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The Implementation of the Antitrust Damages Directive in Slovenia: Tensions with the (Lurking) Preventive Character of Liability in Damages?

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Abstract: In December 2016, Member States need to implement the Antitrust Damages Directive. The Directive adopts the full compensation principle and expressly prohibits overcompensation. I will embark on an enquiry whether such an approach departs from the Slovene general regime of civil liability, in particular liability in damages. At face value, one might argue that the Slovene civil liability regime prohibits non-compensatory rationales for awarding damages. This article challenges this perception. It argues that there is a space for interpreting the rationale for damages in the Slovene private law, when this is justified with dissuasiveness and sufficient reasons are given, as well as embracing non-compensatory considerations, prevention and deterrence in particular. Regrettably, the judiciary does not necessarily keep in step with such an interpretation. However, there are tendencies in the legal scholarship to change the established case law. In this setting, the special liability regime based on the Directive, which prohibits overcompensation, can be seen as an exception to the general regime for damages awards in certain contexts. This approach is contrasted with damages awards regime in the labour law context, which is also based on the EU regulation. In this context, the Slovene legislator expressly embraced prevention and deterrence as rationales for the award of damages. Thus, legislation which is based on or influenced by EU law can lead to different outcomes in practice. It can either reinforce preventive tendencies of the general regime of civil liability or, as it is seen in the competition law context, undermine them. Nevertheless, the (proposed) Slovene implementing legislation opts for a solution that accommodates both the Antitrust Damages Directive and the general regime of civil liability.

KEYWORDS: • Antitrust Damages Directive • civil liability • damages • full compensation • prevention • deterrence

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1 Introduction

In December 2016, Member States need to implement the Antitrust Damages Directive (Directive).[1] Private enforcement of EU competition law is thus arguably becoming 'a European tort in the most complete sense', where both substance and procedure are dictated, broadly, by harmonising EU law (Dunne, 2014: 12). The Directive adopts the full compensation principle and expressly prohibits overcompensation. I will embark on an enquiry whether such an approach departs from the Slovene general regime of civil liability, in particular liability in damages. At face value, one might argue that the Slovene civil liability regime prohibits non-compensatory rationales for awarding damages. This article challenges this perception, arguing that there is a space for understanding the rationale for damages in the Slovene private law, when this is justified with dissuasiveness and sufficient reasons are given, as embracing non-compensatory considerations as well.

For the purposes of this article, non-compensatory considerations and non-compensatory damages encompass all types of damages that are not purely compensatory in nature. However, the article will focus on deterrence and preventive considerations in particular. Here, prevention is understood as an instrument of deterrence whose purpose is to modify future behaviour. It is a common understanding that compensation and deterrence are both aims of damages awards, albeit to a different extent. In national legal systems, compensation is usually at the forefront or the main aim of the damages awards, while deterrence is often understood as their (positive) side effect. While deterrence and prevention have a prospective character, compensation has a retrospective character (Leczykiewicz, 2013; Nebbia, 2008: 23). Thus, in the case of deterrence and prevention, the emphasis is not solely on the claimant and his harm, but also on the defendant and his conduct (Deakin, Johnston & Markesinis, 2008: 944). For the purposes of this inquiry, the dissuasive and punitive considerations are understood as giving an expression to the aim of deterrence, at least to a certain extent, as both these considerations have a prospective character with an aim to modify future behaviour (see for example Leczykiewicz, 2013).

This article examines whether the Antitrust Damages Directive's approach departs from the Slovene general regime of civil liability. It exposes the current state of the law through an examination of the rationale for damages claims in general and special regimes of civil liability in Slovenia. In particular, it will consider the presence of deterrence and prevention rationales in the Slovene civil liability framework. It will be shown that, in principle, the normative framework of the general regime of civil liability does not oppose preventive, and arguably neither punitive, considerations in awarding damages. The analysis that leads me to reach this conclusion is structured as follows. I will first examine the general civil liability regime under the Code of Obligations[2] (Section 2). I will focus on a recent case of medical malpractice, in which the first instance court openly awarded punitive damages. The Appellate Court in Maribor and the Supreme Court of Slovenia later both rejected punitive damages, however, not because they would be incompatible with the Slovene civil liability framework. Rather, they rejected them because the first instance court did not give

sufficient reasons for departure from the established case law. The analysis will then focus on two special regimes of civil liability – sex discrimination in employment and workplace harassment and mobbing and competition law, respectively. Both these two regimes are based on the EU regulation. It will be shown that legislation which is based on or influenced by EU law can lead to different outcomes in practice. In the labour law context, EU law reinforces preventive aims, whereas in the competition law context it forbids overcompensation. Thus, EU law-based solutions can either reinforce (lurking) preventive tendencies of the general regime of civil liability in Slovenia or undermine them. In the context of labour law (Section 3), Slovene regulation follows the general regime of civil liability and goes even further by expressly embracing deterrence and prevention. Regarding competition law (Section 4), the law implementing the Antitrust Damages Directive has not been adopted at the time of writing this article. However, the publicly accessible legislative proposal shows that the (proposed) Slovene implementing legislation opts for a 'permissive' solution regarding preventive and deterrence rationales for damages, as it does not transpose the provision governing the full compensation principle *verbatim*. Rather, it opts for a solution that accommodates both the Antitrust Damages Directive and the general regime of civil liability in Slovenia. A conclusion is provided in Section 5.

