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Building Private Enforcement from Scratch – The Serbian Example

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The theme of this paper is the analysis of the current situation regarding private enforcement of competition law in Serbia, with special emphasis on obstacles that should be overcome if it is to actually become noticeable in practice. The current legal framework in Serbia is not specially geared to promote private enforcement, and some improvements in this regard happened only recently with the inclusion of the provisions regarding follow-on actions in the newest competition law statute. Generally speaking, however, there are currently no provisions, either in statutes or other instruments, which would specifically deal with various aspects of private enforcement, such as the role of consumer associations or damage quantification. The lack of doctrinal works is not helpful in this regard either. This paper thus attempts to sketch the contours of the system for damages actions, including stand-alone actions, within the current rules of competition law, the law of civil procedure, and the general law of obligations. It also offers recommendations for reform and improvement.

1 INTRODUCTION

There is little doubt that private enforcement is the hot topic of reforming competition law in the EU. The expectations are high, the debates sometimes heated. Yet, Europe is (for now) more than just the EU. Even if the focus of both official and academic discussions is often on topics such as the interaction between the Commission and the national courts, or attempts to harmonise certain litigation rules at the EU level, this does not mean that non-EU European countries do not have equally troubling times with their competition laws as well. For countries aspiring to become EU members, Serbia being one of them, these problems are augmented to a certain extent. There is the obligation to adopt the EU *acquis* as it stands but also ideally an attempt to try and foresee what the *acquis* will be at a certain point in future in order to avoid excessively frequent changes of the national law. Regarding the issue of private enforcement that would mean to try and guess what parts of differently coloured Commission reform papers will eventually become EU law. In the worst case scenario, an aspiring EU candidate might simply try to imitate whatever seems ‘EU flavoured’ enough so that it seems acceptable for the Commission when it drafts the next report on the progress of the said candidate country.

What is often neglected and left somewhere in between these aspirations is the homogeneity of legal solutions and actual practicability of ambitiously envisaged reforms of competition law. The issue of private enforcement in the Serbian legal system offers a good opportunity to illustrate this. Instead of a well-thought out

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implementation that would include adequate reforms and enhancements in areas bordering private enforcement as a whole, such as civil procedure and the law of obligations, the Serbian legislator decided to enact a single new provision in the most recent, 2009 Law on the Protection of Competition (2009 LPC). The provision looks attractive, and would surely please the eye of any EU Commissioner checking the progress in *acquis* acceptance. But it is also a ‘remote island’, unrelated to any other 2009 LPC provision and left in practical application to *mutatis mutandis* use of existing rules of litigation and the law of obligations. How this would succeed, in a legal (and even social) system still substantially ignorant of how market competition and competition law should optimally work, has not been analysed. Thus, the aim of this paper is to analyse, describe and recommend. The available space leaves no room for in-depth analyses of every potential aspect, but it is the author’s hope that the presented solutions and proposals of reform are illustrative enough to convey the problems and challenges of a fledgling system of private enforcement.

There are some preliminary remarks that should be made here. Firstly, under ‘private enforcement’, for the purposes of this article, the author refers to stand-alone and follow-on actions for damages for the breaches of competition law. Other elements that could also be rightfully included, such as nullity actions and restitution, will not be elaborated. This is due to an attempt to focus the discussion on these core actions which should form the basis of a successful system of private enforcement. Secondly, it should be noted that there is a severe lack of Serbian doctrinal works dedicated to the issues discussed here. Practically, this article presents the first scholarly effort to analyse these issues in the context of Serbian law. One can only hope that this will not remain the case for long and that the author’s opinions and recommendations made here will be responded to by other scholarly work. Finally, the starting assumption of this paper is that more private enforcement would be beneficial for Serbian competition law and economic competition in general. The benefits of private enforcement are, of course, also strongly contested in the doctrine,¹ but the author’s deep conviction is that private enforcement system which complements the public enforcement and at the same time raises the level of overall competition culture can only benefit the fledgling system as existing in Serbia. In this sense, it is also the author’s opinion that the European Commission’s White Paper recommendations² form good starting points in achieving this. More details on these issues will be elaborated throughout the paper.

Analyses and recommendations in this paper are grouped around general themes which are in the author’s view crucial for an effective private enforcement system – standing, obtaining evidence and quantification of damages. Also, an overview of the current Serbian competition law and private enforcement framework is given beforehand.

The paper ends with concluding remarks which summarise what would be the correct steps in creating and nurturing a private enforcement system that would actually have

¹ See, for example, Wils, ‘Should Private Antitrust Enforcement be Encouraged in Europe?’, (2003) 26(3) *World Competition* 473.

² White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2008) 165, 2.4.2008 (White Paper).

some effect in practice. One hope of the author is that the analysis undertaken and measures proposed would foster the improvements in this area. But the other, equally important, hope of the author is that they will also be useful in providing general insight on what is important for a private enforcement system to succeed, especially in smaller economies which have only relatively recently gotten onto the ‘free market and competition’ train.

2 SERBIAN COMPETITION LAW IN A NUTSHELL

The evolution of Serbian competition law, at least in terms of promulgated statutes, has been unusually turbulent. The former Socialist Federative Republic of Yugoslavia, of which Serbia was a constituent federal unit, was a country without a free market economy and as such had no competition law in the Western sense. The first competition law statute was promulgated in 1996 by the Federal Republic of Yugoslavia, which was by then constituted out of Serbia and Montenegro only. The 1996 Antimonopoly law was by no means an attempt to seriously follow the European trends, although the wording of the provisions sometimes resembled the then actual EU provisions. It suffices to say that the law was short and often laconic, practically had no provisions on control of concentrations, and had only rudimentary regulation of the ‘Antimonopoly Commission’ and its procedure. It is hardly surprising that it failed to produce any tangible results in practice, let alone promote the idea of competition.³

The serious attempt to modernise and harmonise with EU competition law trends came in 2005. The 2005 Law on the Protection of Competition (2005 LPC)⁴ systematically implemented the rules, concepts, terms and definitions present in the EU competition law (hard and soft); starting from basic Art 101/102 TFEU rules to relevant market definitions, exemptions and the control of concentrations. The 2005 LPC sanctioned a new competition authority, the Commission for the Protection of Competition (*Komisija za zaštitu konkurencije*, hereinafter the CPC),⁵ which continues its work to this day as the sole administrative organ charged with the protection of the competition. There are no specialised courts dedicated to competition such as the Competition Appeals Tribunal in the UK. The CPC work and investigation procedure were regulated in detail by this statute. However, the 2005 LPC had no provisions on private enforcement.

