ESTABLISHMENT OF EFFECTIVE MECHANISMS FOR PRIVATE ENFORCEMENT OF COMPETITION LAW IN THE REPUBLIC OF NORTH MACEDONIA – AN INEVITABLE STEP FOR THE NEAR FUTURE, OR AN ELUSVE FICTION?

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ABSTRACT
Competition law plays a crucial role in the efficient functioning of the free market economy. It aims to deter potential infringers, detect anticompetitive behavior, sanction those behaviors, and finally, compensate the affected parties of these behaviors.
Historically, competition law has been used predominately as a deterrent mechanism, and only if violations are detected, as a mechanism to sanction the wrongdoers. Compensation of victims has played a secondary role. However, in the past decade, there were many scandals such as Dieselgate, Cambridge Analytica, and Ryanair's mass cancellation of flights, which resulted in mass harm suffered by consumers. This, coupled with the lack of capacity of many national competition agencies to discover and tackle anticompetitive actions of many large companies solely on their own, imposed the idea for the strengthening of the private enforcement of competition law.
The paper aims to analyze the latest trends in the sphere of private enforcement of competition law on a global scale, primarily through an examination of the competition laws of the USA and the EU, before focusing on the current situation in the Republic of North Macedonia.

Keywords: *antitrust law; public enforcement of competition law; private enforcement of competition law; group representation; class actions; compensation for damages.*

JEL classification: *K20; K21; D18*

1. INTRODUCTION

In the model of a free market economy, free competition has a key role. This model can be effective only if companies and market actors act independently of each other but are subject to the pressure exerted by their competitors. Even Adam Smith, who is widely considered the father of the free market economy, admits that there are limitations to the theoretic model in practice, admitting that actors in the same markets tend to conspire in order to reduce the market pressure and increase prices (Smith, 1776).
Consequently, for free market economies to achieve their potential, a system that would enable free competition has to be established. This is accomplished firstly through the enactment of laws for the protection of competition, and secondly through the creation of mechanisms for the effective enforcement of those laws. Regardless of the necessity to create a system for the protection of competition, from a historical perspective, it has been a relatively new creation on a global scale. According to statistical data from the OECD, in 1970, only 12 jurisdictions had a competition law, and only seven had a functioning competition authority, whereas today, more

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than 125 jurisdictions have a competition law regime, and the large majority has an active competition enforcement authority (OECD, 2020).

National agencies for the protection of competition have historically been the most important institutions for enforcing competition law. As governmental agencies, they are the main bodies responsible for the public enforcement of competition law. Public enforcement is considered essential for maintaining competition and protecting consumers and businesses from anticompetitive practices. However, the primary goal of public enforcement is to deter anticompetitive behavior, protect competition, and ensure a level playing field in the market. If an anticompetitive behavior is found, a fine is issued which should act as a punishment for the infringers and as a warning and deterrence for all future market participants. However, while the monetary fines should ensure a leveled playing field, a shortfall of public enforcement is that it neither considers the damage that other market participants have suffered due to these violations nor provides compensation mechanisms.

As a result of this setback, in the last decade, there has been an ongoing trend for the promotion of private enforcement of competition law. Private enforcement allows affected parties (competitors, consumers, or suppliers) to seek damages, injunctions, or other remedies through civil litigation. Private enforcement primarily seeks compensation for the victims of anticompetitive practices, but it can also serve as a deterrent mechanism, especially in legal systems where efficient mechanisms for collective redress exist.

Today, there is broad agreement that private enforcement can substantially improve the functioning of a competition regime and that individuals and firms who suffer harm from anticompetitive conduct, should be entitled to reasonable compensation (OECD, n.d.). Public and private enforcement of competition law are two different approaches for achieving complementary objectives – public enforcement agencies play a crucial role in deterring anticompetitive behavior, while private enforcement allows individual parties to seek compensation and provides an additional check on anticompetitive practices. Consequently, they should work in tandem to achieve the goals of competition law - ensuring fair competition and preventing anticompetitive behavior in the marketplace.

In this paper, the focus is on the private enforcement of competition law as a new and emerging trend. The paper examines the global trends for private enforcement focusing on the USA and the EU, before analyzing the current state of play concerning the legal framework for private enforcement of competition law in the Republic of North Macedonia. The paper concludes with recommendations for further actions necessary for the establishment of more efficient mechanisms for private enforcement of the competition law in North Macedonia.