2 Rationale for Damages in the General Regime of Civil Liability in Slovenia

2.1 Prevention in the General Regime of Civil Liability

The starting point of my observations is that the general regime of civil liability in Slovenia could be, in principle, characterised by a legal framework favourable to prevention and deterrence rationales in awarding damages. Due to the limited space available, I will not analyse these concepts and the rationale for damages in depth, but rather limit myself to providing an overview thereof. The Slovene Code of Obligations governs both contractual and non-contractual obligations (in this article, this notion is understood as a synonym for delictual liability and tort law). Its provisions governing contract and tort law build on the Yugoslav Obligations Act's regulation,[3] which has modelled its provisions on the basis of the Civil Code of Austria[4] (*the Allgemeines bürgerliches Gesetzbuch*, ABGB) and its approach – the unitary approach to the law of damages (Možina, 2013: 349). Thus, the provisions on non-contractual liability are applied both to contract and tort, in so far as there is no special provision laid down for contractual relations (Article 246 of the Code of Obligations). In tort the principle of fault is the rule (Article 131(1) of the Code of Obligations), and strict liability irrespective of culpability is the exception. Contractual liability can be described as some sort of subjective-objective theory of liability, arguably closer to the objective conception of liability than to the subjective one (see for example Možina, 2013: 351).

Damage is defined by Article 132 of the Code of Obligations. It provides that damage comprises the diminution of property (ordinary damage), prevention of the appreciation of property (lost profits), the infliction of physical or mental distress or fear on another person, and encroachment upon the reputation of a legal person. Regarding the material

damage, Article 169 governs the 'full compensation' principle and provides that when considering the circumstances arising after the infliction of damage the court shall award the injured party compensation in the amount necessary to restore the injured party's financial situation to what it would have been without the damaging act or omission.

With respect to the reimbursement of the non-pecuniary damage (both in contract and tort), the Code of Obligations governs two possibilities – publication of judgment or correction in a case of the infringement of a personality right (Article 178) and monetary compensation (Article 179). For publication of judgment or correction, mere regulatory breach suffices and no proof of damage is required. Regarding monetary compensation for the reimbursement of the non-pecuniary damage, Article 179 provides that *just monetary compensation* shall pertain to the injured party,[5] *if the circumstances of the case so justify, even if there was no material damage*. It further provides that the amount of compensation shall depend on the importance of the good affected and *the purpose of such compensation*, and *may not support tendencies that are not compatible with the nature and purpose thereof*. But what is 'the purpose of such compensation' and which tendencies are not compatible with it?

On the basis of the wording of the Code of Obligations, it is discernible that the legislator had a clear intention to differentiate between compensation for material and non-pecuniary damage – regarding means for the reimbursement, the amount and the purpose of compensation. The full compensation principle governs only compensation for material damage. Non-pecuniary damage is compensated with 'just compensation'. This distinction reflects the practical difficulty of applying the full compensation principle to compensation for non-pecuniary damage, as it is by definition non-monetised. 'Just compensation' is a legal standard that is open-textured and prone to elastic interpretation (see also Vuksanović, 2010: 11). It is very broad-ranging and flexible enough to embrace also non-compensatory considerations. While compensation is the main rationale for material damages, the main aim of non-pecuniary damages is satisfaction (see for example II Ips 130/2012). Satisfaction is often awarded under the 'compensatory umbrella'. It is argued that this is conceptually mistaken, as the idea of satisfaction comes closer to the idea of punishment than of compensation (Možina, 2016: 381). Možina (2016) claims that both satisfaction and compensation are – distinct – aims of non-pecuniary damages. Conversely, the Supreme Court of Slovenia is of the view that the rationale for non-pecuniary damages is neither compensation for damage nor punishment of the infringer (II Ips 130/2012). It held that the purpose of satisfaction is to 'mitigate/remedy the injured party's problems'[6] (II Ips 130/2012).

Part of Slovene legal scholarship has articulated tendencies to recognize the need for the inclusion of the function of prevention into the law of obligations (see for example Plavšak, 2003; Bergant-Rakočević, 2006; Mežnar, 2006; Petek, 2014; also Jadek-Pensa, 2003: 666; Možina, 2016: 387). These tendencies are the strongest in the context of the defamation of good name or reputation (Mežnar, 2006; Bergant-Rakočević, 2006), although Plavšak (2003) considers that prevention assumes the main rationale for damages in general. She advocates for a changed approach in the case law by enhancing

the function of prevention (similarly as Mežnar, 2006; Bergant-Rakočević, 2006). It is believed that this change could be achieved by a mere change in the case law, since the legal framework does not oppose the function of prevention. Moreover, Plavšak (2003: 1057) emphasises that damages are civil sanctions and ascribes them also the punitive function. In contrast, Jadek-Pensa (2003) makes distinction between the punitive and the preventive functions of damages and embraces only the latter as a function that might play a role in awarding damages.

Tendencies to distinguish between preventive and punitive rationales have surfaced also in the EU context. Wagner (2012: 5) argues that effective sanctions for breaches of EU law for purposes of deterrence are not tantamount to punitive damages, and that consequently the deterrence function of liability in damages must be distinguished from the penal function in the technical sense of retribution for wrongs. In his view the case law of the Court of Justice of the EU (Court) and the legislative acts of the EU do not correspond to the classical view of dual function of punitive damages, but embrace the deterrence function only. He goes as far as proposing a new term for this European institution, for example 'preventive damages', for the sake of conceptual clarity. Advocate General Jääskinen expressly adopted such distinction in the case of *Geistbeck,*[7] dealing with the 'reasonable compensation' which a farmer must pay to the holder of a Community plant variety right.[8] While such a distinction is an appealing option, the question is whether and how preventive and punitive considerations can truly – and fully – be separated. Both the preventive and the punitive function embrace the prospective character and aim to modify future behaviour of the infringer.

It can be concluded that the legal framework enables the introduction of preventive and deterrent rationales for damages, or it does not oppose it at least. So far, the judiciary – with an exception discussed below – has openly recognised only aims of compensation and satisfaction. However, there are tendencies in legal scholarship to change the established case law and to openly embrace the function of prevention.