Merely four years after the enactment of the said LPC a new one was adopted, the current 2009 LPC.⁶ The reasons for enacting this new law were multiple, but it suffices to say that there were no major changes in the substantive competition law rules; the

³ UNCTAD, *Voluntary Peer Review of Competition Law and Policy: Serbia*, New York and Geneva, United Nations, 2011, 13.

⁴ Zakon o zaštiti konkurencije, ‘Službeni glasnik RS’ 79/2005 [Official Gazette of the Republic of Serbia no. 79/2005].

⁵ The CPC has a rather informative site – www.kzk.org.rs – which is to a large extent also available in English. For anyone with a more than just a passing interest, information found in this paper can be supplemented there.

⁶ Zakon o zaštiti konkurencije, ‘Službeni glasnik RS’ 51/2009 [Official Gazette of the Republic of Serbia no. 51/2009].

enactment was largely motivated by the desire to allow the CPC to punish the offenders more expeditiously and with less possibility of review by the courts. These developments were criticised.⁷ It is important to note the new Article 73 which regulates follow-on private actions stemming from a CPC decision confirming the existence of an infringement. This provision will be elaborated in more detail in the next section.

To conclude, Serbian competition law framework is, on paper, strongly EU-inspired and harmonised with the *acquis* to a large extent. Yet, on the legislative level, it has been aptly observed that: '[t]he legislative history of the domestic regulations on the protection of competition causes a certain type of discomfort due to its richness.'⁸ The CPC practical record is also not particularly impeccable.⁹ A rather erratic combination of non-application of bad regulation and bad application with frequent changes of somewhat better regulation is no way to cultivate a system of competition law. This can be said to have left its mark on private enforcement as well.

3 THE LEGAL FRAMEWORK FOR PRIVATE ACTIONS

Procedural and substantive provisions dealing with private enforcement of competition law in Serbia are scarce. There are no provisions which would deal with stand-alone actions in competition law, leaving this area to be regulated exclusively by general norms on civil litigation. As for follow-on actions, the situation is somewhat different as the 2009 LPC contains one article, Article 73, which deals with follow-on actions. But in general terms, in both substantive and procedural law the legal framework is predominantly formed of *mutatis mutandis* application of general norms. These will be elaborated in this and sections that follow.

It should be said that in a society (legal community included) which has no experience with private enforcement the legislator would probably be better off with more detailed statutory provisions, or at least statutory instruments and by-laws, in an attempt to provide guidance and enhance legal certainty. As this has not occurred in Serbia, one should at least focus on establishing what Article 73 has to offer. This article states:

Compensation for damages caused by acts and practices which represent infringements of competition within the meaning of this Law, and determined by the decision of the Commission, is effectuated by litigation before a competent court.

⁷ Begović and Pavić, 'Jasna i neposredna opasnost: Prikaz novog Zakona o zaštiti konkurencije' ['Clear and Present Danger: Review of the New Law on the Protection of Competition'] (2009) 2/2009 Annals of the Faculty of Law in Belgrade 70, 83-84.

⁸ *Id.*, 70.

⁹ In the 2005-2009 period, the CPC suffered serious drawbacks as its decisions on what would in the EU be Art 101/102 infringements were constantly overruled by the Administrative court due to procedural flaws.

The decision of the Commission referred to in paragraph 1 of this Article does not presuppose that the damage occurred, but it [damage] has to be proved before the court.¹⁰

The ‘litigation’ mentioned is the standard, civil litigation before a civil court. No presupposing of the damage means that there is no creation of presumption that the damage occurred. This is relevant because the Serbian law on obligations, generally contained in the Law on Obligations (*Zakon o obligacionim odnosima* – SLO)¹¹ follows the well-known continental law pattern in obtaining compensation for non-contractual/tort damage. Awarding compensation requires three elements: an infringing act for which the infringer is liable, damage and a causal link between these two elements.¹² Article 73 thus provides the rule that the CPC decision is the irrefutable proof of the infringing act for which the infringer is liable, leaving the other two elements to be proved by the plaintiff.

This seems as a good opportunity to elaborate more on the substantive aspects of the legal framework. The SLO, in its key article for non-contractual damages, Article 154, prescribes the broadest possible liability: ‘Whoever causes injury or loss to another shall be liable to redress it, unless he proves that the damage was caused without his fault’.¹³ This follows the French *Code civil* concept (Articles 1382 and 1383), and is broader than the common law system of torts¹⁴ and also than the German law solution which denies tort liability for pure economic loss.¹⁵

Article 154 is followed by Article 155 which prescribes the broadest possible concept of damage that includes simple loss, lost profits and also broadly formulated non-material damage. Finally, these two articles are topped by an overarching principle contained in Article 16 which states that ‘[e]veryone shall be bound to refrain from an act which may cause damage to another’.¹⁶ The SLO provisions on non-contractual damage thus offer a good base for building private enforcement system in a sense that they present no additional obstacles to damages actions and can fully accommodate claims arising from competition law within the grasp of broad norms. There is no room to elaborate on nearly 35 years of court practice and case law stemming from these provisions, but it suffices here to say that all these broad concepts have been confirmed as such.

¹⁰ The translation here is provided by the author. A rather more cumbersome translation offered by the CPC can be found at: <http://www.kzk.org.rs/kzk/wp-content/uploads/2011/07/ZAKON-O-ZASTITI-KONKURENCIJE-ENGL-PDF-FORMAT.pdf>.

¹¹ ‘Službeni glasnik SFRJ’ 29/78 i dr. [‘Official Gazette of the Socialist Federative Republic of Yugoslavia no. 29/78 et al; This law was amended on multiple occasions throughout the years].

¹² Antić, *Obligaciono pravo* [The Law of Obligations], Belgrade, University of Belgrade Faculty of Law, 2007, 430-431.

¹³ See fn. 11 *supra*.

¹⁴ Zweigert & Kötz, *An Introduction to Comparative Law*, 3rd ed, Oxford, Oxford University Press, 1998, 605.

¹⁵ *Id.*, 599-600.

¹⁶ See fn. 11 *supra*.

All this was potentially also a reason why there was no private enforcement provision in the 2005 LPC – these general rules could be seen as sufficiently regulating the matter.¹⁷ This fully remains the case for stand-alone actions, and is still also largely true for follow-on actions.

