ON CERTAIN ISSUES OF COMPETITION LAW DAMAGES CLAIMS, WITH AN OVERVIEW OF ACCESS TO DOCUMENTS

DOCTORAL DISSERTATION

Theses

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1. SUMMARY OF THE OBJECTIVES OF THE RESEARCH

The general objective of the research is to examine along the research questions the fundamental issues of cartel damages claims.

The starting point of the research is that Hungarian law is not capable of accommodating cartel damages claims appropriately, which necessitates steps in the field of substantive and procedural civil law.\(^1\)

(a) Examination of the legal development process in the EU

The background of the research is the legal development / unification process of the European Union. The Court of Justice of the European Union ("CJEU") in its judgment adopted in the Courage case\(^2\) stated that individuals can base their damages claim directly on the infringement of EU competition law. The CJEU confirmed this statement in its judgment adopted in the Manfredi case.\(^3\) Another important statement of the judgment adopted in the Manfredi case was that in the absence of regulation at EU level the claims based on infringement of EU competition law must be adjudicated by the national courts in accordance with national law.

However, the absence of EU level regulation did not seem a permanent situation even at the adoption of the Manfredi judgment, since the European Commission ("Commission") initiated a consultation process, on the basis of which it adopted the Green Paper,\(^4\) which described the possible methods of facilitating damages claims. The Commission adopted the White Paper\(^5\) in 2008, which contained the proposed mechanisms to facilitate damages claims. After the adoption of the White Paper, the consultation process was divided: (i) the part which related to collective redress mechanisms, not exclusively in an antitrust damages context was concluded with the adoption of a Commission recommendation\(^6\) ("Recommendation"), while (ii) the part which related to substantive and procedural issues of antitrust damages claims was concluded with the adoption of a directive\(^7\) ("Directive").

The Recommendation contains general requirements regarding all types of collective actions and specific requirements regarding collective damages actions. The objective of the research is to examine mainly the requirements of collective damages actions.

The Directive contains rules regarding the harmonization of national competition law in issues of evidence (disclosure of evidence, binding nature of national competition authority decisions) and issues of liability (joint and several liability, passing-on damages). The

\(^{1}\) See Darázs Lénárd: A kartellek semmissége, Budapest, 2009. CompLex, p 33
\(^{3}\) Case C-295/04. Manfredi (13 July 2006), ECR [2006] I-6619
\(^{6}\) Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013, p 60
objective of the research in particular without limitations is the assessment of the issues regulated by the Directive.

(b) Examination of horizontal restrictions of competition by object

Preliminary hypothesis of the research is that it is necessary to distinguish among competition law prohibitions, in order to draw well-founded and useful conclusions in connection with the relationship of competition law and civil law. With respect to this, the research distinguishes cartel infringements, in particular horizontal (among competitors) restrictions by object (agreements, concerted practices and decisions of associations of undertakings). Competition law prohibitions apply to a wide array of practices. Starting point of the research is that horizontal restrictions by object have features, which need to be taken into consideration during the examination of civil law claims based on infringements of competition law. The objective of the research is to examine civil law issues, which are relevant only in respect of horizontal restrictions by object.

(c) Examination of damages claims

In respect of the enforcement of competition law, public and private enforcement needs to be distinguished. Public enforcement of competition law is when a public bodies (authority or court), proceeding on the basis of public interests impose public law sanctions (fines, injunctions, imprisonment) for a competition law infringement. Private enforcement of competition law is when a private individual on the basis of his/her private interests enforces civil law claims (injunction, invalidity, damages) for a competition law infringement.

Another hypothesis of the research is that among civil law claims, the European Union attributes the most important role to damages. This is supported by the Recommendation, which specifically addresses damages claims and the Directive, which regulates only issues of damages, furthermore, by the circumstance that the Commission in the course of the consultation process expressly tackled the issue of quantifying damages, adopting a notice\(^8\) and guidance\(^9\) as a result. The objective of the research is to examine issues related to damages claims, exclusively in the framework of delictual (tortious) liability.

(d) Detailed objectives of the research

The aforementioned objectives of the research can be divided into the following detailed objectives:

(i) It is the objective of the research to – without being exhaustive – examine horizontal restrictions by object found by the European Commission and the Hungarian Competition Authority in order to ascertain whether or not common features of cartels can be established, which affect the enforcement of claims for compensation of

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\(^8\) Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, OJ C 167, 13.6.2013, p 19

\(^9\) Commission Staff Working Document - Practical Guide - Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union
damages caused by cartels and the prospective EU or national measures in order to facilitate such enforcement.

(ii) One of the objectives of the research is to examine the legal grounds and justification of the intervention of the European Union in the national rules on enforcement of damages claims through adopting measures facilitating enforcement of claims for compensation of damages caused by horizontal restrictions by object. It is subject to examination to which extent the intervention of EU law in national laws is justified. The research specifically addresses what the legal grounds for intervention in national procedural law are and what the legal grounds for intervention in national substantive law are.

(iii) In Europe enforcement of competition law mainly means enforcement of administrative authorities. Thus, the effectiveness of public enforcement of competition law is crucial. The objective of the research is to examine the interaction between private enforcement and public enforcement, and considerations regarding the effectiveness of public enforcement, which affect the extent of the measures adopted for the facilitation of private enforcement.

(iv) Considerations regarding the difficulties of enforcing claims for compensation of damages caused by cartels consist not only of procedural law issues. Objective of the research is to examine the implications of the EU legislation process on the delictual (tort) rules. The research specifically addresses the four elements of compensation of damages. In relation to illegality it is necessary to examine how exemptions from the prohibitions of cartels affect the (civil law) illegality of the practice, furthermore, to what extent the injured parties can rely on the findings of the competition authorities regarding the illegal practices. In relation to damages it is necessary to examine which of the market effects of a cartel qualify under the civil law definition of damages, including the examination whether the compensation of damages that were passed-on can be claimed, furthermore, which factors influence the quantum of damages in case of cartels. In relation to causal link it is necessary to examine how the civil law models of causal relationships can be applied in case of cartels, furthermore, what the role of foreseeability is in connection with proving a causal link. In relation to culpability it is necessary to examine what the interaction is between the objective infringement and the culpability-based claim for compensation of damages caused thereby, furthermore, whether it is possible to escape liability for damages if the damaging party erred concerning the illegality of its conduct. Another question is whether joint and several liability for damages caused by the cartel is affected by competition law considerations and whether the single continuous infringement caused by cartels affects the statute of limitations.