2.2 Case Study: Medical Malpractice

The legal framework based on the Code of Obligations and its textual interpretation, in principle, enable both the introduction of preventive and punitive rationales for damages. This 'permissive' approach was reflected also in the judgment of the District Court in Ptuj dealing with medical malpractice. It concerns gross negligence of a surgeon which resulted in an amputation of a leg of a 17-year-old boy. In this case, the court expressly awarded punitive damages under the umbrella of non-pecuniary damages. It acknowledged that this represents a departure from the established case law, however, it claimed that such departure is justified.

The Appellate Court in Maribor in the case I Cp 1032/2011 confirmed that the legal framework, more precisely Article 179 of the Code of Obligations, allows for an interpretation which embraces prevention and punitive consideration. It held that the interpretation of this Article depends on the understanding of the wording 'the purpose of such compensation'. The Appellate Court also acknowledged that punitive or

preventive elements are not alien to the Slovene civil liability regime and offered examples found in Articles 134 and 168(4) of the Code of Obligations. Article 134 deals with the request to cease infringement of personal rights, while Article 168(4) deals with the subjective value of damaged goods that can be taken into consideration if goods (or objects) are destroyed or damaged intentionally (*praetium affectionis*). However, the Appellate Court held that the court of first instance did not give sufficient reasons for such departure from the established case law. Any departure that is not supported by sufficient reasons results in an infringement of constitutional guarantees, namely equality before the law (Article 14 of the Constitution of the RS) and equal protection of rights (Article 22 of the Constitution of the RS). The Appellate Court held that fault is one of the crucial elements that could justify a potential punitive function of monetary compensation. Thus, in this case fault assumes the double function: it is a requirement for determination of liability and for the assessment of damages. As soon as the culpability of the wrongdoer enters the process of the assessment of damages, non-compensatory considerations by definition enter the arena.

This case also reached the Supreme Court of Slovenia. In the case II Ips 130/2012, the Supreme Court held that the court of first instance did not give *sufficient reasons for penalising a public health care provider*. It held that when the public health care provider, which provides services under the compulsory health insurance, which is mainly financed through the health insurance fund, is liable to pay punitive damages, such liability indirectly punishes all the potential users of health services. Thus, it seems that the Supreme Court rejects punitive damages in this case because the prevention and deterrence under given circumstances (insurance) cannot be sufficiently achieved.

It follows that both the Appellate Court and the Supreme Court reject punitive rationales for damages because the first instance court did not give sufficient reasons for the departure from the established case law (see also Petek, 2014: 11). While the Appellate Court criticises insufficient reasons from the perspective of fault, the Supreme Court focuses on the insufficient prevention and deterrence in a situation where damages are covered by the public insurance fund. The question is whether the Supreme Court would reach a different conclusion if the preventive aims could practically be achieved, for example if a doctor had to pay damages out of his or her own pocket.

None of these two courts, neither the Appellate Court nor the Supreme Court, criticised the first instance court for awarding punitive damages on the basis of their incompatibility with the Slovene civil liability legal framework, but rather on the basis of their incompatibility with the interpretation of this framework in the established case law. They acknowledged that the textual interpretation allows for such an interpretation as offered by the District Court in Ptuj, and also stressed that penal elements are found in the Slovene civil liability system.

2.3 Rejection of Classical Objections to Prevention and Punitive Considerations in a Nutshell

Those that are resisting the view that preventive (and/or punitive) rationales for damages are compatible with the Slovene civil liability system are mostly offering 'classical'[9] objections against punitive damages, claiming that prevention and punitive considerations are alien to the continental civil law systems and outdated (see for example Polajnar Pavčnik, 2013; Vuksanović, 2010). Punitive damages are often perceived as contrary to *ordre public*, with the main objections (i) that they do not fit into tort law, as they are not compensatory in nature, (ii) that they confuse civil and criminal functions of the law (and that civil law procedure does not offer adequate procedural safeguards to award damages that are punitive in nature), (iii) that aggrieved parties are unjustly enriched, and (iv) that punitive damages are awarded in an arbitrary manner and generate a degree of legal uncertainty. There is another objection, which is less conceptual in its nature and more policy-based – the risk of abusive litigation. It is used in the Commission's narrative to reject punitive damages in the competition law context and the collective redress context.

In essence, these classical objections concern some of the essential aspects of legal systems, such as the distinction between public law and private law in general and between tort law and criminal law in particular (see also Cappelletti, 2015). I consider that such reasoning is flawed as it adopts a narrow understanding regarding the rationales for damages and gives a deceitful support to the aforementioned divisions.

In words of Wagner (2006: 69), historically, tort law and criminal law are two of a kind and their strict separation is only the fruit of the modern age. Koziol (2008: 751) points out that the 'idea of punishment is outside of the private law as according to its purpose, the private law is not aimed at and also is not in a position to realize this idea.'. He claims that punitive damages represent 'relapse into the archaic mixture of punishment and compensation' (Koziol, 2008: 751), when legal systems did not make a strict difference between the two (Koziol, 2008: 741). Along these lines, some stress that it is inadmissible 'to change the main aim of tort law'. However, in spite of a more or less clear conceptual difference, in reality, it is often difficult to distinguish between aims such as compensation, retribution, punishment, and prevention when damages are awarded. Whereas compensation is confined to actual loss and is thus retrospective, the ultimate purpose of punishment and prevention is prospective, aiming at influencing the infringer's future behaviour. Koziol himself acknowledges that this difference is in reality not so strict. However, some academics repeat the mantra of 'compensation only in private law' (Verheij, 2015: 552). This line of reasoning seems unconvincing in light of other 'irritants' that find their way into national private laws and are not subject to such stark objections as punitive damages (see also Verheij, 2015: 552; Büyüksagis, Ebert, Fairgrieve, Meurkens & Quarta, 2016: 141-156). One explanation might be that other irritants do not necessarily have a punitive edge, at least not at their forefront (Možina, 2016: 385). However, this does not hold true in all cases. This was expressly acknowledged also by the Appellate Court in Maribor in the medical malpractice case discussed above. Still, academics who oppose punitive damages find justifications for

other irritants, often by finding a way to bring them under the 'compensatory umbrella' (e.g. satisfaction, multiple damages in IP law). Numerous justifications could be found to rationalize the existence of non-compensatory considerations and to try to fit them into the compensatory framework. But is this hiding behind the 'compensatory façade' not plainly circular reasoning? This flaw in reasoning is something that Pierre Schlag (1997) calls the ontological proof of god, in his criticism of judicial legal reasoning. They have to be called everything else than punitive, of course, since they are not allowed to be called that. However, the focus should not be placed on their label but instead on the function they serve.

