislation is common.

Another reason may be specifics of legal culture. In some countries, people are used to defend their rights themselves, while in other countries people are rather used to state protection, and therefore they delegate the competition enforcement to national competition authorities.

In the Czech Republic, as it is evident from a recently issued research,[1] the situation regarding private competition enforcement is more or less disconcerting – the annual number of new actions is steady, but relatively small, since 2001 varying between 0 and 2 since 2001.

The main aim of this paper is to compare some of our existing experiences with the private competition enforcement in selected EU Member States and to describe and evaluate certain practical or problematical aspects of private competition enforcement in selected EU Member States, namely in the Czech Republic, in Hungary and in France.

Hungary, which has approximately the same population as the Czech Republic, was chosen for this comparison, because it has very similar recent historical development, including the transition to a market economy and accession to the

[1] Michal Petr, Eva Zorková: Soukromé prosazování v České republice, Antitrust, Issue 2, year 2016, p. I – VIII.

European Union in 2004, while France, by population much more larger than Hungary and the Czech Republic, represents a traditional European democracy and is a founding member of the European Union's competition authority. Besides, French experiences with competition law are among the world's best rated.

2. Comparison Report

2.1. Current State of Knowledge

At the beginning, it must be admitted that the role of private competition enforcement has been quite unnoticeable on the development of competition law as such. Current development (or rather underdevelopment) of private competition enforcement in most of the European countries is linked to the lack of quantitative and/or qualitative research in this field, mainly due to difficult access to information, since obtaining the relevant data in this area is not an easy task.

For instance in the Czech Republic, only one (academic) research has been made in2016. This research strives to be the first qualitative as well as quantitative analysis of private competition enforcement (both on national and on EU level) in the Czech Republic. It is bases on an academic project, during which Czech courts were addressed with dozens of requests of information concerning specific private enforcement decisions. If thou the authors claim to have completed the wideset database of private competition enforcement decisions in the Czech Republic – more than 70 judgements issued in more than 20 cases. Despite, authors are aware of the fact that the research is still necessarily incomplete.[2] Likewise in Hungary, where the current state of research seems to be sightly better than in the Czech Republic, since there have been three major surveys in the field of private competition enforcement. Firstly, "The Hungarian country report" prepared for the Euroepan Commission on the condition on claim for damages in 2004, reported about the lack of competition law based actions for damages in Hungary.[3] Six years later, in 2010, the Hungarian reporter, Csongor Nagy described the litigation friendly legislation and also a couple of ongoing follow-on damage actions.[4] Third survey summarized the practice

[2] Michal Petr, Eva Zorková: Soukromé prosazování v České republice, Antitrust, Issue 2, year 2016, p. I – VIII.

[3] Tamás Éless, Ágnes Németh: Hungarian country report, [2004], available at: http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/hungary_en.pdf, [19-11-2016].

[4] Csongor István Nagy: The Judicial Application of Competition Law in Hungary, in G. C. R. Iglesias and L. O. Blanco (eds.) Proceedings of the FIDE XXIV Congress Madrid Vol. 2, 2010.

of Hungarian courts, involving both Hungarian and EU competition rules published in two papers, in 2013 and in 2014. After studying 16 cases between 2007 and 2012, the author noted that there was not a single private competition action which had stood the chance of succeeding and stated that private competition enforcement is highly underdeveloped in Hungary, although underdeveloped Hungarian practice stays in sharp contrast with the legislative background in Hungary.[5]

In France, according to the best author's knowledge, a complex qualitative and/or quantitative analysis of private competition enforcement, both on national and on EU level, is missing. It is possible to find analysis and/or brief description of relevant case law, as well as certain explanations of relevant French legislation, but a complete and complex survey in this field is missing.