(v) Facilitation of compensation of damages caused by cartels requires integrated solutions, which take into consideration the rules of all relevant fields. The objective of the research is to examine the procedural rules serving as framework for the enforcement of competition law damages claims with a view to whether their amendment is necessary, and if yes, to which extent and in what form. In the framework of this, the research
extends to standing, in particular the standing of indirect purchasers suffering damages due to the (lawful) passing-on of damages caused by cartels and the collective redress mechanisms available to consumers. The subject-matter of the examination are the collective actions, which are novelties in most European jurisdictions, as well as representative actions. The research extends to the application of other civil law institutions (assignment, reward) for the collection of consumer claims. The research extends to the issues of evidence, in particular disclosure mechanisms counterbalancing information asymmetry between the damaging parties and the injured parties and other solutions easing the burden of proof. The research extends to the issue of procedural costs, in particular the limitation of legal fees. The research extends to the issue of jurisdiction, in particular the special grounds for jurisdiction based on the place of damages and the close connection of respondents.

(vi) The centre of gravity of enforcement of claims for compensation of damages caused by cartels is evidence. The objective of the research is to present the recent case-law of the CJEU and the General Court to draw conclusions regarding access to documents in the possession of the competition authorities. In the framework thereof, in connection with national rules of access to documents, the research extends to the presentation of the judgment adopted in the Pfleiderer case\(^\text{10}\) and the judgment adopted in the Donau Chemie case.\(^\text{11}\) In connection with the EU rules of access to documents, the research extends to the presentation of the judgment adopted in the CDC Hydrogene Peroxide v Commission case,\(^\text{12}\) judgment adopted in the EnBW v Commission,\(^\text{13}\) the judgment adopted in the Schenker v Commission case\(^\text{14}\) and the judgment adopted in the Akzo Nobel v Commission case.\(^\text{15}\)

In summary, the objective of the research is to examine certain issues of the interaction between horizontal restrictions by object and damages claims and draw conclusions relevant for Hungarian legislation and case-law.

2. **BRIEF DESCRIPTION OF THE METHODS OF RESEARCH**

The research applied two methods: on the one hand, it examined the relevant rules of EU and Hungarian law from a dogmatic viewpoint, on the other hand, it examined EU, foreign and Hungarian case-law established on the topic. In the course of the dogmatic examination the research relied basically on the documents of the EU legal development process, including in some instances the comments of the stakeholders published during the consultation, and analysed these on the basis of Hungarian, English and German literature. The dogmatic examination extended exclusively to the aspects of civil law institutions relevant from the viewpoint of competition law infringements. In the course of the case-law examination the

\(^{10}\) Case C-360/09. Pfleiderer (14 June 2011), ECR [2011] I-5161
\(^{11}\) Case C-536/11. Donau Chemie (6 June 2013), ECR not reported yet
\(^{13}\) Case T-344/08. EnBW v Commission (22 May 2012), ECR not reported yet, and Case C-365/12. P. Commission v EnBW (27 February 2014), ECR not reported yet
\(^{14}\) Case T-534/11. Schenker v Commission (7 October 2014), ECR not reported yet
\(^{15}\) Case T-345/12. Akzo Nobel and others v Commission (28 January 2015), ECR not reported yet
The research relied basically on the judgments of the CJEU and the Hungarian Kúria. With respect to the circumstance that the majority of European antitrust damages actions were brought before the courts of three Member States (the United Kingdom, Germany and the Netherlands), the case-law examination extends to the solutions applied in the German and English legal systems and the decisions adopted in cases brought before the courts in these jurisdictions.

The research applied the method of comparative legal analysis, in particular on issues, where foreign legal systems introduced or apply progressive mechanisms for the enforcement of competition law damages claims. Thus, the research focussed on mechanisms applied in the United States of America. With respect to the significant differences in the American legal system the research also gave priority to the presentation and assessment of mechanisms applied in European jurisdictions having more common features with the Hungarian legal system.

The research also applied the method of economic analysis, in particular with respect to issues arising in connection with the types and quantification of damages.

3. STRUCTURE OF THE DISSERTATION

The dissertation consists of the following main structural elements:

(a) Firstly, the dissertation presents cartel infringements and civil law claims, furthermore, it discusses the preliminary questions of introducing special rules regarding cartel damages claims, i.e. the legal grounds for EU legislation and the interaction of public and private enforcement of competition law. Thereafter, the dissertation presents the typical features of cartels. In the course of this, the dissertation summarizes those cases of the Commission and the Hungarian Competition Authority, where the highest fines have been imposed.

(b) Secondly, the dissertation discusses in detail the substantive law (law of obligations) issues of cartel damages claims. In the course of this, it presents the competition law issues related to the four basic elements of liability for damages, illegal conduct, damages (definition and quantum), causal link and culpability. The dissertation also discusses the issues related to joint and several liability and statute of limitations.

(c) Thirdly, the dissertation discusses procedural issues of cartel damages claims. In the course of this the dissertation discusses the two most important issues of standing, standing of indirect purchasers and the possibility of collective actions. The dissertation summarizes various collective redress mechanisms, presents the most important considerations in connection with collective and representative actions and alternative mechanisms applied (or to be applied) in practice. Furthermore, the dissertation presents disclosure mechanisms, considerations regarding procedural costs and grounds for jurisdiction regarding restrictions of competition.