But what is then the significance of Article 73? In strictly legal terms, it is nothing ground-breaking even for Serbian law. This is understandable as the 2009 LPC was primarily envisaged to deal with substantive law and public enforcement and Article 73 came out almost as a ‘by-product’. The insight into the legislator’s intentions offered by the literature confirms this.¹⁸

As SLO articles can truly be seen as a potentially sufficient *lex generalis*, a question arises whether the Article 73 in its present form was needed at all. In the author’s opinion the answer is still yes. It performs a useful role in clarifying that the damage compensation is: a) available; b) to be effectuated via litigation; and c) subject to general conditions of compensation minus the infringing act. This clarification might not seem as really warranted, but bearing in mind potential problems with inexperience and/or reluctance of Serbian judges to embrace novel concepts it is beneficial. It is also not irrelevant that it sits well with the White Paper recommendations on the subject.¹⁹

Importantly, Article 73 could and should have become an impetus for further developments in the area of private enforcement, but unfortunately this did not occur. None of the stakeholders reacted to make the legal framework richer and/or clearer. The legislator remained passive and there are no by-laws, statutory instruments, or even interpretative opinions on any issue regarding private enforcement by any official authority, including the CPC.

What is perhaps even more troubling is that the courts produced practically no case law on the subject, regarding both stand-alone and follow-on actions. To the best of the author’s knowledge, and after rather extensive research,²⁰ it was possible to identify only one case in which damages were sought for the breach of competition law which was sanctioned by a CPC decision. Due to confidentiality, it is not possible to disclose the party name and details, but these are practically irrelevant as court proceedings were stayed because the CPC decision was appealed to the Administrative court where it remains to this day. No examples of stand-alone actions could be found. It is hardly worth mentioning how much the legal framework would benefit from court practice on the subject, despite the fact that there is no system of court precedents in Serbian law.²¹

¹⁷ Milutinović, ‘Anticompetitive Conduct of the State under Serbian and EC Competition Law’, (2009) 46 (1-4) *Pravo i privreda* 613, 624.

¹⁸ *Id.*, fns. 36 and 37. It should be noted here that turning to doctrine here instead of legislative history is necessary because preparatory documents for the adoption of the 2009 LPC have not been made publicly available.

¹⁹ See fn. 2 *supra*, 5-6.

²⁰ The author would like to thank friends and colleagues from AKT, KN, CMS and Schoenherr law firms in Belgrade for providing the data and comments on the subject.

²¹ On solely *inter partes* effect of judgements see 2011 Law on Civil Procedure (*Zakon o parničnom postupku*, ‘Službeni glasnik RS’ 72/2011 [‘Official Gazette of the Republic of Serbia no. 72/2011’], hereinafter 2011 LCP) Art. 360.

The persuasive value of the judgements of higher courts remains nevertheless strong.²² Lack of case-law also prevented the courts from issuing binding practice statements in this subject-matter, which would be very beneficial for future cases.²³ Potential use of binding practice statements in the field of damage quantification will be elaborated below when discussing these issues.

An academic interested in private enforcement is thus forced to look to alternative sources for more information. One such source is the Serbian answer to EU questionnaire for candidate countries, Chapter 8. The answer to question 29 (in Serbian) of the said chapter confirms that the compensation of damage is done in accordance with the general rules of the law of obligations, but also states that the court is not bound by the CPC decision regarding the amount of damages nor the basis of damages.²⁴ This last part, however, is unclear as it is not explained what is meant by 'basis'.²⁵ If the actual event causing the damage is considered as a basis, then the court is certainly bound by the decision finding infringement as the basis of damage in this sense. If, however, basis is meant in the legal sense of whether the damage is contractual or non-contractual, then again there is little doubt in saying that the damage basis is non-contractual, as can be deduced not only from comparative law and practice but from the broad wording and teleological interpretation of Article 73. Such ambiguities illustrate that truly understanding, as well as applying, the adopted legislation can sometimes present a problem for enforcers in Serbia. Another potentially quite useful source of information, UNCTAD Peer review of Serbian competition law,²⁶ sadly and perhaps surprisingly offers no comments or insights on private enforcement in Serbia.

Thus, further analysis must be done, apart from some specific statutes, within the coordinates of the general law on obligations and the law of civil procedure. Adequacy of solutions in these areas is of key importance if one is to hope that a private enforcement system, from a legal viewpoint, is to work in practice in Serbia. Another equally important condition for private enforcement to grow, the culture of competition, is unfortunately not something that can be created merely by enacting laws.

4 STANDING

The already mentioned rule of Article 154 SLO, which states who can claim compensation for damage, *inter alia* caused by breaching competition law, is in line with

²² Stanković and Vodinečić, *Uvod u građansko pravo [Introduction to Civil Law]*, Belgrade, Nomos, 1996, 37-39.

²³ Binding practice statements are a useful institute of Serbian law which supplements the lack of *stare decisis* doctrine and allow for the court practice to remain coherent. They are issued by joint sessions of the departments of the highest court, the Supreme Cassation Court in Belgrade.

²⁴ The answers to the questionnaire (in English) can be found at: <http://www.seio.gov.rs/documents/national-documents.222.html>.

²⁵ Clarifying the terminology when dealing with law of obligations is quite warranted. See, for example, Antić, fn. 12, 426-429.

²⁶ See fn 3.

CJEU reasoning in *Crehan*²⁷ and *Manfredi*²⁸ decisions. As anyone who suffered damage is entitled to have it compensated by the infringer, it is clear that there is no potential for limitation of standing to direct purchasers via the prohibition of the passing-on defence and US style (on federal level) limitation of potential plaintiffs. Such a limitation would contravene the basic and well-established principles of non-contractual liability in Serbia which have already been touched upon in the context of the SLO. Accordingly, in stand-alone and follow-on actions, a potential plaintiff is either a legal entity/company down the distribution chain or a final consumer which we will consider to be a private individual. Of course, a legal entity might also be a final consumer, but for simplicity sake we will consider this is not the case.

Let us examine the final consumer first. It is well known that the motivation of an average consumer alone to initiate a court procedure to be compensated for what can be a very modest sum is limited at best; this being perfectly rational economic behaviour. Two additional disincentives are also present in Serbia – a general lack of information about competition law and the dreadful economic situation of the average Serbian consumer.²⁹ The first factor additionally lowers the possibility of lawsuits, as a potential plaintiff would have to be both informed and unusually strongly willed to proceed with suing an infringer. But even if the information problem could be remedied, the second factor is far more troublesome. The court procedure can be considered expensive, but this is not something specific only for Serbia. This expensiveness should, however, be put into perspective. A brief examination would show us that an average consumer, assuming that he is employed, informed and willing to battle himself through a slow court system, would have to pay at least around €70 upfront, around €70 for every court session, and an absolutely unforeseeable amount for experts and other necessities, and all that with an average monthly salary of around €350.³⁰ In other words, if an average Western consumer would hardly find it worthwhile to file a suit because it is hardly gainful for him in economic terms, a Serbian consumer would nearly have to forego sizeable parts of monthly income in order to keep the process going. And even with the loser pays principle honoured at the end,³¹ the actual amount of damages that the consumer would receive is always single.³² There are no treble or any similar damages in the general law of obligations, and there seems to be no indication of changes in that direction, so no additional motive can be found there. However, it is important to note here that the SLO provisions also fully embrace the principle of full compensation, including the interest,

²⁷ Case C-453/99 *Courage Ltd v Bernard Crehan* [2001] ECR I-6297.