2. GLOBAL TRENDS FOR PRIVATE ENFORCEMENT OF COMPETITION LAW

Aside from causing harm to national economies and economic development, anticompetitive actions also cause concrete damage to competitors, suppliers, and consumers. In most cases, the consumers are the most affected, since they are at the end of the supply chain, and the cost incurred from suppliers due to the anticompetitive practices are passed on to them. Depending on the products and markets in which these anticompetitive practices occur, the inflicted damage on consumers can amount to millions of dollars or euros. This is why the existence of an effective system for private enforcement of competition law is necessary.

It is important to note that all countries that have competition laws, also have some rules related to private enforcement of competition law. However, it is very important to differentiate between countries where compensation can only be claimed on individual action and countries that have

specific rules for collective redress or class action. Collective redress is important since in many cases the amount of individual damage incurred might be dwarfed by the possible legal fees for court proceedings, which has a discouraging effect on affected parties. This disbalance is even more pronounced in countries where there is no chance of recovering the legal fees in case of a successful claim.

Traditionally in continental Europe, countries focus more on individual compensation, whereas in the USA, collective redress is more prominent. Regardless, recent events have led to significant shifts in the EU prompting changes in the methods for private enforcement. Below we analyze the mechanisms for private enforcement in the USA and the EU, before examining the situation in North Macedonia.

The relevance of the analysis of the private enforcement of competition law in the EU stems from the fact that North Macedonia is aiming to become a member of the EU, and in that process, it must align its national legislation with the *EU acquis*. On the other hand, although the enforcement of competition law in the USA does not have a direct impact on the competition law of North Macedonia, its significance for the analysis stems from the fact that many characteristics of this system have slowly been adopted by the EU, and therefore it has an indirect effect on the national legislation.

2.1. Private enforcement of competition law in the USA

The USA is a true model for the successful inclusion of all relevant actors and stakeholders in the process of exercising market pressure to achieve effective functioning of the markets and free competition. The system for enforcement of competition law in the USA is very often used as a model, both by less developed countries and by economically powerful supranational organizations such as the EU.

In the US, private enforcement of competition law has been the dominant approach. This can be attributed to the fact the US has a tradition of private enforcement of competition law dating from the Clayton Antitrust Act from 1914, which strongly encouraged the private enforcement of competition law, by providing the possibility for treble damages, declaratory relief against infringers, use of decisions against infringers as *prima facie* evidence, clear and unambiguous statutes of limitations, and well as the possibility to recover legal costs (Section 4, 6 & 16, 1914). Additionally, the characteristics of the US legal system itself have fertilized the sprout of this method: pre-trial discovery, consolidation of cases and class actions, joint and severable liability of infringers, and possibility for contingency fees are just a number of concepts that stimulate private enforcement (Jones A., 2016).

As a result, private parties have had great significance in ensuring free market competition by placing pressure on the market participants. This is also supported by statistical data. According to research conducted by Jones, 90% of all antitrust cases in the US involve private rather than public action (Jones C.A., 1999). Additionally, Professors Davis and Lande conducted research analyzing more than 60 cases for damages in civil court proceedings. The analysis showed that not only through this type of proceedings the affected parties were awarded large sums as compensation (between 33.8 and 35.8 billion US dollars) but also that without their involvement, a large part of the cases of violation of the competition law would have remained undiscovered (Davis & Lande, 2003).

However, the biggest achievement of the US competition law is the possibility for collective redress for mass harm suffered through the utilization of class actions. A class action is defined as a legal proceeding in which one or more plaintiffs bring a lawsuit on behalf of a larger group,

known as the class (Investopedia.com n.d.). Any proceeds from a class action, as well as all legal costs, are shared among all members of the class, thus making them suitable even where the individual harm is low, if there is a large number of affected parties. Class actions are deeply rooted in the US legal system. Even in the federal rules for the civil procedure from 1842, there was a possibility to consolidate claims to ensure cost-effectiveness (Equity Rule 48, 1842). In 1966, significant changes were made in the federal rules of civil procedure, which established the so-called "opt-out system" With the new rule, class actions bind and cover all members of the group (regardless of whether they are present or absent and whether they are actively involved in the proceedings or not), except for those members who will explicitly decide to withdraw (Weber Waller & Popal, 2016).