16 See Howard, Anneli: Too little, too late? The European Commission’s Legislative Proposals on Anti-Trust Damages Actions, Journal of European Competition Law & Practice 2013/6, p 455
The dissertation highlights third party access to documents in the possession of the competition authorities, in particular access to information and evidence provided to the competition authorities in the course of leniency applications. The dissertation presents the current regulation of leniency policy, as well as case-law related to the extent of access to documents.

4. SUMMARY OF THE CONCLUSIONS OF THE RESEARCH

(a) Preliminary questions of cartel damages claims

The first preliminary question of cartel damages claims is whether the EU has legal grounds to intervene in respect of the rules of enforcing claims and whether this intervention is justified.

The following conclusions can be drawn as a result of the research on legal grounds and justification of EU measures:

(i) The CJEU in the judgments adopted in the Courage and the Manfredi case clearly stated that injured parties may claim compensation of damages on the basis of an infringement of EU competition law. With respect to this an intervention is justified in matters where it is apparent that national substantive and procedural rules are not enabling or significantly hindering the enforcement of the damages claim.

(ii) Competition law and civil law reflect fundamentally different regulation methods. With respect to this the introduction of such special civil law rules is justified, which apply explicitly to claims for compensation of damages caused by cartel infringements.

(iii) Uncertainty regarding the applicability and interpretation of rules significantly affects the situation of cartel damages claims. With respect to this the introduction of binding rules is justified.

(iv) Intervention in the national procedural systems is necessary in order to facilitate cartel damages claims. With respect to this the introduction of such special procedural rules is justified, which apply explicitly to claims for compensation of damages caused by cartel infringements.

(v) The objective of EU legislation regarding cartel damages claims is not limited to the enforcement of competition law, but extends to the creation of an internal

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17 See Keßler, Jürgen: Private Enforcement - Zur deliktsrechtlichen Aktualisierung des deutschen und europäischen Kartellrechts im Lichte des Verbraucherschutzes, Wettbewerb in Recht und Praxis 2006/9, p 1061
market with respect to cartel damages claims. With respect to this EU legislation has legal grounds with respect to Article 103 TFEU and Articles 114 and 352 TFEU.

In summary, EU measures regarding cartel damages claims have legal grounds and are justified.

The second preliminary question of cartel damages claims is what the relationship between public and private enforcement of competition law is.

The following conclusions can be drawn as a result of the research on the interaction of public and private enforcement:

(i) Neither the judgement of the CJEU adopted in the Masterfoods case, nor Article 16 of Regulation 1/2003/EC regulates the relationship of public and private enforcement. With respect to this public enforcement has no priority, which would call into question the introduction of measures supporting private enforcement.

(ii) Private enforcement also serves objectives within the scope of public interests (e.g. by more deterrence and forfeiting illegal gains). With respect to this the argument that public enforcement has priority because it serves public interests is not convincing.

(iii) Private enforcement is not necessarily more costly than public enforcement with respect to process economy considerations of courts and cost minimisation considerations of attorneys. With respect to this the argument that public enforcement is cheaper is not convincing.

(iv) The injured undertakings also have market knowledge and the courts' lack of power of investigation is only virtual. With respect to this the argument that only public enforcement can guarantee the appropriate assessment of the infringement is not convincing.

In summary, public and private enforcement of competition law has an equally important role, neither does public enforcement have priority, nor does private enforcement replace public enforcement, they complement each other.

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20 See Rizzuto, Francesco: Does the European Community have legal competence to harmonise national procedural rules governing private actions for damages for infringements of European Community antitrust rules?, Global Competition Litigation Review 2009/1, p 42
24 See Jones, Clifford A.: Private antitrust enforcement in Europe: a policy analysis and reality check, World Competition 2004/1, p 23
The third preliminary questions of cartel damages claims is whether it is justified to distinguish horizontal restrictions by object with respect to its special features in connection with damages claims.

The following conclusions can be drawn as a result of the research on the distinction of horizontal restrictions by object:

(i) One of the features of international cartels is that they concern intermediary products.\(^ {26}\) Thus, the rules on cartel damages claims must take into consideration that damages are passed-on several times until they reach consumers (issue of indirect purchaser standing and passing-on defence).

(ii) Features of Hungarian cartels are that they concern the use of public funds,\(^ {27}\) and their effect on consumers is more difficult to track.\(^ {28}\) Thus, the rules on cartel damages claims must take into consideration that cartels affect financial interest of the state and a broad interpretation of the definition of damages is necessary to cover certain effects of cartels.

In respect of the above, it can be stated that both international and national cartels have specific features, which justify their differentiation during the adoption and application of rules facilitating damages claims.

(b) \textbf{Substantive law questions}

The dissertation came to the conclusion earlier that in respect of the facilitation of damages claims based on horizontal restrictions by object not only the procedural law institutions need to be examined. With respect to this the research extends to the substantive law rules regarding delictual (tort) liability for the compensation of damages.

Out of the issues of law of obligations the dissertation discusses the condition of illegality first. One of the questions of illegality is the so-called independence of sector-specific illegality. According to jurisprudence the sector-specific definitions of illegality are independent from each other.\(^ {29}\) According to case-law authorization of a conduct by sector-specific rules may not lead to the exemption of the damaging party from its


\(^{27}\) See GVH Competition Council decision dated 15 June 2006 (Vj-162/2004); GVH Competition Council decision dated 29 January 2009 (Vj-130/2006); and GVH Competition Council decision dated 9 June 2010 (Vj-174/2007)

\(^{28}\) See GVH Competition Council decision dated 21 December 2006 (Vj-51/2005); and GVH Competition Council decision dated 24 September 2009 (Vj18/2008)

obligation to compensate damages. Another issue of illegality is the binding nature of competition authorities for civil courts. According to the judgment adopted in the Masterfoods case and Article 16 (1) of Regulation 1/2003/EC national courts may not adopt, which are contrary to the decision of the Commission. In Germany and in the United Kingdom, the decision of national competition authorities is binding for civil courts with respect to the finding of an infringement, while in the United States, decision adopted in the course of public enforcement leads to the reversal of the burden of proof (prima facie evidence). In Germany even decisions adopted by competition authorities of other states have a binding nature. According to Article 9 (1) of the Directive the decision of the competition authority must be binding with respect to the infringement, while Article 9 (2) provides that decisions adopted by the competition authorities of other states must be regarded as prima facie evidence.