2.2. Legislative Framework and Types of Claims

Hungary, just like the Czech Republic, introduced its first modern competition act in early 90s. In Hungary, until an amendment of the Hungarian Competition act in 2005, the only avaible remedy was the nullity of the anticompetitive act. Nowadays, plaintiffs can seek much more remedies, for example recovery of loss suffered (compensatory damages), in integrum restitutio, interim measures, seize and desist, declaration and/or modifications of contractual relations by the court.[6] The Czech Civil Code, which came into effect in January 2014, claims that anybody affected by breaches of competition law may raise against the infringer. It also stipulates that under certain circumstances, breach of law (not only the competition law) may cause invalidity of a contract. On the basis of the Czech Civil Code, anybody whose rights were violated or jeopardised by competition law infringements may ask the court to issue restraining (cease-and-desist) order, restitution order; decision on (reasonable) satisfaction; decision on damages and/or decision on disgorgement of unjustified enrichment.[7]

Both legislations therefore provide enough types of remedies, althought, in Hungarian practice there are three mainly used types of private competition law claims based on competition law provisions, that is claims on the nullity of a contract, requesting the provision of services (injunctive relief) and demanding compensation. Other remedies available in private competition

[5] Pál Szilágyi: Private Enforcement of Competition Law and Stand-alone Actions in Hungary, [2013] G. C. L. R., Issue 3, p 136.; Pál Szilágyi: The Hungarian Experience on Private Enforcement and Class Actions, [2014] G. C. L. R., Issue 3 © 2014, p. 168.

[6] Pál Szilágyi: Private Enforcement of Competition Law and Stand-alone Actions in Hungary, [2013] G. C. L. R., Issue 3, p 136.

[7] Czech Law No. 89/2012 Coll. Civil Code, § 2990 and § 2988.

litigations are available, but rarely used in cases based on competition law infringements.[8]

In Czech existing practice, most of the claims are for damages, followed by injunctions and nullity of contracts, in almost 25 % of cases the claimant also asks for preliminary relief. While the claims for preliminary relief are relatively successful (more than 50 %), the success rate of the claims themselves (on the merits) is strikingly low, only one (partially) successful action was identified; out of the other actions, a slight majority is settled out of the court, while the rest is dismissed. Breach of competition law is only rarely employed as the only legal ground for action. Typically, it is associated with unfair competition or contractual law claims; astonishingly, in none of the cases a breach of EU competition law was dealt with by the courts.[9]

In France, private competition enforcement is based on the general tort law provisions of Article 1382 of the Civil Code in combination with the specific competition law provisions, Articles L420-1 and L420-2 of the Commercial Code and Articles 101 and 102 of the TFEU.

The infringement of any legal provision – whether administrative, civil or criminal – constitutes a fault for the purposes of Article 1382 of the French Civil Code. Damages actions may also be based on contractual claims. The statutory basis for such actions is Article 1147 of the Civil Code, in combination with the relevant competition law provisions. Under the French law, the plaintiff may bring an action for nullity under Article L. 420-3 of the Commercial Code or Article 1304 of the Civil Code an action for damages under Article 1382 and following of the Civil Code. Damages actions may also be based on contractual claims. The statutory basis for such actions is Article 1147 of the Civil Code, in combination with the relevant competition provisions. [10]

2.3. The Need of Specialised Courts and Educated Judges

Both in the Czech Republic and in Hungary, there are no courts designated to deal specifically with antitrust law. In Accordance with the Czech Civil Procedure Code, all Czech regional courts are empowered to hear private competition enforcement cases in the first instances, these courts act generally as courts of appeal and they have a first-instance-jurisdiction only in more complex cases,

[8] Tihamér Tóth: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p. 410.

[9] Michal Petr, Eva Zorková: Soukromé prosazování v České republice, Antitrust, Issue 2, year 2016, p. I – VIII.

[10] Mélanie Thill – Tayara, Marta Giner Asins: The Private Competition Enforcement Review, Chapter 11 – France, [2014], The Private Competition Enforcement Review, Edition 7, p. 170.

including (among others) antitrust, unfair competition or intellectual property rights. a single judge is in charge with handling and deciding the case. Judgements of Czech regional courts may be appealed to a superior court in Prague or in Olomouc, within which the case is firstly decided by a panel of three judges. Under specific circumstances, judgements of appellate courts may further be challenged using an extraordinary appeal mechanism before the Supreme Court of the Czech Republic.