The tort/criminal law divide was perhaps sufficient justification for the rejection of punitive damages in the past. However, the inclination towards punitive considerations in national private laws and in the EU law context, and also a mere ongoing debate[10] about the possibility of awarding punitive damages in Europe and in Slovenia, highlights that this justification might be outdated. Although this rejection of punitive damages is not entirely unreasonable, especially not from the conceptual perspective, it is premised on the understanding of modern legal culture as static, carved in stone, and resistant to change. Such an account of modern legal culture is at odds with the reality and takes the rationale for rejection of punitive damages too far (see also Verheij, 2015: 551). The achievements of the modern world are developing way faster than in the past and law is often slow in keeping up with these developments. Thus, law needs to be constantly revised and 'fitness-checked'. As Cappelletti (1975–76; 686) wrote long ago, even 'the most sacred principles of 'natural justice' must therefore be reconsidered in view of the changed needs of contemporary societies. Reconsideration, however, does not mean abandonment, but rather adaptation'.

It is believed that such 'adaptation' or an acknowledgment that there are instances where non-compensatory considerations do play a useful role in private law would not dramatically impact the private law setting. For example, overcompensation could play a useful role in private law in cases of 'lucrative fault'. It is the fault that enables the wrongdoer to profit from his misconduct, despite paying damages to the victim, which are calculated in his profit. As described by Fasquelle (2002: 31), due to high market pressure and competition, enterprises tend to become more egoistic market players, focusing on profitability and gain and less on legal or moral considerations. Some of them breach legal rules, as they calculate that it is overall cheaper for them to be ordered to pay damages rather than having to change their wrongful behaviour (Fasquelle, 2002:31; see also Možina, 2015). This can lead to the paradoxical situation if the law does not react, as market players get no deterrent signal that would give them incentives to comply with legal rules. The principle of full compensation does not prove to be satisfactory in such instances (similarly Grundmann, 2016: 239-240; Možina, 2016: 387). It seems that also the Supreme Court of Slovenia in the medical malpractice case held similar view. It contrasted legal tendencies of legal scholarship to award punitive damages for *grave, intentional, and lucrative* media interferences with personality rights on the one hand with unconvincing reasons for penalising public health provider which would indirectly penalise all potential service recipients on the other hand (II Ips 130/2012). However, one must be careful to take all interests into

account when proposing damages with a normative role to regulate the behaviour in the market and society, so as not to suppress the 'healthy' risk-taking in business or to base the awarding of damages too heavily on extra-legal considerations.

3 Sex Discrimination in Employment and Workplace Harassment and Mobbing

Sex discrimination in employment and workplace harassment and mobbing are governed by sectoral legislation in Slovenia, by the Employment Relationship Act (ZDR-1).[11] Damages in these cases are conceptually based on the general civil liability regime laid down in the Code of Obligations. However, the civil liability regime in the ZDR-1 goes even further by expressly embracing deterrence and prevention.

In the field of the gender equality or sex discrimination in employment law, the Directive on equal treatment of men and women[12] in the access and supply of goods and services and the Directive establishing a general framework for equal treatment in employment and occupation[13] explicitly require the availability of 'sanctions' for breaches of the principle of equal treatment. Sanctions, which might comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive (see Mežnar, 2010). The Court developed these requirements in the seminal case of *Von Colson.*[14]

The Court specified in cases *Dekker* and *Draehmpaehl*[15] that liability for acts of discrimination should not be restricted by the condition of fault, as in that case the practical effect of those principles would be weakened considerably and it would undermine the Equal Treatment Directive. The Court held in *Dekker* that 'any infringement of the prohibition of discrimination suffices in itself to make the person guilty of it fully liable'. This can be interpreted either as a strengthening of the compensatory function of damages actions at the expense of their regulatory benefits, but can be also seen as inspired by incentive and deterrence arguments (Leczykiewicz, 2013). Moreover, as Leczykiewicz (2013) suggests, the 'damage' suffered by the victim of discrimination is 'often perceived as non-material and its quantification based largely on the gravity of defendant's conduct, further suggesting that it is in fact quite difficult to speak of purely compensatory nature of discrimination damages'.

Article 18 of the recast Equal Treatment Directive provides that compensation for discrimination must be *real, effective and dissuasive and proportionate to the damage suffered*. This provision has been transposed in the Slovene legislation by Article 8 of the ZDR-1. It provides that in the event of violation of the prohibition of discrimination or workplace harassment and mobbing, the employer shall be liable to provide compensation to the candidate and/or worker *under the general rules of civil law.*[16] This Article further provides that in the assessment of non-pecuniary damages, it must be taken into account that the compensation is *effective* and *proportionate* to the damage suffered by the candidate and/or worker and that it *discourages the employer from repeating the violation*.

ZDR-1 expressly provides that compensation needs to 'discourage the employer from repeating the violation', thus, it embraces the preventive function (expressly aiming at special prevention). The legislative proposal that led to the adoption of the ZDR-1 noted that, based on EU law, it is appropriate to ascribe to non-pecuniary damages also *preventive and punitive functions* and that this represents a *departure from the rules of the general civil law.*[17] This is how the Slovene legislator interpreted and implemented the requirement, initially established by the Court's case law, that compensation must be 'dissuasive'. It follows that this provision requires that the infringer's position is taken into account in the assessment of damages (see also Možina 2016: 388), ascribing them a prospective character.