The following conclusions can be drawn as a result of the research on illegality:

(i) In case of damages claims based on horizontal restrictions by object the independence of sector-specific illegality is limited. Illegality under competition law and illegality under civil law is independent only in case of stand-alone actions (when the injured party substantiates the facts supporting illegality and the damaging party substantiates the facts supporting exemption from the prohibition) and partially when the decision preceding the follow-on action found the absence of an infringement.

(ii) In connection with the binding nature of competition authority decisions, the regulation of the Directive is justified since it eases the difficulties of injured parties concerning evidence in respect of details of the infringement that were clearly established beforehand. However, the Directive applies an unjustified discrimination regarding decision of own competition authorities and decisions of other states’ competition authorities. The decision of competition authorities of Member States should be equivalent in particular with regards to the European Competition Network. Furthermore, the reversal of burden of proof enables the damaging parties to dispute facts that were established in a decision approved upon judicial review. Current Hungarian rules are in compliance neither with the Directive, nor with the German example.

Out of the issues of law of obligations the dissertation discusses the definition, quantification and passing-on of damages secondly. Both the judgment adopted in the Manfredi case and Hungarian law [Section 6:522 (2) of the Civil Code] set forth what sort of harm can be claimed within the framework of delictual liability: actual loss (damnum emergens), loss of profit (lucrum cessans) and costs / interests. However, horizontal restrictions by object cause various harms, such as, inter alia, an overcharge,
umbrella pricing, deadweight loss, sales loss, exclusion from the market and decrease in innovation,34 out of which not all may qualify under the civil law definition of damages.

The quantification guidance issued by the Commission proposed comparative and other (simulation, cost-based or financial analysis) methods for the calculation of actual loss, while earnings-based, market-based or asset-based assessments for the calculation of loss of profit.

Legal institutions assisting calculation of damages are more important than calculation methods. On the basis of Section 88/C of the HCA it is possible to apply a presumption regarding the amount of the overcharge. It also is possible to employ accounting and economics experts.35 In connection with the estimation of damages, on the one hand under Hungarian law it is possible to apply general compensation of damages [Section 6:531 of the Civil Code] as well as determination of the amount of compensation of damages on the basis of discretion [Section 206 (3) of the Civil Procedure Code], on the other hand Article 17 (1) of the Directive also prescribes the estimation of the amount of damages.

If the business partner of the undertaking participating in the cartel is not an end-user – and in cases of horizontal restrictions by object they generally are not – it is almost inevitable that the overcharge created by the cartel is passed-on by the business partners to their own customers.36 However, in the judgment adopted in the Hanover Shoe case37 the United States Supreme Court dismissed invoking the passing-on of damages as a defence against liability for damages with respect to the circumstance that such a defence would enable the unjust enrichment of the damaging parties. According to the case-law of the CJEU concerning unjust enrichment invoking the passing-on of damages is compatible with EU law,38 and Article 13 of the Directive explicitly allows invoking the passing-on of damages. Under Hungarian law, the damaging parties may invoke passing-on of damages on the basis of the prohibition of gains from damages [Section 6:522 (3) of the Civil Code].

The following conclusions can be drawn as a result of the research on the definition of damages:

(i) In connection with harmful effects qualifying under the definition of damages it can be stated that horizontal restrictions by object lead to such harmful effects, which may not qualify under the civil law definition of damages, in particular the decrease in innovation and deadweight loss. While there are such harmful effects (umbrella pricing), which qualify under the civil law definition of damages in

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35 See Szamosi Katalin: A kartell kártérítési perek akadályai Magyarországon, Iustum Aequum Salutare 2007/4, p 58
36 See Bishop, Simon – Walker, Mike: Az Európai Közösségi versenyjog közgazdaságtana, Budapest, 2011. GVH Versenykultúra Központ, p 719
37 Hannover Shoe, Inc. V. United Shoe Machinery Corp., 392 US 481 (1968)
certain cases. Nevertheless, it is unjustified to theoretically exclude the possibility for an injured party to attempt to prove any of the harmful effects.

(ii) In connection with methods of damages quantification it can be stated that methods for the determination of actual loss can be applied in practice easily, while methods concerning the determination of loss of profits are likely not to be applied by the judges acting in the procedure due to their complexity, but by the experts employed by the court.

(iii) Concerning mechanisms simplifying quantification of damages Hungarian law is in compliance with the requirements of the Directive in connection with estimation of damages and sets forth a rule regarding presumption of damages, which is particularly progressive. However, it would be justified that the Hungarian Competition Authority contributes to the procedure of the courts concerning damages calculation, in particular with respect to the parts of damages that are difficult to be calculated (loss of profits, passing-on of damages), and in case of damages affecting a wide scope of consumers.

(iv) Passing-on of damages is possible under EU and Hungarian law. However, this defence is not unconditional and its conditions need to be proven by the damaging party. Such a condition is that the direct purchaser was able to pass-on the entire damages without significant efforts and the passing-on being justified, and the damages were not passed-on to persons, who are not capable of claiming damages themselves.

Out of the issues of law of obligations the dissertation discusses the issue of causality thirdly. The detrimental consequences of horizontal restrictions by object reach the different levels of the production-distribution chain (finally the consumers) indirectly and in a complex way.\(^39\) Thus, in case of cartel damages claims the issue is not related to factual causality, but to legal causality. Legal causality may constitute time, subject and capacity limitations concerning causal links.\(^40\) Due to Section 6:521 of the Civil Code the assessment of a causal link needs to be extended to issues of foreseeability in case of competition law infringements. In a preliminary ruling procedure regarding umbrella pricing the CJEU stated in the judgment adopted in the Kone case\(^41\) that the liability of undertakings participating in a cartel depends on whether the undertakings participating in the cartel could reasonably disregard the circumstances and market characteristics contributing to the occurrence of damages.