2.2. Private enforcement of competition law in the EU

From a historical standpoint, within the EU public enforcement has been more important than private enforcement (Whish & Bailey, 2012). The first step toward a more decentralized approach for the enforcement of EU competition law was the adoption of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, that allowed national courts to apply rules of EU competition law. However, the necessity for strengthening the private enforcement of EU competition law continued and has been advocated for a long period by the European Commission. Firstly, in the Commission's White Paper on damages actions for breach of the EC antitrust rules from 2008, it was estimated that due to the lack of effective mechanisms, victims fail to receive compensation of up to several billion euros annually (Commission of the European Communities, 2008). Secondly, in the Commission's Impact Assessment from 2017 Accompanying the proposal for Directive for the empowering national competition agencies, it was found that due to the existence of undetected cartels, annual losses in the amount of 181-320 billion euros accrue (European Commission, 2017). However, while there is a consensus that the mechanisms for private enforcement should be strengthened, the biggest obstacle is the fact that each EU member state has its competition law, as well as the fact that the principle of national procedural autonomy in the EU makes enforcement of EU competition law dependent on the procedural, evidential, and substantive rules governing civil litigation applicable in each of the member states (Jones A., 2016).

Regardless of these obstacles, in the last decade, two important directives were adopted that are of significance for the strengthening of the private enforcement of EU competition law:

- The Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text (hereafter Damages Directive); and
- The Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers (hereafter Directive on Representative Actions).

It is important to note that the directives only affect EU competition law, while national competition law remains within the exclusive domain of member states.

The Damages Directive was adopted to enable private parties to effectively obtain compensation in civil proceedings. While all member states have general provisions on torts in their law on obligations, the Damages Directive aims to introduce specific rules, tailored to the needs of the victims, enabling affected parties to obtain compensation for anticompetitive practices. The main features of the Damages Directive are:

- Acceptance of the principle of full compensation to victims of anticompetitive practices - which covers actual loss suffered, loss of profit, plus the payment of interest, but excludes punitive damages or multiple types of damages that would lead to overcompensation.
- Strengthening the legal effects of the decisions of national competition authorities – decisions of national competition authorities that establish a breach of competition law have the power of irrefutable evidence in front of courts in the same jurisdiction, whereas in courts in other member states they have the power of *prima facie* evidence.
- Introduction of the concept of disclosure of evidence – this is a concept that allows the claimants to seek courts to compel defendants to disclose documents in their possession that would support the claimant's assertion. This is justified since in most cases of anticompetitive practices affected parties have no insight into documents in the possession of the infringes which are crucial for the calculation of the damages incurred.
- Introduction of a longer statute of limitation, with a minimum of 5 years, which is favorably calculated subjectively from the perspective of the affected party.
- Introduction of joint and severable liability to infringers – which allows affected parties to seek compensation for the harm suffered from any of the infringing undertakings, regardless of whether they have made direct or indirect contact with the infringer from whom they seek compensation.
- The right of infringers to rely on the defense for the "passing on" of overcharges – this is aimed at protecting infringers from having to overcompensate - if the infringing undertaking proves that purchasers have passed on the increased price by way of charging a higher price to their customers further in the supply chain, then they would not be liable towards those purchasers.

The Damages Directive is considered a significant act in the promotion and strengthening of the private enforcement of EU competition law. It was implemented by all member states by the end of 2018 (European Commission, 2020). The Directive introduced many novelties typical for the US legal system in the hope of protecting EU consumers from harm. However, the biggest problem that remained is that it did not address the procedural challenges that affected parties face when they have to go to court to pursue a case for damages – no harmonized procedures, no minimum standards across jurisdictions, and most importantly no mechanism for collective redress. This translated into a lack of access to justice. This is why in 2020 the Directive on Representative Actions was adopted. The main features of the Directive are:

- Implementation and harmonization of existing systems for indemnification – Prior to the Directive, only 19 members had some form of legal remedy for victims of mass harm and proceedings are often lengthy and costly, especially if victims go to court individually (European Parliament, 2018). The Directive aims to set a standardized and harmonized procedure in each member state for actions for compensation due to breach of EU competition law. This would enable at least a minimum level of unified standards and procedures on the EU level.
- Collective representation – this is the by far most important novelty in the Directive. Very often consumers feel powerless and are hesitant to commence legal actions, resulting from uncertainty about their rights or procedural mechanisms available, or fearing the negative balance of the expected costs relative to the benefits of the individual action. Collective representation levels the playing field since it enables larger groups to jointly oppose infringers, thereby depleting these fears.

- Facilitated access to justice through Qualified representative entity (QRE) - Consumers are represented by a qualified entity, which can be a consumer organization, an NGO, or a public body, who acts as a claimant party, in the interests of and on behalf of these consumers. Individual consumers concerned by a representative action are not claimants but should be entitled to benefit from that action (European Commission, n.d.). However, unlike the USA, member states have the option to provide for an opt-in mechanism, opt-out mechanism, or a combination of the two.
- Broad definition of consumers – The Directive provides a broad definition of consumers, which also encompasses "personal data subjects", which would enable individuals whose personal data is misused and processed without consent, to be able to rely on the provisions for the protection of the Directive.