²⁸ Case C-295-298/04 *Vicenzo Manfredi v Lloyd Adriatico Assicurazioni* [2006] ECR I-6619.

²⁹ Raw economic data about this situation can be found at: http://www.indexmundi.com/serbia/economy_profile.html. A useful short illustration can be found, for example, at: http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2012/01/14/feature-02.

³⁰ Data given based on official court tax, advocate tariff and average salary data indexes.

³¹ 2011 LCP Art. 153.

³² SLO Arts. 154, 155, 185, 189.

which means that no further harmonisation with the White Paper recommendations³³ would be necessary.

If we now turn to intermediate entities in the distribution chain, presumably companies and other commercial entities, one could see a better perspective for private enforcement here, at least in terms of initiating procedures. Apart from a reasonable presumption that companies have more financial resources at their disposal, the amount of damages would certainly be incomparably higher than that of a consumer (leaving aside for now pass-on defence issues etc.). Also, companies often either have their own law departments or have outsourced lawyers with whom they operate on a regular basis, often on a constant monthly fee which includes representation in lawsuits, lowering the initial expenditures. All this increases the chances of launching a lawsuit. However, there are some other worrying factors. First of all, and in line with consumers, most Serbian companies hardly have extra financial resources available. Even a solvent and relatively successful company is likely to be cautious in making any extra expenditure. Thus, complex stand-alone actions are not a likely scenario, although follow-on actions potentially do seem a prudent choice leading to a relatively sure gain. However, a second factor to be taken into consideration is that the Serbian market, generally speaking, tends to be very small and with a limited number of actors. This means that a company might not be motivated at all to sue an infringer, even in a follow-on action, if this means worsening the business relationship with a particular company with likely retribution in the form of cessation of co-operation. If the infringer is not dominant, this cessation/boycott would not be illegal at all, and even if it was, the CPC practice on the abuse of dominant position is for the time being still not developed enough to present a clear source of deterrence.³⁴ Thus, private enforcement by purchasers seems comparatively more difficult in still underdeveloped market economies.

What can be done to improve such a picture? A solution presents itself – promoting representative actions. However, one can legitimately ask whether the situation should be improved at all. If civil litigation is costly, why should it be promoted? The main reason is that the complementary function of private enforcement is of great importance for competition law in Serbia, as public enforcement is still marred by lack of institutional capacity and resources. As a matter of fact, this lack of capacity has been emphasized by the UNCITRAL Peer Review as perhaps the greatest issue with competition law and policy in Serbia.³⁵ In such a situation, it is more than justified to mobilise other potential actors of competition law enforcement. Although, as will be seen later, stand-alone actions may not be particularly feasible as an option, follow-on actions remain as an important factor. In addition, the increase in private enforcement, coupled with adequate media coverage, can be very beneficial in promoting the awareness of both businesses and consumers about competition law. Both of these

³³ See fn. 2, 8.

³⁴ There is a total of 6 CPC decisions since its formation, which is hardly enough to form guidance based on CPC practice. What is available in English (one decision) can be found at <http://www.kzk.org.rs/en/odluke/tipovi/zloupotreba>.

³⁵ UNCTAD, fn. 3, 80-83.

aspects, complementary enforcement and awareness, may prove crucial in creating the culture of competition which should be a long-term goal in both the economic and legal sense. Bearing this in mind, it is the author's opinion that despite the fact that costs of litigation are destined to remain a problem, the solutions should focus on overcoming it by means other than evading litigation itself.

It is thus useful to see how representative actions can be used as one of these means of increasing private enforcement while overcoming cost issues. Serbian law in general does not have a long standing tradition of fostering such actions, but this does not mean that there is no perspective for this to change in the future. As for opt-out actions, Serbian law in general would not allow opt-out representative actions by either private individuals or companies.³⁶ The concept of damage compensation and civil actions in general presupposes that a person is to sue and get compensated for its own damage, excluding the possibility of anyone suing for a whole class of persons in the same legal position.³⁷ In the context of private enforcement, this is rather regrettable. A well-developed opt-out system would mean that an average consumer would not have to pay anything, would not have to get involved and would just have to be informed about the final outcome.³⁸ However, as these actions would mean such a deep change in the whole concept of damage compensation, they are highly unlikely to be an option for reform.

Opt-in actions, on the other hand, are available and additional parties can generally join the litigation well until the very end of the lawsuit.³⁹ Still, it does not seem very likely that the mere possibility of joining in would make much difference to an average consumer. Even if sharing costs would mean that it no longer takes giving monthly incomes for a lawsuit, the number of plaintiffs would presumably still have to be very high for the cost/benefit ratio to be actually acceptable for a consumer to join. Achieving such a high number of plaintiffs would require good organisation before and during the lawsuit for consumers to be informed and enticed to join. The possibility of a spontaneous grassroots consumer initiative is thus slim.

Before seeing what consumer associations can offer in this regard, it should be said that opting in is a far more feasible option regarding direct and indirect purchasers. Sharing costs, when joined with a possibility of solid compensation, is an appealing option. Also, depending of course on the circumstances of each case, opt-in action might be joined by a large number or even all of the purchasers dealing with a particular infringer or infringers, thus limiting the possibility of retribution. In such a case the small Serbian

³⁶ Some actions that resemble collective redress are available to a limited extent in Serbian company law, but have no effect on the larger picture.

³⁷ Jakšić, *Gradansko procesno pravo [Civil Procedure Law]*, Belgrade, Belgrade Law Faculty Centre for Publications, 2006, 154-158.

³⁸ Proposal for introducing opt-out actions in this area in the UK has been very recently made by the Department for Business, Innovations and Skills. See <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation>.

³⁹ 2011 LCP Art. 205.

market might even come as a benefit, as the infringer(s) might face a situation that there would be no one to sell to if retribution by boycott was undertaken.

Lawsuits initiated by consumer associations, of course, have tangible advantages over any form of consumers organising or trying to organise themselves. Presumably, a consumer association is well versed in the legal framework, is actually created so it could protect consumer interests and is, hopefully, funded well enough to proceed with its projects. However, a legal obstacle present with opt-out actions is also present here: under general rules the consumer association did not suffer any damage itself and cannot claim for others. Yet, the legislator seems to be more lenient here and there is a tendency to allow such actions via *lex specialis*; although mere license to sue in the name of consumers does not solve the problem of what happens with the amount of damages that is potentially obtained. Leaving that aside for now, one should regrettably indicate another example of incoherence in the current Serbian legislature.