The following conclusions can be drawn as a result of the research on causality:

(i) In the course of assessing legal causality (imputation) it needs to be taken into consideration that international cartels usually have a wide market coverage and

\(^{39}\) See Nagy Csongor István: Kartelljogi kézikönyv – A közösségi és a magyar kartelljog joggyakorlata, Budapest, 2008. HVG-Orac, p 740-742

\(^{40}\) See Petrik Ferenc: Kártérítési jog. Az élet, testi épség, egészség megsértésével szerződésen kívül okozott károk megtérítése, Budapest, 2002. HVG-Orac, p 64

\(^{41}\) Case C-557/12. Kone AG and others (5 June 2014), ECR not reported yet
affect a wide scope of consumers, thus, in case of horizontal restrictions by object the concept of close relation between the infringement and (consumer) harm must be interpreted broadly.

(ii) In the course of assessing foreseeability it needs to be taken into consideration that international cartels are usually created by undertakings having a large organisation and extensive market knowledge, thus, in case of horizontal restrictions by object the standard of foreseeability of damages (capacity limitations) must be interpreted broadly.

(iii) The causal link is not disrupted simply by contributing circumstances or free decisions of third parties, while foreseeability is not precluded simply by the multitude of market factors or the efforts necessary to monitor these.

Out of the issues of law of obligations the dissertation discusses the issue of culpability fourthly. For the finding of a competition law infringement the assessment of the fault of the infringer is not necessary (although it is taken into consideration by competition authorities for the determination of the amount of fines). However, the assessment of culpability is necessary for the adjudication of damages claims. The assessment of culpability in a competition law context is important from two viewpoints. On the one hand the objective standard of culpability based on social expectations is higher in case of organisations like undertakings carrying out horizontal restrictions by object. Thus, the undertakings participating in the cartel may invoke successfully the absence of culpability very rarely. On the other hand, in certain cases it may arise that the culpability of undertakings is missing. One of these cases is when the undertaking erred in the lawful nature of its conduct. Though adopted in a public enforcement context, the judgement of the CJEU adopted in the Schenker case addressed the issue and set forth that neither legal advice, nor the decision of a competition authority may entail the error of the undertaking leading to exemption from liability.

The following conclusions can be drawn as a result of the research on culpability:

(i) The participants of horizontal restrictions by object are typically organisations, which fall under a higher standard of social expectations. With respect to this though the civil court must assess culpability, the standard applicable to undertakings is similar to objective liability.

(ii) With respect to the self-assessment mechanism of competition law undertakings carry the risk concerning the adequate legal qualification of their practices. Thus, under culpability undertakings have a limited possibility to invoke an error in legal qualification (if regarding the legal advice or the competition authority decision is provided by an independent attorney / competent competition

43 Case C-681/11. Schenker & Co and others (18 June 2013), ECR not reported yet
authority, it refers to identical factual and legal circumstances and it is not clearly erroneous).

Out of the issues of law of obligations the dissertation discusses the issue of joint and several liability fifthly. The participants of horizontal restrictions by object are typically jointly causing the damages, which leads to joint and several liability under Hungarian law according to Section 6:524 of the Civil Code. The subject-matter of the research is not joint and several liability in general, but its interaction with leniency policy. This interaction was raised with respect to the circumstance that in the United States of America the leniency applicant is only liable for the compensation of damages arising from its own sales. Under Hungarian law Section 88/D of the HCA applies a similar solution on the basis of which leniency applicants that were granted full immunity from fines may refuse to compensate damages until compensation can be achieved from other damaging parties. Finally, Article 11 (4) of the Directive sets forth that the liability of leniency applicants that were granted full immunity from fines may not exceed the amount of damages caused by the leniency applicant to its direct and indirect purchasers and suppliers.

The following conclusions can be drawn as a result of the research on joint and several liability:

(i) Penetration of joint and several liability is justified in order to enhance the effectiveness of leniency policy. However, this penetration may not jeopardize the right of injured parties to full compensation of damages.

(ii) The solution applied by Section 88/D of the HCA does not affect the liability of the leniency applicant for damages, however, it creates a difficult position for injured parties (e.g. they must prove the unenforceability of their claims from other damaging parties).

(iii) The solution applied by Article 11 (4) of the Directive limits the extent of the liability of the leniency applicant for damages, however, it does not eliminate the detriment to the leniency applicant that the competition authority decision becomes final and binding against the leniency applicant.

(iv) Contrary to the position of the European Parliament, the combined application of the solution according to Section 88/D of the HCA (temporal penetration of joint and several liability) and the solution according to Article 11 (4) of the Directive (personal penetration of joint and several liability) is justified.

Out of the issues of law of obligations the dissertation discusses the issue of statute of limitations sixthly. The statute of limitations in case of cartel damages claims is important from two viewpoints. On the one hand, horizontal restrictions by object

44 Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Public Law 108-237, Section 213
qualify as single and continuous infringements, which should affect the commencement of the limitation period.\textsuperscript{46} On the other hand, it is not clear when the limitation period is suspended in case of follow-on actions. According to Hungarian law, the limitation period is five years [Section 6:22 (1) of the Civil Code], which is suspended as long the injured party is unable to enforce its damages claim due to excusable reasons [Section 6:24 of the Civil Code]. Excusable reason is, inter alia, if the injured party was or could not have been aware of the information necessary to enforce its damages claim (cause of damages, amount of damages).\textsuperscript{47} Article 10 of the Directive on the one hand states that the limitation period is not commenced until the injured party becomes aware of the infringement, the damages and the damaging party, on the other hand it sets forth that the limitation period is suspended until the judicial review of the competition authority decision is pending.