Concerning specialization within the courts, courts have mostly established specialised panels of judges (or single judges in case of regional courts) dealing with antitrust cases. However, the case-load of these specialised panels comprises mostly of unfair competition cases. Due to a very low number of cases, full specialization in antitrust cannot be realised in Czech practice, although it would be very needed. While antitrust cases are extremely rare for most Czech judges, the only exception is the Municipal Court in Prague, dealing with a new competition case biannually. Most of these cases are reviewed by the Superior Court in Prague, which is the only one likely to have constitutes any sort of "institutional memory" due to the number of processed antitrust cases.[11]

The qualification of Czech judges in antitrust law is (unfortunately) limited, in particular due to the fact that private competition enforcement is still very rare. Occasionally, a seminar concerning antitrust law is organised by the principal educational institution for judges. The lack of qualification may be demonstrated by the fact that in some (fortunately exceptional) cases, the judges still doubt they even have a jurisdiction.[12]

In Hungary, in accordance with Hungarian procedural legislation, general courts are empowered to hear private enforcement cases of competition law, since all appeals from the Hungarian Competition Authority are to be made to the Metropolitan Court. In case of private competition enforcement, regional courts act as the first instance courts if the value of the claim is higher than 30 million HUF. Tribunals, as the second instance courts in Hungary, have an exclusive competence to deal with cases involving unfair contractual terms, or various intellectual property related disputes.

In Hungarian practice, there is a call for educational training in competition law, at least at the level of the Curia (Hungarian Supreme Court). One of the proposed solutions is to involve experienced administrative law judges in civil law case concerning competition law issues.

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[11] Michal Petr, Eva Zorková: Soukromé prosazování v České republice, Antitrust, Issue 2, year 2016, p. I – VIII.

[12] Czech Judgement of the Supreme Court of 27 May 2015, Ref. No. 23 Cdo 2555/2014.

Just like in the Czech Republic, some of the Hungarian judgments prove that some Hungarian judges are not aware of the exact meaning of competition law provisions. On the other hand, most of the Hungarian judicial conclusions are very well founded, although the reasoning is far from the usual public competition enforcement standard, given by the Hungarian Competition Authority decisions. a non-application of EU competition norms may be the result of the lack of Hungarian judge's knowledge, although all judges are frequently trained by the Hungarian Judicial Academy. Unfortunately, competition law is not part of the practical legal exam which has to be passed to become an attorney, public prosecutor or a judge and so involving an economist as part of a three-member first instance court panel could improve the poor economic reasoning of Hungarians private competition enforcement judgments.[13]

The situation is quite different in France, where (untill the end of 2005) the competent courts were the general civil or commercial courts. In 2006 there were created sixteen specialised courts. Eight of these courts are commercial courts, competent over litigation between professionals (commercial courts of Marseilles, Bordeaux, Lille, Lyons, Nancy, Paris, Rennes and Fortde-France), the other eight courts are civil courts with jurisdiction over cases between private litigants (courts of first instance situated in the same cities as the commercial courts).[14]

According to most of available resources, it seems that the knowledge of competition law in case of French judges is sufficient. The reason might be the specialization of courts in competition law which reflects the desire of French legislature to provided certain jurisdictions which would deal with this special type of procedure. However, in some surveys, the need of better judge's training in (private) competition disputes is explained by the new allocation of the selected courts which was cheated to achieve greater efficiency for this type of litigation.[15]

2.4. Quantitative Level

In general, it is extremely difficult to quantify the frequency of claims based on private competition law infringements. For example in the Czech Republic, the

[13] Tihamér Tóth: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p. 416.

[14] Mélanie Thill – Tayara, Marta Giner Asins: The Private Competition Enforcement Review, Chapter 11 – France, [2014], The Private Competition Enforcement Review, Edition 7, p. 172.

[15] Florence Ninane, Guillaume Teissonnière, Mélanie Paron and Romain Maulin: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p. 333.

courts register private enfrocement cases together with unfair competition cases. It is therefore impossible to correctly report all the private enforcement cases. In July 2015, the Czech Competition Authority asked all the competent civil courts to report their private enforcement cases over the last 10 years but just less than 10 cases have been reported, based mainly on individual memories of the judges involved. The Czech Competition Authority undertook similar survey again in 2009, unfortunately with similarly unsatisfying results, as the Czech system of judicial evidence was not able to successfully identify these cases. Research in this field is further complicated by the fact, that only the Supreme Court's judgements are systematically accessible through an online database.