After a rather vocal media campaign by the government, the Serbian legislator relatively recently (October 2010) enacted the Law on the Protection of Consumers⁴⁰ which, *inter alia*, regulates the formation, financing and activity of the consumer associations in protecting consumer rights. Despite the fact that this law was enacted a whole year after the 2009 LPC there is nothing in it that would remotely connect it with the protection of consumers in regards to competition law infringements. Consumer associations are allowed to initiate legal action to protect the rights and interests of consumers,⁴¹ but the law nowhere mentions within these rights and interests the right to an abuse-free competition environment.⁴² This is even more striking when compared to the fact that Article 1 of the 2009 LPC explicitly states that competition is protected especially to benefit consumers. Paradoxically, a consumer association can initiate action against infringers which do not translate instruction manuals well, but infringers which collude to practically rob consumers of their money are safe from lawsuits initiated by consumer associations. This is even more surprising when one knows that consumer associations in some neighbouring countries, such as Romania, have had the possibility of initiating private enforcement for twenty years now.⁴³ If there is something positive in all of this, it is that at least the legislator now endorses the concept of consumer associations protecting consumers via lawsuits, which offers a possibility of expanding this to the field of private enforcement in the future, thus also following recommendations found in the White Paper.⁴⁴

In a fledgling private enforcement system, however, in the author's opinion, the story should not end with consumer associations. A role can be found for business

⁴⁰ Zakon o zaštiti potrošača, 'Službeni glasnik RS' 73/2010 [Official Gazette of the Republic of Serbia no. 73/2010] (2010 LPCons).

⁴¹ *Id.*, Arts. 60 and 130.

⁴² *Id.*, Arts. 2 and 5.

⁴³ European Consumer Consultative Group Opinion on Private Damages Actions, 18.11.2010., 78, available at: http://ec.europa.eu/consumers/empowerment/docs/ECCG_opinion_on_actions_for_damages_18112010.pdf.

⁴⁴ See fn. 2, 5.

associations, namely those of companies which are direct and indirect purchasers. These, in one form or another, already exist in Serbia but their role was never seen as the one of direct enforcer of their members' rights, but more as a meeting point or a way to convey the voice of a particular branch to the public/government.⁴⁵ However, adding the function of enforcer and making them in this regard similar to consumer associations would be an excellent step forward. These business associations would most likely face a much more certain financing situation and a much more homogenous membership than consumer associations, thus allowing a more efficient pursuit of private enforcement. In the alternative, even without the possibility of these associations taking the action themselves, they could still be seen as a fertile ground for initiating opt-in actions by the companies.

If the previously mentioned shortcomings were remedied and improvements implemented, the legal framework would be substantially improved. Yet, in the author's opinion, this would not in itself guarantee a rise in private enforcement. What a system like the Serbian one needs is a forceful 'spark' to ignite the mechanisms. And this 'spark', leaving aside the factually necessary 'spark' in the form of suitable CPC decisions, is most likely to come from the attorneys looking for profit. It is true that both the EU Commission and the Parliament are in deep opposition to the US-style attorney-driven system and especially 'the abuse of that system',⁴⁶ but without dwelling on the issue of whether or not such an attitude is the correct one for the EU, for the time being attorneys have a seminal role for improving the current Serbian system.

Firstly, attorneys are, or at least should be, the best informed actors on the scene regarding the legal framework, current events and CPC decisions.⁴⁷ Secondly, they have a very clear and straightforward motive – profit. It is the author's first-hand experience that, as in many other professions, the economic situation of Serbian attorneys is generally far from prosperous and additional avenues to gain income would surely be welcomed. Finally, attorneys would likely be far more ready to battle with the long processes and the slow court system than any consumer, association or even a company would on its own.

Some of the prerequisites for a successful attorney driven system are already present, apart from opt-out actions initiated by attorneys. Contingency fees are not officially the way the system works in Serbia, but are actually quite common in practice, so there is no need to 'introduce' them. Opt-in actions co-ordinated by attorneys are not only

⁴⁵ See, for example http://www.cable-serbia.rs/about_us.php.

⁴⁶ European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)), I.

⁴⁷ Some of the most thorough articles on Serbian competition law came from practitioners – for example Petrikić & Radovanović, 'Sprovođenje uviđaja prema novim propisima o zaštiti konkurencije' ['Conduct of inspections under new rules on protection of competition'] (2010) 47 (10-12) *Pravo i privreda* 54.

already possible but are, if judging by some recent developments, starting to play a more prominent role in general.⁴⁸

The ideal scenario would be a combination of empowering consumer and business associations to pursue private enforcement via attorneys working on a contingency fee. The attorneys would be expected to monitor the developments and suggest or assist initiation of actions to relevant associations. Associations on the other hand would be in a good position to either pursue the action themselves or help organise, alongside the attorney, an opt-in action. While business associations could offer a direct link with interested companies, a consumer association would be in a position to garner interest for an opt-in action due to media presence and activism among consumers.

A prerequisite for all these developments is to increase the awareness of all the interested actors about competition law, and the increased attention of the CPC to investigations that would be suitable for follow-on actions. Stand-alone actions do not seem to be able to contribute much, both due to the likely excessive complexity and other factors that will be examined below.

5 OBTAINING EVIDENCE

Assuming that the private enforcement lawsuit has been initiated, another crucial step in actually obtaining compensation is proving the claims. This process, of course, differs between stand-alone and follow-on actions. We will first deal with the (in)adequacy of Serbian law in dealing with the more complex stand-alone actions, before turning to somewhat less problematic follow-on actions.

5.1 Stand-alone actions

Stand-alone actions, regardless of the alleged infringement, usually require complex analysis based on substantial amounts of proof.⁴⁹ The court would practically have to manage an effective investigation ‘imitating’ the CPC, which under the 2009 LPC has far-reaching investigative powers harmonised with the EU rules on the matter.⁵⁰ Litigation in general is not, however, well suited for such tasks. In addition, neither civil procedure rules nor the 2009 LPC envisage co-operation between the CPC and the courts which could potentially remedy this.

Let us shortly illustrate the inadequacy of litigation for some hypothetical court-led investigation, aimed at obtaining certain documents or just information from alleged infringers.

⁴⁸ The author has gathered information on lawsuits in various areas of law which have been joined sometimes by as much as 150 persons. Although it might not seem as much in comparative terms, it is still a remarkable general increase in terms of previous Serbian practice.

⁴⁹ General complexity of private enforcement lawsuits has been also well recognized in the White Paper, fn. 2, 2.

⁵⁰ 2009 LPC Arts. 48 to 56.