The question that arises is whether this provision, which refers to the general rules of civil law, truly departs from these rules by introducing rationales that are allegedly not familiar to the Slovene general regime of civil liability – namely, prevention and deterrence (see also Možina 2016: 387). As it has been established in the subsection dealing with the general civil liability regime, such rationales actually form part of the general liability legal framework, or at least they do not contradict it. Such conclusion can be reached at least for the preventive function.

It is argued that damages awarded on the basis of Article 8 ZDR-1 can legitimately amount to overcompensation. However, that would be justifiable only in cases where pure compensation would not in itself perform a sufficiently dissuasive function (Možina, 2016; 387). The lack of dissuasiveness of pure compensation needs to be properly reasoned (Možina, 2016; 387). Možina (2016: 387) gives an example of the repetition of infringements. Such an approach is in accordance with the general civil liability regime. As it has been shown in the context of medical malpractice, the Appellate Court and the Supreme Court rejected overcompensation because the principle of sufficient reason was not observed.

The situation is not as clear as regards the punitive function, which the legislative proposal of the ZDR-1 also expressly embraced. The Court of Justice had the chance to rule on the question whether rules that require compensation for sex discrimination to be *real, effective, dissuasive and proportionate* to the damage suffered, require punitive damages for sex discrimination in the case of *Arjona Camacho.*[18] The case concerns the award of punitive damages to Ms Arjona Camacho following her dismissal constituting discrimination on grounds of sex. It was referred to the Court by a Spanish court which asked whether the EU law enables the national court 'to award the victim reasonable punitive damages that are *truly additional'*.

Firstly, the relevant provisions in the recast Equal Treatment Directive should be set out. Two provisions are crucial – Article 18 dealing with 'Compensation or reparation' and Article 25 dealing with 'Penalties'. Article 25 provides that the penalties may comprise the payment of compensation to the victim. Both provisions employ notions 'effective, proportionate, dissuasive', which also highlights the semantic and conceptual confusion accompanying the compensation and sanctions/penalties debate, possibly amounting also to a confusion in rationales that are ascribed to these concepts.

According to Advocate General Mengozzi, the Equal Treatment Directive does not require, nor oppose, Member States to award punitive damages to the victim.[19] As the Advocate General stated, the absence of punitive element in this case 'may well be regrettable', since the system of liability is 'far from fulfilling its compensatory function in a systematically satisfactory way'. The Court agreed with Advocate General Mengozzi, stressing that Article 25 of the Directive 2006/54, dealing with penalties (but not also Article 18 dealing with compensation), '*allows, but does not require*, Member States to take measures providing for the payment of punitive damages to the person who has suffered discrimination on grounds of sex'. Thus, the legal framework of this Directive 'enables' punitive damages. It follows that the EU legal landscape is, arguably, favourable for such an introduction – the provisions are at least not discouraging. However, this applies only if a Member State chooses to provide such measure. National courts do not have powers to impose punitive damages of its own motion. Thus, the legislative proposal for the ZDR-1, which ascribes to damages in this context both preventive and punitive functions, seemed to cast the net further than the actual EU legislation demanded. This is in line with Article 27 of the recast Equal Treatment Directive, which provides that 'Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.' It remains to be seen whether the case law will follow suit.

4 Competition Law

4.1 The Shift in the Rationales for Private Enforcement of EU Competition Law

The right to damages in EU law was initially available in the 'public' law context, to individuals acting against the Union (now regulated in Article 340 TFEU) and against a Member State (the so-called *Francovich*[20] remedy). At the time of the creation of the *Francovich* action for damages, actions by individuals in national courts were considered a powerful tool to force Member States to comply with their obligations (Lianos, Davis & Nebbia, 2015: 20). Thus, in the case of *Francovich* the Court added to its arsenal the power of sanction (Harlow, 1996: 205). It is true that the State liability carries a dual function – the Court expressed concerns both for the effective enforcement as much as judicial protection. However, at that initial momentum of creating the right to damages, effective judicial protection was no more than an implication of the principle of full effectiveness of EU law, 'as such to be used more to exact obedience from Member States than to protect citizens' (Caranta, 1995: 703, 710, 725). Thus, the principle of State liability is grounded in the enforcement-based regime and it is, subsequently, prospective in its character, encompassing deterrence as its main function.

With respect to punitive considerations in the context of the *Francovich* remedy, the Court held in *Brasserie du Pêcheur* that '[i]n the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. […] Moreover, it must be possible to award

specific damages, such as the exemplary damages provided for by English law, pursuant to claims for damages founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law.'[21] Thus, in principle, punitive damages are not prohibited in the public law context.

Debate on 'private enforcement' of competition law was sparked off by the decision of the Court the Court in the case of *Courage*[22] and by the subsequent initiatives taken by the Commission. In the seminal judgment *Courage*, the Court expressly recognised that damages actions for the violation of Article 101 TFEU are also available against non-state actors, i.e. to individuals acting against each other. The Court construed this right on the grounds of direct effect, as Article 101 TFEU in fact does not grant any rights to individuals (Milutinović, 2010: 48-50; Leczykiewicz, 2013). This means that individuals can derive rights directly from those provisions, and they can invoke them before national courts of the Member States. The reasoning in *Courage* is allegedly 'the logical extension of the same principle that has generated *Francovich*' (Lianos, Davis & Nebbia, 2015: 18). Already in the case of *Banks*, which set the tone for *Courage*, Advocate General Van Gerven asserted that *Francovich* liability paved the way for the development of similar rules for breach of EU competition law rules by private parties.[23]

The decision in *Courage* has established the obligation for national courts to provide a remedy in damages, yet, 'during its migration from the Luxembourg to the Brussels arena', the focus of discussion has shifted from 'damages claims' to 'private enforcement' (Nebbia, 2008: 24). Although these expressions are used interchangeably in the context of competition law, there is allegedly 'a subtle difference between them, as 'private enforcement' is semantically biased towards the idea of ensuring compliance with the law, rather than compensating the victim of a wrong' (Nebbia, 2008: 24). Thus, while becoming a significant concern in EU competition law enforcement and policy making, private enforcement has triggered tensions between the compensation and the deterrence rationales (see, for example, Marcos and Sánchez, 2008: 469; Nebbia, 2008: 36-39. See also Leczykiewicz, 2013).