Although the Directive is aimed primarily towards the protection of the collective interest of consumers, its effect on the enforcement of competition law is significant. The Directive contains many novelties that should strengthen the private enforcement of EU competition law. However, currently, it is still in the process of implementation by member states, and it is too early to discuss its impact. Nevertheless, it is a significant instrument, that along with the Damages Directive should enable EU consumers to obtain compensation for anticompetitive practices.

3. CURRENT STATUS OF PRIVATE ENFORCEMENT IN NORTH MACEDONIA

The existence of competition law is a relatively new concept within the Macedonian national legislation. The country gained its independence from the Socialist Federalist Republic of Yugoslavia in 1991 and adopted the economic model of a free market economy. The first Law on Protection of Competition (hereafter LPC) was enacted only in 2005. The law was replaced with a new law in 2010, which was amended several times since its enactment.

As most countries found in a situation of adopting a new concept in their national legal systems, North Macedonia was faced with the challenge of choosing between the US and EU models of competition law. Since the country is aspiring to become an EU member, and one of its legal obligations on that path is to implement the EU *acquis*, it modeled its competition law after the EU legislation. And like the EU, public enforcement has been the dominant approach, with private enforcement having a very minimal role.

The Commission for Protection of Competition (hereafter CPC) is the central body responsible for the enforcement of the national competition law. Consequently, the enforcement of competition law in the country has to be analyzed through its work. The CPC issues annual reports on its work. The last report was published in October 2022 related to the work of the CPC in 2021. Table 1 contains information related to decisions adopted by the CPC from 2016 to 2021.

Table 1: Decisions on the CPC for the period 2016-2021

Year	Decisions on concentrations	Decisions on abuse of dominant position	Decisions on restrictive agreements, decisions and practices
2016	31	2	3
2017	50	1	6
2018	61	2	4

2019	57	/	3
2020	58	/	3
2021	81	4	1
total	338	9	20

(Source: Annual reports of the work of the CPC, kzk.gov.mk)

As evident from the statistics, most of the CPC's resources are focused on the evaluation of market concentrations, as an *a priori* method for protection of competition. While it is normal for the numbers on decisions on concentrations to be higher, it is evident that the CPC has very modest activities in the detection of abuse of dominant position (on average 1.5 cases per year), and restrictive agreements, decisions, and practices (on average 3.33 per year). However, before discussing and evaluating the achieved results of the CPC it is important to consider its capacity and the availability of resources it has, to set realistic expectations.

Table 2: Capacity of the Commission for Protection of Competition

Year	Staff	Approved budget
2016	28 employees	17,723,415.00 MKD (~288,352.47 EUR)
2017	27 employees	18,780,296.00 MKD (~305,547.48 EUR)
2018	27 employees	18,715,835.00 MKD (~304,547.09 EUR)
2019	26 employees	21,340,595.00 MKD (~347,209.81 EUR)
2020	27 employees	18,695,000.00 MKD (~304,095.34 EUR)
2021	27 employees	21,331,510,00 MKD (~346,023.42 EUR)

(Source: Annual reports of the work of the CPC, kzk.gov.mk).

As evident from Table 2, in the last 6 years, the CPC has had a budget of roughly 300,000 EUR, which is significantly lower than other countries from the region. For example, the budget of the Serbian competition agency for 2021 is approximately 3.5 million EUR (Commission for Protection of Competition of the Republic of Serbia, 2021). The budget of the Croatian Competition Agency for 2021 is approximately 1.8 million EUR (Croatian Competition Agency, 2021), and that of the Slovenian Competition Agency is 1.75 million EUR (Slovenian Competition Protection Agency, 2021).

Out of the budget of the CPC, more than 80% is delegated for wages and social contributions for the employees, leaving very limited funds for the strengthening of the capacity of the institution, such as training, education, equipment, etc. Consequently, it becomes difficult to properly assess and evaluate the functioning of the CPC given the lack of available resources.

This only illustrates the necessity for strengthening the mechanisms for private enforcement of competition law and empowering consumers and other market participants to take a proactive role in the detection and sanctioning of anticompetitive practices.