The following conclusions can be drawn as a result of the research on statute of limitations:

(i) The limitation period of damages claims based on competition law infringements should be governed by special regulations, differentiating between stand-alone and follow-on actions.

(ii) The Directive correctly regulates the limitation period with respect to the special nature of a single and continuous infringement and clarifies the effect of judicial review of competition authority decisions on the limitation period (suspension).

(c) \textbf{Procedural law questions}

The dissertation came to the conclusion earlier that institutions of procedural law need to be reviewed in connection with the facilitation of damages claims based on horizontal restrictions by object.

Out of the issues of procedural law the dissertation discusses legal standing first, in particular the standing of indirect purchasers, collective redress mechanisms and the use of assignment in the absence or instead of collective redress mechanisms. The issue of standing of indirect purchasers was raised, because - simultaneously with excluding the passing-on defence - the judgment of the US Supreme Court adopted in the Illinois Brick case,\textsuperscript{48} precluded the standing of indirect purchasers (directly against damaging parties), mainly in order to increase the effectiveness of enforcement. Although on the basis of the judgment adopted in the Courage case exclusion of standing of certain individuals seems incompatible with EU law, limitations of standing exist in several

\textsuperscript{46} See Whish, Richard: Versenyjog, Budapest, 2010. HVG-Orac, p 99
\textsuperscript{47} See Kötelmi jog Első és Második Rész, ed.: Wellmann György, In: Polgári jog: az új Ptk. magyarázata, ed.: Petrik Ferenc, Budapest, 2013. HVG-Orac, p 64
\textsuperscript{48} Illinois Brick Co. v Illinois, 431 US 720 (1977)
European jurisdictions. Article 12 of the Directive explicitly stated that indirect purchasers are entitled to enforce claims directly against damaging parties.

Collective redress mechanisms are important from the viewpoint of enforcing consumer claims. On the basis of the principle of full compensation, civil law must ensure that consumer can enforce their claim for compensation of damages through accessible, simple and low-cost instruments. Collective redress mechanisms can be distinguished on the basis of whether they aim at an injunctive relief or the compensation of damages. Another distinction is whether it is based on the participation of the members of a group (opt-in) or it is independent from the participation of the members of the group (opt-out). Furthermore, collective redress mechanisms must be differentiated in accordance with whether the group consists of specified members or unspecified members and whether a member or an independent organisation enforces the claim (public interest litigation / representative actions and group / collective actions). In the context of antitrust damages, the White Paper proposed the introduction of rules facilitating a combination of public interest litigation and opt-in collective actions. The Recommendation sets forth particularly restrictive rules both with respect to representative actions (e.g. only pre-appointed, qualified organisations may bring a claim, which may accept third-party funding to a limited extent), and with respect to damages actions (e.g. exclusion of success fees for attorneys, exclusion of punitive damages, remuneration of financing parties proportionately to the awarded damages and exclusively follow-on actions). Current Hungarian regulation only recognizes joint claims (Section 51 of the Civil Procedure Code) and public interest litigation pursued by administrative bodies (Section 92 of the HCA), former is not adequate for the management of a large number of damages claims, while latter is not used by the authority.

With respect to the absence of collective redress mechanisms, several initiatives took place in Europe, which were based on the acquisition of claims of injured parties in the form of an assignment by a special purpose vehicle established for litigation. Enforcement of group claims by using civil (substantive) law institutions is not alien from Hungarian law either. However, as the judgment of the Düsseldorf Regional Court adopted in the cement cartel case pointed out, the use of assignment for group claim enforcement may be illegal or contrary to good morals under certain circumstances. Under Hungarian law, the invalidity of fiduciary securities (Section 6:99 of the Civil Code) raises the question whether the use of assignment is possible where it

49 See Böge, Ulf – Ost, Konrad: Up and running, or is it? Private enforcement - the situation in Germany and policy perspectives, European Competition Law Review 2006/4, p 201
52 See Nagy Csongor István: A csoportos igényérvényesítés gazdaságtana és lehetőségei a magyar jogban, Jogtudományi Közlöny 2011/3, p 169
53 LG Düsseldorf, Urteil vom 17.12.2013 - 37 O (Kart) 200/09
creates a favourable position with respect to the enforcement of claims for injured parties, which is not justified or is achieved by a sham contract.

The following conclusions can be drawn as a result of the research on standing:

(i) The absolute exclusion of the standing of indirect purchasers is not justified. On the one hand, the total exclusion in the United States of America had special reasons (e.g. the previous exclusion of the passing-on defence), on the other hand, it would not be compatible with EU case-law. Nevertheless the limitation of indirect purchaser standing is possible if the causal link is missing between the damaging event and the damages of the indirect purchaser. It was justified that the Directive confirmed the standing of indirect purchasers, however, it must be regarded as a deficiency that the Directive does not set forth rules on situations where contrary to the general rule (due to causal circumstances) indirect purchaser may not have standing.

(ii) Opt-in actions and public interest litigation currently available under Hungarian law cannot ensure the effectiveness of consumer claim enforcement, thus, it is justified that more flexible rules are introduced concerning collective actions and the revision of the current rules on public interest litigation. The introduction of opt-out actions is not justified, however, courts should enjoy a wider discretion with respect to the management of opt-in actions. In case of disadvantaged injured parties (consumers) more emphasis should be attributed to public interest litigation than to opt-in collective actions requiring active participation, thus, it is justified to amend competition law with detailed rules on actions brought by non-governmental organisations. Furthermore, it would be reasonable to go beyond the rules of the Recommendation in several aspects by introducing a sector-specific (competition law) collective redress mechanism and disregarding restraints on financing of representative actions and the limitation of damages actions to follow-on actions.

(iii) The use of assignment for group claim enforcement is fundamentally not in compliance with the original purpose of the legal institution. However, until effective collective redress mechanisms are available, it is justified that courts interpret the legal institution in a sufficiently broad manner.