As mentioned above, an academic research has been made in 2016. This research, although published only in Czech language, strives to be the first qualitative as well as quantitative analysis of private enforcement of competition law (both on national and EU level), in the Czech Republic. It is bases on an academic project, during which Czech courts were addressed with dozens of requests of information concerning specific private enforcement decisions. The authors claim to have completed the wideset database of private enforcement decisions in the Czech Republic – more than 70 judgements issued in more than 20 cases. Even thought authors are aware of the fact that it is necessarily incomplete and ask their readers to provide them with more additional information, it is the most comprehensive research made in the Czech Republic so far. Overall, such a small number of cases cannot be adequately used for statistical purposes. The annual number of new actions taken within the practice in Czech private enforcement is very steady but still low, varying between 0 and 2 since 2001.[16]

In Hungary, there are publicly available judgments of the Curia (Hungarian Supreme Court) and the five regional Courts of Appeals since 2010, although only in Hungarian language, which greatly complicates any research. It can be assumed, that in case of serious antitrust issues, they would reach at least the court of appeals. In a period from 2007 to 2012 there have been 16 private enforcement cases in Hungary. Except for two cases, all the cases invoked the national equivalents of arts 101 and/or 102 TFEU.[17]

The Curia handled four antitrust cases, three of them relating to follow-on damage claims and a fourth one stand-alone case involving arbitration court judgment and Article 101 TFEU. As to the regional courts of appeals, it can be found seven cases, two of those involving domestic abuse of dominance

[16] Michal Petr, Eva Zorková: Soukromé prosazování v České republice, Antitrust, Issue 2, year 2016, p. I – VIII.

[17] Tihamér Tóth: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p. 410–411.

provision. None of the cases involving anti-competitive agreements referred to the application of EU law though. The case decided by the Metropolitan Court of Appeal involved a follow-on action for damages. One of the two cases decided by the Court of Appeal of Győr was a kind of follow-on damage action, based on a commitment decision of the Hungarian Competition Authority. The other based claims involved the nullity of a property lease agreement, a non-compete clause and a non-compete relating to the sale of a local grocery store. The plaintiffs in the abuse of dominance cases sued for damages based on exploitative contractual clauses and predatory pricing. Although the number of cases is slowly growing in Hungary, there are still only a few of them. Most Hungarian courts, within the reasoning of the judgment, dealt with the competition law issues in only a few sentences. The arguments far from those arguments that are usually seen in competition judgments of the United Kingdom Competition Appeal Tribunal or the US courts. However, private actions in Hungary are practically non-existent and for example in 2013, only four pending actions for damages were recorded, all involve bid-rigging in public tenders in the construction industry.[18]

In accordance with available data, just a few years ago private competition enforcement was not so common in France. But this is rapidly changing in recent years. Although the number of actions for damages is increasing in France, actions for contractual invalidity based on an infringement of private competition law remain the most frequent. To autor's best knowledge, complex quantitative analysis does not exist,but it is still possible to find specifically described (or commented) case law. Most French professionals and practising experts state, that private competition enforcement in France still remains limited and remains difficult in practice, mainly because of the limitation period as well as because of the number of defenses that are publicly available.[19] Lastly, the limitation might be caused by the duration of procedures which is often too long. Long delays in public competition enforcement may discourage private competition enforcement in follow-on actions. In any case, it is certain that these imperfections will have to be corrected in the future.[20]

[18] Pál Szilágyi: Private Enforcement of Competition Law and Stand-alone Actions in Hungary, [2013] G. C. L. R., Issue 3, p 136.

[19] Florence Ninane, Guillaume Teissonnière, Mélanie Paron and Romain Maulin: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p. 331.