Some claim that the only function of private antitrust actions should be compensating victims of anticompetitive behaviour, whereas the deterrent function should only be considered a positive 'collateral' effect or a secondary function (Marcos & Sánchez Graells, 2008: 474). This positive effect of private enforcement on the effectiveness of EU competition rules has been allegedly acknowledged by the Court in its judgment in the case of *Courage*, where the court stressed that 'actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community'. However, a different reading is possible, suggesting that the *Courage* judgment appears to place on an equal footing the compensation and the deterrence rationales (Lianos, Davis & Nebbia, 2015: 17). Even more, it seems that enforcement was the objective, whereas compensation served as an instrumental (Komninos, 2002: 457, 458, 469) tool to achieve it.

The Court established in the case of *Manfredi* that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest.[24] The position with regard to damages that go beyond actual loss and lost profits is not clear. As regards punitive considerations in the competition law context, the Court has not excluded the possibility of awarding exemplary or punitive damages in the case of *Manfredi*, relying on the enforcement argument again, while at the same time it held that national courts are not prevented from taking steps to ensure that the protection of the rights guaranteed by EU law does not entail the unjust enrichment of those who enjoy them.[25] Interestingly, following the Court's judgment in *Manfredi*, the national judge in that case doubled that amount in accordance with the alleged discretionary power under the Italian Code of Civil Procedure.[26]

The few cases on actions for damages for competition law infringement discussed above, together with principles on liability for violations of EU law, constituted the stepping stone on which the Commission built its legislative initiatives to establish a common approach on competition law damages actions. In 2005, the Commission published a Green Paper on damages actions for breach of the EC antitrust rules.[27] The Commission's 'follow-up' White Paper on Damages actions for breach of the EC antitrust rules[28] was published in 2008. Against this backdrop, the Commission adopted a proposal for a Directive on antitrust damages actions for breaches of EU competition law in 2013. The Directive was adopted in 2014 and it needs to be implemented in the national legal systems by 27 December 2016.

It is interesting to note that the focus of the damages actions reform changed from compensation and deterrence in the Green Paper towards a more compensation-centred perspective in subsequent documents. The Green Paper did not take a clear position as to whether it prioritises the compensation or the deterrence rationale. It showed the willingness to pursue both objectives, by setting up a system that would be able to accommodate them both (Lianos, Davis & Nebbia 2015, 25). The accompanying Staff Working Paper highlighted findings of the Ashurst Study[29] that disincentives created by restrictions on the amounts that can be awarded, such as the unavailability of punitive damages, can also constitute an obstacle to private actions.[30] However, the subsequent White Paper reflected some tendencies to embrace the compensation rationale as 'the first and foremost guiding principle', although acknowledging the importance of deterrence as well.[31] In the first draft of the Antitrust Damages Directive in June 2013 a different narrative appeared to underpin the initiative, denoting a clear shift in the Commission's approach (Milutinović, 2010: 127; Lianos, Davis & Nebbia, 2015: 26-27). This narrative then found its way into the adopted version of the Directive, which prohibits overcompensation. This approach is at odds with the Commission's previous approach and the underpinning rationales of several binding EU instruments, and finds no sustenance in the Court's case law (see also Büyüksagis, Ebert, Fairgrieve, Meurkens & Quarta, 2016: 139; Vanleenhove 2012). The Commission fails to offer a convincing explanation for this policy shift.

Broadly speaking, the Antitrust Damages Directive has two main objectives. The first objective is to facilitate damages claims and in this vein to safeguard the effective private enforcement of EU competition law. The second objective is the coordination of public and private enforcement of EU competition law. The second objective is placing limits on the first one (Peyer, 2016: 2). The conflict or tension between the two objectives is obvious, however, it will not be explored further within the confines of this article which focuses on the rationale for damages.

As Margrethe Vestager, the Commissioner for Competition, put it: 'I am very pleased that it will be easier for European citizens and companies to receive *effective compensation* for harm caused by antitrust violations'.[32] What is meant by 'effective compensation'? Is the emphasise on 'effective', with an objective of generating more damages claims to support public enforcement and in so doing to strengthen enforcement of competition law? It seems that the Commissioner employs the law enforcement rhetoric, having in mind more damages claims as a result of the Antitrust Damages Directive. The White Paper's Impact Assessment clarifies what is meant by more effective enforcement: 'More effective antitrust damages actions implies more cases.'[33] Then, the primary underpinning rationale for antitrust damages seems to be deterrence of anticompetitive behaviour.

However, Article 3(1) of the Antitrust Damages Directive provides that any harmed individual is entitled to claim *full compensation*. Article 3(3) provides that full compensation *shall not lead to overcompensation*, whether by means of *punitive, multiple or other types of damages*. What does overcompensation mean? The Directive spells out that not only punitive damages lead to undesirable consequences – it is hostile to any type of damages that can violate the principle of full compensation. It is interesting to note that both expressly mentioned types of damages, punitive and multiple damages, used to be viable options contemplated by the Commission in the documents setting the scene for the adoption of the Antitrust Damages Directive. It is often difficult to estimate the extent of the loss suffered in the competition law context, so the question of overcompensation is dubious.