The first option is a court order to provide the documents.⁵¹ This order needs to be obeyed in a time period fixed by the court, and the standard court practice is to leave a ‘reasonable period’ which usually means at least up to the next hearing. The tendency of Serbian courts is to schedule hearings with two to three months in between. This means that the alleged infringer received a ‘heads-up’ warning what the plaintiff suspects with a comfortable period to examine, and if necessary, dispose of the evidence. But, one should ask, there is surely an urgency provision, especially if there is a risk of evidence being destroyed? Yes, there is the civil procedure provision which allows for particular evidence to be obtained and examined under an urgent procedure, even before the first hearing in a particular lawsuit.⁵² However, both of these provisions are made meaningless by the rule that a ‘party’ (this was probably envisaged for private individuals, but the law makes no difference here) cannot be forced to supply any evidence that would leave it vulnerable to ‘considerable financial damage or criminal prosecution’.⁵³ Obviously, it is very easy for an alleged infringer to not supply anything as it would certainly cause it financial damage if the plaintiff’s allegations are proven. Even if a potential infringer denies even having any such evidence, and the court thinks otherwise, which in itself can take a long time to establish, the instrument available to force the alleged infringer into providing evidence is a monetary penalty which, for a company, can maximally be in the range of €10,000.⁵⁴ It is unclear what happens if the alleged infringer continues to refuse to obey the court order, but even if the maximum penalty is repeated it is still a relatively small amount in comparison to how much an infringer could be found to be liable.

A broad rule against self-incrimination is an obvious obstacle. The court has an obligation to take into account this denial of providing evidence when it makes its final decision,⁵⁵ but in the author’s opinion this does not help much. Without solid evidence and based practically on the court’s ‘impression’ a hypothetical award in the plaintiff’s favour does not stand a good chance with the higher courts, which have already demonstrated strictness in dealing with competition law.

There are no provisions that would allow for any investigation on behalf of the civil court by either officers of the court or other public authorities. This means that truly investigative measures, such as ‘dawn raids’ and seizure of documents, remain exclusively with the CPC.

Other measures in a civil court’s ‘arsenal’ which remain are hearings of witnesses and experts. The hearing of witnesses can potentially be a plaintiff’s best bet to succeed if there is an ‘insider’, an employee willing to come clean about potential infringements within his or her current or former company. Otherwise, if the witnesses are employees of the alleged infringer which are determined to keep infringements a secret, there are a host of options for them to do so even without resorting to perjury. Evading the court

⁵¹ *Id.*, Arts. 241 and 242.

⁵² *Id.*, Art. 284.

⁵³ *Id.*, Art. 241 in conjunction with Art. 249.

⁵⁴ *Id.*, Art. 243.

⁵⁵ *Id.*, Art. 241.

calls for witnesses is a common occurrence and a witness can always provide at least a semi-plausible ‘justifying circumstance’ for not showing up, which can in practice prolong the moment of hearing for months and even years.⁵⁶ Then, a witness can refuse to answer if this would mean incriminating himself/herself either criminally or for financial liability and also if there is a duty of professional secrecy.⁵⁷ Again, this can easily be manipulated. Finally, even if a witness refuses to show up or answer a question without a justification, the maximum financial penalty, which is also the only penalty available, is limited to a sum equalling €1,500.⁵⁸ This penalty can be repeated, but is still hardly a sum providing serious deterrence.

Regarding experts, the rules of procedure are suitable, but the problems would more likely be practical. The first issue is for the plaintiff to find a suitable expert to present the economic findings to the court. Since this sort of analysis is not common in Serbia, it is likely that potential experts are scarce and that their work would be expensive. Then, the court is very likely to appoint its own expert to assess potentially highly complex economic data presented, and this is primarily done from the existing court registry of experts. Bearing in mind that this sort of work for the courts is not held in high regard, it would be hard to find such an expert on the existing registry. There is a provision to appoint an expert outside the registry, but this initially requires the agreement of the parties about the person and only after attempts to agree the court is to make the appointment.⁵⁹ All this offers an infringer ample opportunity to prolong the process further.

One option to make stand-alone actions more likely to succeed could be to introduce the co-operation with the CPC. Currently, neither the 2009 LPC nor the LCP have any provisions on that matter. The only co-operation civil procedure law envisages for the civil courts is that with other national or foreign courts.⁶⁰ On the other hand, the 2009 LPC directs the CPC to co-operate with other state authorities etc. in order to ‘create the conditions for the application’ of the LPC⁶¹ – a very broad norm which is not elaborated further. The rule on co-operation actually found in the 2009 LPC is one-sided – the other state entities are to provide the CPC any requested information.⁶² As for sharing the case file, the 2009 LPC is restrictive – this is only available to the parties to the CPC proceedings, and there is no place for an inquisitive civil court here.⁶³

It is of course, open to debate to what extent and in what aspects should the CPC assist the civil courts dealing with stand-alone actions. Concentrating now just on obtaining

⁵⁶ It is the author’s personal experience that a Serbian court has failed to decide on a motion to punish a witness for not showing up without a justified reason for 4 (four) years. Naming and analysing all of the reasons which were given for this by the court would probably require an article of its own.

⁵⁷ 2011 LCP Arts. 248 and 249.

⁵⁸ *Id.*, Art. 257.

⁵⁹ *Id.*, Art. 264.

⁶⁰ *Id.*, Arts. 174 to 179.

⁶¹ 2009 LPC Art. 21 5).

⁶² *Id.*, Art. 49.

⁶³ *Id.*, Art. 43 in conjunction with Art. 33.

evidence, the obvious argument against it is to prevent ‘fishing expeditions’ by plaintiffs. On the other hand, one might argue that in a competition law system still in its infancy it might be useful to join forces of all the actors concerned to aid the enforcement in any form. Still, even if one would strongly favour the CPC spearheading the investigative process on behalf of the courts, the possibilities of something like that are limited. Namely, it is highly unlikely to see the CPC conducting investigations or securing evidence on behalf of the civil courts as that is simply not in the spirit of civil procedures in Serbia. The inquisitorial approach has even begun to lose ground in criminal procedures as well.⁶⁴ Introducing court-led investigations in which the CPC would assist would demand important changes to the freshly introduced 2011 LCP and is thus not to be expected. Similarly, sharing information from case files or other information in the possession of the CPC is also an unlikely option as it clearly increases the risk of ‘fishing expeditions’ and would run counter to the EU *acquis* on this subject.