[20] Josepf Vogel, Louis Vogel: France: An Important Legislative and Case-law Activity, [25-11-2016], avaible at: https://www.expertguides.com/articles/france-an-important-legislative-and-case-law-activity/ARSULQWY

2.5. Interactions between National Courts and National Competition Authorities

Basicly, the enforcement of competition law stands on three pillars. In Europe dominates the public competition enforcement, in some European countries the criminal competition enforcement is still avaible and the third pillar is currently in the biggest development, as it is the private competition enforcement. It is therefore quite obvious that public and private competition law can never be applied and interpreted independently, since they complementary and mutually react to each other with regards to the unity and the harmony of a whole legal system as such. Also the preamble of Regulation 1/2003 state the complementary role of national courts in relation to the national competition authorities of all EU Member States. And so, in practice a cooperation between national courts and national competition authorities can be found on several levels – national civil courts might ask their competition authorities for relevant opinions, mutual exchange of information is possible and even a temporary interruption of the proceedings can be an option.

In the Czech Republic, civil courts only rarely ask for opinion. On one occasion, the Superior Court in Olomouc even ordered to open proceedings and to adopt a formal decision, the Czech Competiton Authority refused to do so and the case was ultimately settled as the parties to the proceedings merged. [21] Similarly rare are the cases in which the competition authority would submit its opinion to the court. There is no legal basis for the *amicus curiae* procedure in Czech legal order, there is only a specific provision for proceedings in which EU competition law is applied. The Czech Competition Authority has nonetheless addressed the courts with several opinions, for example, concerning application of the term undertaking on a specific association. Finally, if there are parallel proceedings by civil courts and by the Czech Competition Authority concerning the same putative infringement, the courts usually periodically ask about the progress of public enforcement proceedings (and sometimes even tend to suspend the civil proceedings). Czech courts are not obliged to stay proceedings if the Czech Competition Authority has initiated proceedings on the same matter, they are however generally allowed to do so, on the other hand civil courts are to assess the question of competition law infringements themselves, without 'waiting' for the public enforcement decision. According to Regulation 1/2003, the competition authority is allowed to submit its observations concerning private enforcement proceedings only in cases where EU competition law is applied. In the Czech Republic, the main problem concerning the cooperation between

[21] Czech Judgement of the Superior Court in Olomouc Ref. No. 7 Cmo 348/2002.

courts and the competition authority is the lack of knowledge about court proceedings on the authority's side. Since 1 July 2004, the courts are obliged to send the competition authority copies of judgements in force where Art. 101 or 102 SFEU was applied and since January 2008, they shall also inform the competition authority about initiation of such proceedings. In practice, the competition authority has however not received any such information so far, even though some court cases have been initiated after that date that should have been reported.[22]

For example in Hungary, there are a handful of cases each year where the Hungarian Competition Authority is called upon to help interpret EU or even Hungarian competition rules. Besides, the competition authority should be informed about the violation of Hungarian antitrust law (and Articles 101 or 102 TFEU) and may decide to act as *amicus curiae.* Failure in obeying this procedural rule may lead to the annulment of a civil judgment. There is also an obligation for the judge to send its decision to the Hungarian Minister of Justice so the European Commission can be informed as well. Interestingly, there is no similar rule as regards the infringement of domestic competition rules. According to the latest Hungarian Competition Authority report to Hungarian Parliament about its activity, there are mentioned nine cases of intervention, while in 2012 there were only six cases of intervention. Each of this *amicus curiae* case involved the interpretation of domestic competition rules. [23]

Mutual obligation to provide relevant information and/or to be informed about issued competition decisions, particularly with regards to the European primary law, also applies in French practice. Generally speaking, civil courts usually tend to follow the opinion of the French Competition Authority. In France, as well as in the Czech Republic and in Hungary, there is no obligation to stay the proceedings. However, in the interests of the proper administration of justice, such a stay (especially if is requested by the defendant), is generally pronounced by the judge.[24]

[22] Jiří Kindl, Michal Petr: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapes, p. 275–277.

[23] Tihamér Tóth: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p. 423–424.

[24] Florence Ninane, Guillaume Teissonnière, Mélanie Paron and Romain Maulin: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p. 342.

2.6. Price Avaibility of Private Competition Enforcement Proceeding

In general, private competition enforcement proceeding is quite expensive and therefore it is recommended only to a limited number of specific cases. Since (nowadays) there is no system of financing or reductions for consumers or small businesses, usually only large businesses can afford to sue within the private competition enforcement.