The Antitrust Damages Directive was accompanied by the Commission Recommendation on Collective Redress.[34] This Recommendation on Collective Redress, aiming to enhance consumer protection, contains, as Reich noted, 'surprisingly, a prohibition on punitive damages' (Reich, Micklitz, Rott & Tonner, 2014: 392). The Recommendation provides that the 'compensation awarded to natural or legal persons harmed in a mass harm situation should not exceed the compensation that would have been awarded, if the claim had been pursued by means of individual actions. In particular, punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, should be prohibited'.[35] Thus, the Recommendation expressly targets solely punitive damages. In so doing, the Commission has undergone criticism that proposals and conceptions elaborated by scholars and experts are torpedoed by intensive economic lobbying and fail to get through the political filter 'based on arguments peculiar to phobia of foreign legal solutions, using legal traditionalism as a successful marketing weapon' (Nagy, 2015:

531-532, 552). Reich noted that 'unfortunately, the Recommendation does not show any sincere concern for collective redress for violations of consumer law and may even discourage Member States from advancing legal reform; instead it seems to aim only at rejecting any US class-action initiative' (Reich, Micklitz, Rott & Tonner, 2014: 392).

The space constraints do not allow me to thoroughly examine whether the Commission' policy shift is justifiable and/or desirable. While some experts have welcomed such developments (see for example Hazelhorst, 2010), others have proposed the introduction of some form of punitive damages as a means to encourage private enforcement (see for example Grundmann, 2016; Meurkens, 2014; Van Gerven, 2002). Their arguments are essentially grounded in the enforcement gap problem. Grundmann (2016: 239) rightly points out that the probability that consumer will sue seems so low under the current regime of civil procedure that there are businesses which 'apparently prefer (quite systematically) not to honour even the most obvious claims against them because non-compliance costs them less' (for example, mobile phone and air transportation markets). These practices, described described above as a 'lucrative fault', seem to indicate that incentives to abandon such strategies, which would at the same time benefit consumers, are not strong enough (Grundmann, 2016: 240). As Ioannidou (2015:115) claims, 'for the protection of the consumer right to damages for competition law violations, the appropriate remedy should be based on the functional enforcement of this right and structured upon the deterrence principle, and pursuing compensation should be a secondary concern'. As she forcefully argues, provided that a correct balance is achieved between the 'endemic/functional' aims (deterrence and compensation), consumer damages actions may account for wider institutional benefits, contributing to consumer empowerment and the legitimization of EU competition policy (Ioannidou, 2015:7). Thus, the Commission, at least, should not depart from the Court's approach established in *Manfredi* and confirmed in *Kone*[36], leaving it to the Member States to decide whether they allow non-compensatory damages, advancing pluralist understanding of European private law (see also Büyüksagis, Ebert, Fairgrieve, Meurkens & Quarta, 2016).[37]

4.2 Implementation of the Antitrust Damages Directive in Slovenia

The Antitrust Damages Directive was signed into law in November 2014 and Member States need to implement it in their legal systems by 27 December 2016. At the time of writing this article, the Slovene Parliament has not yet passed the implementing legislation.[38] However, the proposal of the act amending the Prevention of Restriction of Competition Act (the Competition Act)[39] prepared by the Ministry of Economic Development and Technology (the Ministry) is publicly accessible.

The proposal, as it currently stands, implements the relevant provisions of the Antitrust Damages Directive in a manner that accommodates both – the Slovene general regime of civil liability framework and the objectives of the Directive. Article 3 of the Directive is transposed with Article 62.a. This Article has a title 'Right to compensation', in contrast to the Directive's title which places emphasises on the *full* compensation principle ('Right to full compensation'). Article 62.a(1) provides that a

person who infringed competition law and inflicted harm on another shall be liable for the harm caused by that infringement, unless it is proved that the damage was incurred without the culpability of the former. Thus, it governs the reversal of the burden of proof regarding fault and excludes strict liability for competition law infringements. The fault liability is in accordance with the general civil liability regime in Slovenia. The Directive does not regulate the question of culpability and leaves it to the Member States in so far as their regulation complies with the case-law of the Court and the principles of effectiveness and equivalence.

Definition of damage (Article 3(2) of the Directive) is governed by Article 62.a(2) of the Competition Act. It provides that anyone who has suffered harm caused by such an infringement can claim compensation for actual loss (*damnum emergens*), loss of profit (*lucrum cessans*), plus interest. Article 3(3) of the Directive, which defines full compensation (providing that it shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages), is not expressly transposed by the proposal.

The Ministry opted for such non-transposition of Article 3(3) of the Directive, since it rightly concluded that there is no express need for it. As the Ministry clarified in the explanatory part of the proposal, it is derived already from the definition of damage (actual loss, loss of profit and interest) that such damages have a compensatory ('reparation') function and do not amount to double or punitive damages. Thus, the Ministry has chosen a less invasive method of implementation that does not encroach upon the general civil liability rules outlook. The Code of Obligations does not provide a negative definition of the full compensation principle either. Such negative definition is uncommon also from the comparative law perspective.

In my opinion, Article 62.a of the proposal properly transposes Article 3 of the Antitrust Damages Directive. One might argue that such transposition of Article 3 of the Antitrust Damages Directive could lead to an interpretation that embraces also non-compensatory considerations and, thus, runs against an explicit aim of the Directive. This is a valid concern in light of the Slovene legal scholarship's stance that the general civil liability regime enables such an interpretation. However, national courts have a duty of consistent interpretation. It requires national courts of Member States to interpret national law consistently with EU law and, thus, also consistently with Article 3 of the Directive. Thus, this is an additional mechanism that remedies any potential discrepancies between EU law and national law.

5 Conclusion

This article challenged the orthodox view that non-compensatory considerations have no role to play in the Slovene civil liability regime, in particular liability in damages. I side with those legal scholars who advocate for the change in the established case law to embrace also the preventive function in awarding damages. The legal framework *per se* is, in principle, favourable for such change. In this setting, special liability regime based on the Antitrust Damages Directive can be seen as an unfortunate departure from the

general regime, based on the requirements of EU law. This approach is contrasted with civil liability in the labour law context, which is also based on the EU regulation. In this context, the Slovene legislator expressly embraced prevention and deterrence as rationales for the award of damages. Thus, legislation which is based on or influenced by EU law can lead to different outcomes in practice. It can either reinforce preventive tendencies of the general regime of civil liability or, as it is seen in the competition law context, undermine them. The (proposed) Slovene implementing legislation opts for a solution that accommodates both the Antitrust Damages Directive and the general regime of civil liability. Thus, although this implementing legislation does not contradict the aims of the Antitrust Damages Directive, it also does not expressly oppose the provisions in the Code of Obligations.