In the author’s opinion, the ideal way to ‘unite competition enforcement forces’, which should be seen as warranted in the light of the above, would be to enable the CPC to have some sort of *amicus curiae* status before the civil law courts dealing with stand-alone actions, while also promoting the use of CPC as a court expert (more on this below). *Amicus curiae* status would allow the CPC to offer its view on the key issues, suggest the evidence necessary and also potentially share and explain some of its publicly available data which could be of relevance for a particular litigation. Such status for the competition authorities is a well-known feature of the 1/2003 Regulation but there have been no attempts to implement this provision into Serbian law. The problem might lie in the fact that the concept of *amicus curiae* is historically unknown to Serbian law. The 2011 LCP rules on the involvement of third parties (including the public prosecutor) with on-going litigation⁶⁵ require the third party (under specified conditions) to become a fully-fledged party to the proceedings, not a court ‘assistant’.

To sum up, the current legal framework, without even taking into account empirically proven inefficiencies of the court system,⁶⁶ is not well suited for a plaintiff trying to achieve its rights through a stand-alone action. The rules on self-incrimination, provision of evidence, witnesses and experts all offer numerous opportunities to an alleged infringer to prolong and eventually evade any responsibility. The reforms in this area do not seem likely. It is thus to be concluded that the thrust of private enforcement in Serbia is not to be expected to come from stand-alone actions. It also becomes clearer why the Article 73 of the 2009 LPC limited its scope to follow-on actions. The legislator, in a way, sent a ‘signal’ that stand-alone actions are probably a lost cause.

⁶⁴ The most recent changes of the Serbian Code of criminal procedure abolished examiner judges in favour of public prosecutor investigations.

⁶⁵ 2011 LCP Arts. 214 to 221.

⁶⁶ As one illustration, there are currently more than 5800 applications against Serbia before the ECHR, the greatest part of which concerns the inability of the courts to resolve procedures in reasonable time. For more information see Serbia country profile available at: <http://www.echr.coe.int/ECHR/EN/Header/Press/Information+sheets/Country+profiles/>

5.2 Follow-on actions

The obvious advantage of a follow-on action is that the above problems in proving the existence of an infringement should not exist as they are, per Article 73, swept away by having a decision of the CPC. Ideally, a company or a consumer should be able to apply to the civil court and relatively easily get compensated for the damage that has been caused by the infringement. However, as this has not been truly tested in practice⁶⁷ it remains unclear if it will actually work. It is, however, possible to foresee difficulties.

First of all, there should be an understanding on behalf of the CPC of the necessary level of detailed argumentation for the infringement decision, especially in the sense of economic analysis and cause and consequence links. The problem is clear: a Serbian civil court, sorely inexperienced in the field of competition law, will most likely expect the information on how the infringement caused damage as thoroughly explained as possible if the process is to be simple. Assuming that the results of an infringement would eventually manifest itself as the price increase over the competitive price level, the court would ideally expect to see the confirmation and analysis in the CPC decision that this increase did occur alongside the amount of this increase. Having this, it would be rather simple to award the damages to anyone proving, for example, that it purchased something at this inflated price.

However, one should not be too optimistic about the readiness of the CPC to ‘chew’ the material for the courts in that manner. The CPC has generally demonstrated and been criticised for taking the easier path to complex issues.⁶⁸ In cases where the increase in price is not obvious from the decision (e.g. a dominant entity abusing the position by raising prices) this might lead to unwelcome consequences. For example, if the CPC determined that several companies made an agreement to share the market, punished them for it and simply left it at that, this would mean (in combination with a judge lacking any interest and/or time to deal with competition law nuances) that establishing the link between the infringement and the increase in price (read: damages) would fall heavily on the plaintiff’s shoulders. This means that all the issues with complex economic analysis, experts and prolongations found at stand-alone actions which were hopefully thrown through the door might easily come back through the window.

Clearly, even the follow-on actions lose their appeal rapidly if the CPC is not willing or capable to be thorough. In terms of the law of obligations, this link that must be explained is the causal link which is in non-contractual damages often disregarded as obvious - but in competition law this link is far from being such. Although the Article 73 2009 LPC explicitly provides that this causal link must be proven, in the author’s opinion this should nevertheless be (as much as possible) the task of the CPC if there is any willingness to actually incentivise follow-on actions. The courts would most likely

⁶⁷ The one existing case mentioned above, at p 318, is hardly illustrative in any regard.

⁶⁸ Begović & Pavić, *Jasna i neposredna opasnost II: Čas anatomije* [‘Clear and Present Danger II: Anatomy Lesson’] (2010) 2/2010 *Annals of the Faculty of Law in Belgrade* 337, 347-50.

follow suit and take the causal link as shown by the CPC for granted, even if this is not what the 2009 LPC says.

Provided that there is a clear-cut CPC decision suitable for a sufficiently simple lawsuit to obtain damages, this leaves the final step of providing factual evidence that the damage has been suffered. Assuming again a situation in which there has been an increase over a competitive price, the plaintiff is expected to show (leaving aside associations as potential plaintiffs) that it has obtained the goods or services at this price and consequentially suffered damage. It is probably not a revelation to conclude that the ability to prove this differs greatly from situation to situation and from plaintiff to plaintiff. As the well-known UK *JJB Sports* case⁶⁹ has shown, it is not likely to expect that final consumers will be able (or maybe even willing) to prove the purchase of a lower value good after a certain amount of time has elapsed.

Regarding consumers in Serbia, the proof of purchase for lower value, mass produced goods would most likely be the fiscal receipt which has been introduced in 2004 for VAT purposes. The problem, which is of course common not only in Serbia, is that no consumer can be realistically expected to keep this receipt for a lower value good or service for a long period. Another problem, which might be more common in Serbia than elsewhere, is that shops sometimes tend not to issue these for tax evasion purposes and that consumers are generally not in particular habit of taking them. The situation is better when it comes to goods of higher value, as it has become standard practice to require these receipts for using the warranty on technical goods, for example. This notably increases the chance of keeping the proof of purchase. To sum up, companies making infringements which cause increases in prices of goods such as food and beverages in supermarkets can be 'in the green' regarding potential suits by final consumers.

Presumably, companies as direct and indirect purchasers are in a better position regarding available evidence. The companies are required to keep their business books for a significant period of time, their accounting needs to be done in accordance with international standards,⁷⁰ and invoices used between commercial entities in general have a strong evidentiary power in the Serbian system of commercial law.⁷¹ This makes it rather likely that direct or indirect purchaser would have the necessary records of purchases and, in addition, that the courts would recognise these.

We can then assume that when it comes to proving the claims, companies are generally in a better position to protect their own interests, obtain compensation and also achieve the goal of deterrence.⁷² This might also be the case for certain final consumers. But in the case of mass consumption goods, for example, despite these goods often being the centre point of government protectionist interventions towards Serbian consumers, a

⁶⁹ *The Consumers' Association v JJB Sports* [2009] CAT 2; [2009] Comp. A.R. 117

⁷⁰ 2009 Law on accounting and revision, Arts. 2 and 23.