The level of legal fees in the Czech Republic may not deter potential claimants from bringing meritorious private enforcement claims in competition law, since the court fees are relatively low in the Czech Republic (ranging approximately from 2–5% of the claimed amount and 4.1 million CZK at maximum). Legal costs in the Czech Republic are considerably lower than in more advanced jurisdictions. It is generally up to a party to the proceedings to fund its own costs and the costs of its representatives. However, on a party's request (and in accordance with the Czech Civil Procedure Code) a judge can relieve in full or in part of its duty to pay court fees if such relief is justified by the position of the party and, at the same time, the claim is not entirely arbitrary or obviously futile. As regards to reimbursement of costs, Czech civil procedure is based on the 'loser pays' principle. There are, however, certain exceptions to that principle, primarily in cases when certain costs were caused by fault of one party. The reimbursement of costs is not based on a full indemnity basis. Firstly, only those costs that are considered expedient shall be reimbursed. Secondly, in appropriate cases the court may at its discretion decrease the amount of reimbursement if it finds it justifiable in the case.[25]

In Hungary, there might be cases, especially those relating to consumer goods, where the cost of litigation exceeds the potential benefits (in disputes involving corporations, these costs are less detergent). In essence, legal costs would deter consumers from suing companies producing or selling consumer goods, since their estimated individual harm is outweighed by the litigation costs they would face. In accordance with Hungarian legislation, there is a fee (duty) to be paid by the plaintiff. The amount of the duty is 6% of the value of the claim and is to be paid at the time of commencing the procedure. Althought 6% of the value seems to be a lot, this duty cannot be more than 900,000 HUF. The same amount applies for appeals against the first level judgment. As well as in the Czech Republic, there are also rules granting exemption from paying the fee in Hungary, but these exemptions are not relevant for antitrust law related

[25] Jiří Kindl, Michal Petr: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapes, p. 264–265.

claims. The losing party is ordered to pay the costs of legal representation of the other party as well (the size of this legal fee is usually determined in line with a Decree issued by the Hungarian Minister of Justice).[26]

In France, civil procedure is, just like in the Czech Republic, based on the 'loser pays' principle and there is a possibility to fully and/or partly relieve of its duty to pay court fees if such a relief is justified and reasonable. However, according to French practising experts, it is quite possible that the amount of the costs of proceedings and/or fees in France prevents potential plaintiff, in particular private individuals or small businesses, to sue their compensation claims in the field of private competition enforcement. Group actions might be an ideal option (not only) for French consumers.[27]

2.7. Average Duration Of Court Proceeding

According to statistics published by the Czech Ministry of Justice, court proceedings in the field of private competition enforcement (including appeal, if applicable) took on average 666 days. It ought to be mentioned that this figure includes not only antitrust, but also unfair competition cases (standing for vast majority of all the cases reported), which significantly decreases the relevance of this statistics. The fact is, that most of the antitrust court proceedings are on average significantly longer – according to the Czech recent research already mentioned above, the average duration takes about six years, but it is always important to distinguish between preliminary and permanent injunctions. According to Czech civil procedural rules, in case of preliminary injunctions, delivered before the case is decided on the merits, they shall be issued without undue delay; only in case the matter is not urgent may the decision be taken within 7 days from receiving the petition. There are no time limits concerning proceedings on the merits, including decisions on permanent injunctions.[28]

The situation in Hungary does not differ, the average length of civil court procedures can be considered reasonable. The average length of a two stage civil procedure is between 1,5–2,5 years. If the claim is high enough and important legal issues are raised, parties can turn to the Curia as well, which may add 10-12 months more. In complex cases a litigation lasting 5 years is not exceptional

[26] Tihamér Tóth: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p. 414–415.

[27] Florence Ninane, Guillaume Teissonnière, Mélanie Paron and Romain Maulin: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p. 331–332.

[28] Jiří Kindl, Michal Petr: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapes, p. 266–267.

either. Cases beyond five years are not common, since judges are aware of the practice of the European Court of Human Rights which sanction states for such lengthy procedures (of course with the consideration of all specifics in each particular case).