However, the story does not end here. The Commission's anxiety to expressly prohibit overcompensation is reflected also in the Recommendation on Collective Redress. Although it is not binding on Member States, it might signal the Commission's future activities in the fields that encroach upon the civil liability regime. However, the rationale for the pursuit to prohibit overcompensation should be revamped. Hopefully, the Antitrust Damages Directive remains an outlier.

Notes

[1] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349, 5.12.2014.
[2] Official Gazette of the RS, No. 83/01 et seq.
[3] Official Gazette of the SFRY, No. 29/78.
[4] JGS No. 946/1811
[5] Non-pecuniary damages are available for physical distress suffered, for mental distress suffered owing to a reduction in life activities, disfigurement, the defamation of good name or reputation, the truncation of freedom or a personal right, or the death of a close associate, and for fear.
[6] The wording in original: *zadoščenje, ki naj omili njegove težave*.
[7] Case C-509/10 *Josef Geistbeck and Thomas Geistbeck v Saatgut-Treuhandverwaltungs GmbH* (2012) ECLI:EU:C:2012:187, Opinion of AG Jääskinen.
[8] Commission Regulation (EC) No 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14 (3) of Council Regulation (EC) No 2100/94 on Community plant variety rights [1995] OJ L 173. Article 18 of this Regulation deals with special civil law claims and entitles the right holder to be awarded a multiple of the actual loss incurred.
[9] For an overview of the objections to punitive damages, see, eg, McBride (1996) 194 et seq; Koziol (2008) 751-758; Meurkens (2014) ch 6; Meurkens & Nordin (2012) ch 3.
[10] For example, there was a conference on punitive damages in Vienna in 2008, organised by the Institute for European Tort Law, which resulted in the publication of Koziol & Wilcox (2009). See also for example Meurkens & Nordin (n 2012); Büyüksagis, Ebert, Fairgrieve, Meurkens & Quarta (2016). It is reflected also in some academic projects, for example in the Principles of European Tort Law, emphasising in Article 10:101 that damages aim at compensation as well as prevention of harm.
[11] Official Gazette of the RS, No. 21/13.
[12] Directive 2004/113/EC on equal treatment of men and women in the access and supply of goods and services [2004] OJ L 373/37, Article 8.

[13] Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23, Article 18.
[14] Case C-14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* (1984) ECLI:EU:C:1984:153.
[15] Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* (1990) ECLI:EU:C:1990:383, paras 24-26; Case C-180/95 *Nils Draehmpaehl v Urania Immobilienservice OHG* (1997) ECLI:EU:C:1997:208, para 19.
[16] Non-pecuniary damage incurred to a candidate or worker shall also include mental distress suffered owing to unequal treatment of a worker and/or discriminatory conduct of an employer and/or failure to provide protection against sexual or other forms of harassment or workplace mobbing suffered by the candidate or worker.
[17] Poročevalec Državnega zbora, 19 October 2012, page 117.
[18] Case C-407/14 *María Auxiliadora Arjona Camacho v Securitas Seguridad España, SA* (2015) ECLI:EU:C:2015:831.
[19] Case C-407/14 *María Auxiliadora Arjona Camacho v Securitas Seguridad España, SA* (2015) ECLI:EU:C:2015:534, Opinion of AG Mengozzi, para 36.
[20] Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* (1991) ECLI:EU:C:1991:428.
[21] Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* (1996) ECLI:EU:C:1996:79, para 90.
[22] Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* (2001) ECLI:EU:C:2001:465.
[23] Case C-128/92 *H. J. Banks & Co. Ltd v British Coal Corporation* (1992) ECLI:EU:C:1993:860, Opinion of AG Van Gerven, paras 26 et seq. In the *Banks* case, the articles involved were Arts. 65 and 66 ECSC, of which the Court held, contrary to its Advocate General, that they had no direct effect. Van Gerven (2004, 520).
[24] Joined cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (2006) ECLI:EU:C:2006:461, para 95.
[25] Ibid., para 99. Also Advocate General Geelhoed in *Manfredi* suggested that the award of punitive damages is to be left under the competency of national legislators. Case C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (2006) ECLI:EU:C:2006:67, Opinion of AG Geelhoed, para 70.
[26] *Giudice di Pace di Bitonto*, Judgment of 21 May 2007, *Manfredi v. Lloyd Adriatico*. See also Nebbia (2007: 591).
[27] SEC(2005) 1732, COM(2005) 0672 final.
[28] COM(2008) 165 final.
[29] Study on the conditions of claims for damages in case of infringement of EC competition rules, commissioned by the Commission and prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan.
[30] SEC(2005) 1732, para. 40.
[31] SEC(2008) 404, para 15.
[32] Commission, 'Press Release of the European Commission, Antitrust: Commission welcomes Council adoption of Directive on antitrust damages actions' (Brussels, 10 November 2014).
[33] COM(2008) 165 final, para 46; See also MEMO/14/310 of 17 April 2014.
[34] Commission, 'Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms' [2013] OJ L 201.
[35] Point 31 of the Recommendation on Collective Redress.
[36] Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG* (2014) ECLI:EU:C:2014:1317.

[37] For a more general discussion on legal pluralism in European Private Law, see for example Niglia (2013).
[38] Ministry of Economic Development and Technology sent its proposal to the Parliament on 7 October 2016. See for example Vlahek (2016).
[39] Official Gazette of the RS, No. 36/08 et seq.

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