As already noted, as an aspiring EU member, North Macedonia has undertaken an obligation to align the national legislation with the EU *acquis*. In line with this requirement, the LPC is predominantly based on Articles 101-109 of the Treaty of the Functioning of the EU (TFEU) and the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). In addition, the country has adopted several directives related to aspects of competition law in the form of bylaws (Commission for

Protection of Competition, n.d.). However, the last implementation was conducted in 2012, which means that neither the Damages Directive nor the Directive on Representative Actions has been adopted yet.

Consequently, at present, there is a lack of specific rules that would enable affected parties, and particularly consumers, to effectively enforce the competition law.

Firstly, concerning possible violations of the competition law, it remains unclear whether the CPC is the only body that can determine a violation of the rules of the LPC, or whether national civil courts would be able to decide on such matters if an issue of competition law arises in a commercial or consumer dispute. While we believe that the answer should be positive in both instances, currently there is a lack of case law that would support this position.

Secondly, concerning compensation for damages to victims of such practices, the LPC merely contains a general rule in Article 58 that persons who will suffer harm due to a violation of competition law may seek compensation according to the law. Under the national legislation, the *lex generalis* for the compensation of damages would be the Law on Obligations, and for the procedure for indemnification, it would be the Law on Civil Procedure. However, these acts do not contain specific provisions relevant to anticompetitive conduct, since neither the Law on Civil Procedure contain rules for simplified procedures for victims of mass harm, or collective redress mechanisms in the form of class action, nor does the Law on Obligations contain guidance for indemnification of victims of mass harm for infringements of competition law.

Nevertheless, despite these obstacles, there are several interesting cases in practice related to the actions of consumers who have suffered harm from anticompetitive conduct. In 2009, the CPC issued a decision against EVN Makedonija AD, the only electricity supplier at that time, finding that it abused its dominant market position by charging households a manipulative fee in the amount of 6 MKD which equates to roughly 10-euro cents (Commission for Protection of Competition vs. EVN Makedonija AD, 2009). While this is an insignificant amount for a single household, when multiplied by the total number of households it becomes a significant amount of harm inflicted on the consumers. In principle, the total amount can be claimed as damages. However, when considering individual actions for compensation of damages, the benefit/cost ratio would likely dissuade many people. While this was the case for the vast majority, a number of people decided to commence individual legal actions against the company. All of these actions were successful in court, and victims were awarded compensation. From a legal standpoint, the claims were for unjust enrichment and not for damages, but the effect remains the same – compensation for the inflicted monetary harm.

While these individual actions are a welcome sight and a glimpse of hope, the reality is that there are many victims of anticompetitive practices that fail to receive compensation, either because these practices remain undiscovered and unsanctioned, or even worse, because they do not have the necessary mechanisms to obtain damages even when the CPC finds a violation of competition law.

4. CONCLUSION

Private enforcement of competition law is a vital part of the mechanism for effective protection of the free market economy. While its development has been reactively slow in comparison to the pace at which companies find ways to circumvent the market rules, it has gained momentum in the last decade, especially in the EU. Many initiatives have led to the adoption of specific rules for awarding damages, and procedures for collective redress which should ensure at least

minimum protection of EU consumers. In the USA, on the other hand, private enforcement has been already established as an indispensable part of the competition law system.

Unlike the USA and EU, in the Republic of North Macedonia, private enforcement of competition law is at a standstill. While the enforcement of competition law in general is at a low level, compensation of victims for suffered harm is non-existent. For a small and open market economy, the functioning of an efficient system for protection of the free competition is a vital determinant for economic development. Consequently, an effort must be made towards the strengthening of the enforcement of the competition law.

While strengthening the capacity of the Commission for the Protection of Competition has to be a priority for the future, it is undisputed that it will require significant investment and an increase in the budget, employing versatile staff, and increasing the resources spent on education, training, and equipment. This might pose a challenge since the CPC is funded from the state's budget, and it is not able to generate any own revenues.

On the other hand, the first step towards strengthening private enforcement is making legislative changes through the adoption of already recognized and widely used concepts. This requires political will, but much less funds and helps in the development of a system that would put pressure on market participants independently from the state- and state-owned bodies. There are already active organizations for the protection of consumers who can contribute towards familiarizing consumers with these concepts, advising them, and even representing them in proceedings for collective redress. While this is not an easy task and something that can be achieved in a short period, it is important to start investing in the development of a system for private enforcement to be able to achieve results in the long run.

Not only is this a necessity for the strengthening of the market competition, but for North Macedonia, it is also a legal requirement arising from the obligation to align the national legislation with the EU *acquis*. Having in mind that the EU has already started implementing mechanisms for the strengthening of the private enforcement of competition law, these mechanisms would also have to be transposed into the national laws.

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