Out of the issues of procedural law the dissertation discusses evidence secondly. Issues of evidence arise in particular in the context of the disclosure / discovery mechanisms applied in Anglo-Saxon jurisdictions for simplifying proof. The purpose of disclosure is to provide access to documents in the possession of the other party. The dissertation discusses access to documents in the possession of the competition authority in a separate chapter. Disclosure, in particular pre-trial discovery carries the risk of abuses by the plaintiffs. With respect to this in Europe the objective is not to introduce the

54 See Möschel, Wernhard: Behördliche oder privatrechtliche Durchsetzung des Kartellrechts?, Wirtschaft und Wettbewerb 2007/5, p 487
Anglo-Saxon disclosure / discovery, but to appropriately amend the rules on courts requesting the presentation of documents. Under Hungarian law, according to Section 190 (2) of the Civil Procedure Code, the court may only request the opposing party to present a document if it is otherwise obligated to present this document on the basis of civil law rules. Article 5 (2) of the Directive regulates disclosure: although the court must assess proportionality, the Directive, in general, creates the possibility to apply for the presentation of a wider scope of documents.

The conclusion to be drawn as a result of the research on evidence is that taking into consideration other measures favouring the injured parties, the introduction of an American discovery mechanism is not necessary. However, in accordance with the Directive, it is necessary to regulate among the rules of civil procedure that injured parties sufficiently substantiating their claim may request the court to obligate the damaging parties to present a wider scope of evidence (based on categories of documents).

Out of the issues of procedural law the dissertation discusses procedural costs thirdly. The hearing of damages claims based on horizontal restrictions by object is particularly cost-intensive for injured parties (in particular because of costs of attorneys having relevant expertise and experts). In order to facilitate damages claims the loser pays rule may abandoned or modified, cost allowances may be introduced or third-party financing may be enabled or encouraged. According to Hungarian law [Section 80 (2) of the Civil Procedure Code] the loser pays rule is only reversed in case of a failure of the concerned (winning) party. Since attorneys' fees constitute a significant part of procedural costs, in order to facilitate damages actions contingency / conditional fees may be applied. A contingency fee it itself does not reverse the loser pays rule, furthermore, the Code of Conduct for Lawyers in the European Union explicitly prohibits such a contingency fee arrangement, where the fee is deducted from the awarded damages.

The conclusion to be drawn as a result of the research on procedural costs is that deviation from general rule of bearing procedural costs is only justified in case of disadvantaged injured parties (consumers).

Out of the issues of procedural law the dissertation discusses jurisdiction fourthly. Article 5 (3) of the Brussels I Regulation sets forth a special ground for jurisdiction for delictual (tort) liability. Although on the basis of this both the courts of the country

56 See Eilmansberger, op. cit., p 448
where the damaging event took place and the courts of the country where the damages occurred has jurisdiction, in case of horizontal restrictions by object the exact determination of these places is a difficult task.\textsuperscript{59} In the damages litigation related to the synthetic rubber cartel the injured parties relied on anchor defendants. This meant that the plaintiffs based jurisdiction on the place of domicile of the subsidiary of an undertaking participating in the cartel in order to proceed before courts that are considered effective in conducting cartel damages litigation. In order to preclude this jurisdiction an Italian torpedo was applied. This meant that one of the potential respondents filed a lawsuit before the courts of its own domicile requesting the court to find the absence of an infringement. The English court in its judgment\textsuperscript{60} dismissed the objections against jurisdiction, because the English subsidiary constitutes one undertaking (group of undertakings) from a competition law perspective with the other (damaging) subsidiaries.

The CJEU in the judgment adopted in the CDC Hydrogen Peroxide case\textsuperscript{61} discussed jurisdiction issues. The case concerned several objections against jurisdiction, the respondents wanted to rely on the circumstance that the plaintiff settled its claim with the respondent, the domicile of which formed the basis of jurisdiction, after the lawsuit was filed, but before the hearing was commenced.

The following conclusions can be drawn as a result of the research on jurisdiction:

(i) In case of damages claims based on horizontal restrictions by object it is difficult to rely on the special ground for jurisdiction applicable to delictual (tort) liability, because the determination of the place of the damaging event or the place of the damages is cumbersome.

(ii) With respect to the competition law concept of undertaking (business unit) anchor defendants may form the basis of jurisdiction, while an Italian torpedo cannot be used in a competition law context, since the national court cannot adopt a judgment contrary to the decision of the Commission (and certain competition authorities).

(iii) The ground for jurisdiction according to Article 6 (1) of the Brussels I Regulation must exist (only) at the time of filing the lawsuit. The ground for jurisdiction according to Article 5 (3) of the Brussels I Regulation cannot be applied effectively in case of horizontal restrictions by object, since it would lead to the jurisdiction of several courts. While choice of forum according to Article 23 (1) of the Brussels I Regulation is only applicable to delictual (tort) liability if the choice of forum clause explicitly mentions delictual (tort) disputes.

\textsuperscript{59} See Mankowski, Peter: Der europäische Gerichtsstand des Tatortes aus Art. 5 Nr. 3 EuGVVO bei Schadensersatzklagen bei Kartelldelikten, Wirtschaft und Wettbewerb 2012/9, p 799
\textsuperscript{60} Cooper Tire & Rubber Co and others v Shell Chemicals UK Ltd and others [2009] EWCH 2609 (Comm) (27 October 2009)
\textsuperscript{61} Case C-352/13. CDC Hydrogen Peroxide (21 May 2015), ECR not reported yet
With respect to the above, it is justified to introduce a special ground for jurisdiction explicitly applying to cartel damages claims.

(d) Access to documents

Leniency policy is the most effective instruments of public enforcement of competition law. A key point of the interaction between cartel damages claims and leniency policy is third-party (injured parties) access to the leniency application and the documents filed in the framework thereof in the possession of the competition authority.

The rules of access to documents may be distinguished on the basis whether they regulate third-party access to the Commission's file or the documents in the possession of the national competition authorities.