If the plaintiff intends to rely on the outcome of a public enforcement procedure, the gap between the occurrence of the anti-competitive event and the final award of damages can be considerable and it is not exceptional that some of the cases were closed after 8–10 years after the potential anti-competitive actions had taken place.[29]

Unfortunately, neither in France the average duration of private competition enforcement proceedings is not shorter, since the duration of this type of litigation remains reasonable and falls more in line with the time limits for dealing with commercial litigation. The main difficulty is that the contentious claims is (in the majority of cases) initiated after the proceedings before the French Competition Authority, which cause unreasonable delays for individuals and undertakings affected by this type of infringement This inappropriate situation resulted in the fact that compensation for the prejudice of anti-competitive acts occurred several years later. The occurrence and recognition of the antocompetitive evidence make its provement much more difficult. [30]

3. Conclusion

Due to the fact that in December 2016 the legislation transposing the Damage Directive will enter into the force in all EU Member States, the question of existing European experiences, made by this comparison of selected EU Member States, is very atual issue, since any legal comparison in this area in fact hasn't existed.

The Damages Directive will enter into force very soon in all EU Member States and hopefully the implementation period was sufficient enought, because I believe that only effective private competition enforcement is able to adequately protect the rights of those harmed by any anticompetitive conduct. Unfortunately the current legislative and practical state of private competition enforcement is not very satisfying. As indicated by the comparison report above, the need of more sufficient legislation in this field is obvious and so even the

[29] Tihamér Tóth: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p. 417.

[30] Florence Ninane, Guillaume Teissonnière, Mélanie Paron and Romain Maulin: Private Enforcement and Collective Redress in Competition Law, Congres Proceedings Vol. 2, [2016], Wolters Kluwer, Budapest, p 333.

European Commission's efforts to improve the private enforcement situation are not surprising at all.

I have to admit, that my personal estimates before beginning this comparison were much more positive than the private competition reality actually is. Althought it can be expected that the situation in the Czech Republic and in Hungary will be more or less similar and unsatisfactory (which was also confirmed by this comparison), it is still surrising that even in France, which is known for its experiences with competition law much more that the Czech Republic or Hungary, most of the available surveys prove rather unsatisfactory situation and underdevelopment.

Firstly, it is extremly difficult to quantify the real number of private actions in all three states. It is not only about language difficulties, but competition case law is never recorded separately, which could be understood, since private competition enforcement cases are very rare in all selected Member States. On the other hand, it is logical that the chances of a successful application of competition law within private enforcement is reduced, because there is a great risk that the judge who has to decide the case meets with competition law (and with private competition enforcement) for the first time and can not easily find previous case law or use already formulated conclusions. Unfortunately, due to this substantial problem a chance for a plaintiff to succeed is rapidly decreasing as well. For the beginning, the solution is clear – all competition case law need to be clearly recorded, both on European and on national level.

Simultaneously in all selected Member States, a need of a better education in the field of private competition enforcement can be found. All legal experts pefroming in this field should be specifically trained to achieve their greater specialization. To solve the lack of trained experts, sixteen specialised courts were created in France (eight of these courts are commercial courts, competent over litigation between professionals and the other eight courts are civil courts with jurisdiction over cases between private litigants). While in the Czech Republic and in Hungary, there are no courts designated to deal specifically with antitrust law. This fact, as well as the long duration of court proceedings, may reduce the willingness of potential plaintiffs to sue, for example in the Czech Republic, there are many private enforcement cases settled out of court, although the court fee is not among the highest.

Legislation also allows various forms of cooperation between national civil courts and national competition authorities but as the comparison revealed, not very often used in practice. Czech civil courts only rarely ask competition authority for opinion, althought in all EU Member States, competition authorities are called upon to help interpret EU or in some cases even national competition rules. Possibly due to the aspects described bellow, national civil courts usually tend to follow the opinion of their national competition authorities.

In France, as well as in the Czech Republic and in Hungary, there is no obligation to stay the proceedings, however civil judges often do so to wait for the administrative decision and to based their decision in civil proceedings in accordance with the decision taken within the administrative procedure.

As it is obvious, whatever the Damage Directive brings after its implementation may be beneficial to the plaintiff as private competition enforcement still remains (in most EU Member States) underdeveloped field of the competition law and only a long-term development may bring improvements, since the need of better regulation has been sufficiently demonstrated and justified.