Access to the Commission's file is regulated on the one hand by the Transparency Regulation, on the other hand EU competition law rules also regulate access to the file. The Transparency Regulation does not explicitly mention leniency applications, however, it sets out exceptions with respect to the protection of commercial interests of undertakings and the protection of the objectives of the Commission's investigation.

The applicability of EU rules on access to documents in competition law matters was raised in two contexts in recent case-law of the General Court: (i) in two cases third parties wanted to access the Commission's file (in one case only to the table of contents, in the other case to all documents within the file); and (ii) in two cases third parties wanted to access the prohibition decision of the Commission (in one case to an extended non-confidential version, in the other case to the confidential version). Due to an appeal against the judgment of the General Court in the EnBW v Commission case the CJEU also addressed the applicability of EU rules on access to documents in competition law matters. The General Court provided access to the table of contents and the non-confidential version of the decision. The judgment of the General Court to provide access to the entire content of the file was subsequently overruled by the CJEU.

With respect to access to national competition authorities' files Section 55 (4) of the HCA determines that access of third parties may be refused, inter alia, if effective enforcement of public interests so requires, in particular if it would jeopardize the application of leniency. Furthermore, Section 78/D (2) of the HCA provides for the absolute protection of the leniency application and the evidence submitted in the framework thereof. In connection with access to documents in the possession of

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63 See Cauffman, Caroline: The interaction of leniency programmes and actions for damages, Competition Law Review 2011/2, p 184
65 CDC Hydrogene Peroxide v Commission case and EnBW v Commission case
66 Schenker v Commission case and Akzo Nobel and others v Commission case
67 Commission v EnBW case
national competition authorities, Article 7 of the Directive only provides for the absolute protection of the corporate statement forming part of the leniency application.

The CJEU addressed the interpretation of national rules of access to documents in two cases. The CJEU did not exclude access to leniency documents if access serves the effective enforcement of EU competition law on the basis of the weighing of the interest to effective leniency policy and the interest to full compensation of damages. The CJEU otherwise did not accept the position of absolute protection for certain documents from access. One of the first examples of the case-by-case weighing of interests required by the CJEU is included in the judgments adopted in the National Grid case related to the gas-insulated switchgear cartel, where the English court provided access to confidential documents to the attorneys of the parties, while providing access to documents related to the leniency application after the weighing of interests, because the relevant documents were not available from any other source.

The following conclusions can be drawn as a result of the research on access to documents in the possession of competition authorities:

(i) An absolute prohibition of access to documents is incompatible with EU law. Thus, both the Directive and the comprehensive amendment of the HCA is subject to criticism since they provide for the absolute protection of certain leniency documents.

(ii) Access to documents can be provided after the case-by-case weighing of interests, which weighing is extensively influenced how exactly the request for access specifies the documents to be accessed.

(iii) The case-by-case weighing of interests is extensively influenced by the content of the document. Thus, documents containing business secrets may receive stronger protection against third-party access, because the lapse of time does not affect the protection of commercial interests. However, the protection of the objective of investigations is affected by the lapse of time, since such documents do not deserve protection after the closure of the investigation (the judicial review of the competition authority decision) under the exception.

(iv) With respect to the above it can be stated that differentiation of documents is relevant regarding adjudication of access to documents (access to the entire file is unlikely, access to documents containing business secrets is less likely). A distinction is justified with respect to leniency applications. The Advocate General in the Pfleiderer case already suggested that corporate statements forming a part of the leniency application and pre-existing evidence provided to the competition

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68 Pfleiderer case and Donau Chemie case
69 National Grid Electricity Transmission Plc v ABB Ltd and others [2011] EWHC 1717 (Ch) (04 July 2011); illetve National Grid Electricity Transmission Plc vs ABB Ltd and others [2012] EWHC 869 (Ch) (04 April 2012)
authority in the framework of the leniency application should be dealt with differently.

5. USE OF THE CONCLUSIONS OF THE RESEARCH

Competition law damages claims are one of the most widely discussed matters of competition law literature, in particular because of its topicality and social significance. Although the EU legal development process was closed with the adoption of the Recommendation and the Directive, the scientific assessment of these documents is justified, on the one hand taking into consideration the position developed in competition law literature, on the other hand taking into consideration how these may be integrated in the national legal systems. In particular access to documents merits the examination of the legal development process and its results, since the CJEU laid down the principles of access to documents simultaneously with the legislative process. The latter issue is also relevant regarding the amendment of the HCA as of July 1, 2014 since the Hungarian legislator amended the rules of access to documents simultaneously with the EU legal development process.

With respect to the above, the scientific results of the dissertation may be used in Hungarian administration for the appropriate interpretation of the regulated issues, but they may be also used by the Hungarian legislator for the adoption of new rules, in particular in the course of the transposition of the Directive. Apart from the interpretation of current rules and transposition of the Directive, the dissertation also formulates legislative needs and proposals on the basis of the conclusions drawn as a result of the research.

With respect to the significance of applying the principle of full compensation in case of competition law infringements, the dissertation puts special emphasis on providing guidance for potential plaintiffs for the enforcement of their damages claims about the aspects that need to be taken into consideration.

6. PUBLICATIONS ON THE TOPIC OF THE DISSERTATION


70 Act CCI of 2013 on amendment of Act LVII of 1996 on prohibition of unfair market practices and the restriction of competition and certain statutory rules in relation to the procedure of the Hungarian Competition Authority
• The Hungarian Court of Appeal gives ruling on cartel damages claims, ECLR: EUROPEAN COMPETITION LAW REVIEW 32:(6) pp. 282-285. (2011)
• Magyar versenyjogi fejlemények – informátori díj, legal privilege és csoportos per, MAGYAR JOG 57:(9) pp. 534-544. (2010)
• Cartels and the Commission’s current investigation, enforcement and decision-making powers, EUROPEAN INTEGRATION STUDIES 7:(2) pp. 31-42. (2009)