⁷¹ For example, as per Article 18 of the 2011 Law on execution and security, a commercial invoice is sufficient to get a summary executive judgment against a debtor.

⁷² See fn. 2, 3. The deterrent function of obtaining compensation has an important place

hypothetical infringer would likely be able to evade paying compensation to these same consumers and would also suffer no deterrent effect from private enforcement. This is, of course, highly undesirable. But even if it is not to be expected that consumers would suddenly change their attitude towards keeping fiscal receipts, at least the deterrent effect can and should be achieved otherwise.

The solution (again) lies in allowing the consumer associations to fulfil their role in the name of consumers. It seems warranted to allow consumer actions that would resemble *cy pres* solutions which exist elsewhere.⁷³ A consumer association should be in a position to sue the infringer and obtain the compensation in the (ideal) amount – the amount that would have been paid to the consumers if they were in a position to both claim it and prove it. This amount would be calculated by obtaining the sales data of the goods/service affected by the infringement, alongside data on the period of infringement and the increases in price caused by the infringement. Should the need occur, the 2011 LCP provision on estimating damages (mentioned below) can also be used. Forcing the infringer to pay this compensation is practically the only way to keep at least the deterrent effect of private enforcement in the case of mass consumption goods. Of course, the fact remains that the consumer association is not the subject that should actually be compensated for the infringement, even if the special provision running counter to Article 154 SLO is to allow it. Thus, after this compensation is awarded, the consumer association should be obliged to make a general call to the consumers to get their share of the compensation, provided they supply a valid proof of purchase. Bearing in mind the low level of consumer awareness in Serbia, the deadline for claiming this compensation should not be short - six months as a minimum. After this deadline, a consumer association should be obliged to keep the remaining amount in a special purpose fund and use it for initiating new consumer protection lawsuits. Stringent control of this mechanism by the government is well advised. Potential misuse of the obtained sums could seriously compromise the idea of such lawsuits for the future.

6 QUANTIFICATION OF DAMAGES

It has already been stated that in follow-on claims it would be advisable for the CPC to make the task of courts as simple as possible in regards to damages quantification. However, some general questions still need to be answered – how is the party to approach this issue in its claim, in both stand-alone actions and follow-on actions where the CPC was laconic? How is the court to examine these issues? But also, how is the CPC itself to approach this quantification? Surely, the various problems of passing-on and the problems of calculating lost profits will not be resolved easily by inexperienced actors such as the courts or the CPC.

There is by no means enough space, or the need, within the scope of this work to examine economic models to be used for such calculations. Elaborate articles have been written on the subject, but again none in Serbia. What can be done here is to

⁷³ See, for example, Yospe, 'Cy Pres Distributions in Class Action Settlements', (2009) 3 Columbia Business Law Review 1014.

sketch some basics that would be in accordance with the law of obligations and propose some measures how this task can be made easier.

The first feature of the law of obligations in regards to the obtaining of damages and their calculation, already noted above, is that there is no limitation of who can sue for damages, this being available to all 'links' in the chain. Secondly, and closely related to this, is that the pass-on defence is fully legitimate and it would be unthinkable to exclude it as it would lead, in co-ordination with the first feature, to multiplying actual damages caused which is strictly prohibited. Thirdly, no form of punitive damages is possible, either by multiplying actual damages or by imposing some court ordered penalties. Fourthly, the awarding of *lucrum cessans* for the loss of clientele (here it would be due to artificially higher prices) is fully allowed and is standard practice in commercial law. Fifthly, as to the amount of *lucrum cessans* itself, Serbian case law in the field of law of obligations indicates that there is the need to show that this loss was realistically expected but no need to make the exact amount known in detail. Finally, and very importantly, there is the LCP provision which states that the court faced with a difficult calculation of monetary compensation for the suffered harm can resort to estimating it.⁷⁴ This provision, alongside many others, has been modelled on German civil procedure law.⁷⁵

Still, it would not be realistic to expect that this LCP provision would be sufficient to solve all problems. Wild guesses by any civil court would conflict with the other duties the court has under the basic constitutional and LCP principles and rules. Preventing this should be addressed on two fronts.

Firstly, to prevent judgments made on impressions, it is necessary initially to have guidance, and eventually rules. In the author's opinion, the most feasible way of achieving this is the combination of a non-mandatory guidance paper (a solution also suggested by the White Paper)⁷⁶ which is then, by using a test case and the mechanism of binding court opinions, partially or even wholly consecrated as a firm legal rule. The logical first step of creating a guidance paper should most likely be based on adopting the proposals already existing on the EU level while also adjusting them to the needs and current level of the judges' expertise in Serbia. This could be done in the form of a special CPC guidance paper endorsed by the relevant ministries. A starting point could be the Oxera 'Quantifying antitrust damages' study⁷⁷ although in the author's opinion its contents should be very significantly simplified and made more user-friendly for the actual use in Serbian practice.⁷⁸ It can be reasonably predicted that having such

⁷⁴ 2011 LCP Art. 232.

⁷⁵ For more on this interesting provision and its use in German competition law see Pohlmann, 'Private Losses in European Competition Law: Public or Private Enforcement?', in Schulze (ed), *Compensation of Private Losses – The Evolution of Torts in European Business Law*, Munich, Sellier, 2011, 163.

⁷⁶ See fn. 2, 8.

⁷⁷ Available at: http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf.

⁷⁸ This recommendation is made without prejudice to the quality of the said study. Simply, it comes as a logical choice and a preferable one if the alternative is to wait for Serbian competition economists to come with something on their own.

guidance would likely be of immense help to anyone considering private enforcement claims.

The second step, and this is a relatively big (albeit necessary) leap into the hypothetical, is to use a suitable test case to get a binding practice statement. When the issues connected with the calculation of damages do come up in this test case, it would be the responsibility of the court to recognise the importance of this issue and initiate the procedure to get a binding practice statement opinion on how the damages should be calculated. This opinion would likely be based on the available guidance paper which would probably continue to be used to complement and supplement the practice statement. In this way, it can be assumed that there would be a workable legal framework for these issues.

The second front is aiding the courts in the procedure itself. The way to do this would be to get the CPC involved. The one way already discussed is to grant the *amicus curiae* status to the CPC, something rather unlikely to happen. Still, there is a more likely method. It would require promoting the appointment of the CPC as a court expert, which has not happened so far. This way, its resources could be used to aid the courts. The similar idea of having the competition authority as the calculator of damages has been expressed already,⁷⁹ and has been also opposed,⁸⁰ but in the author's opinion it might be a good solution for fledgling private enforcement systems with a great need to use all the expertise available. A possible problem, of course, is that the CPC is already overburdened and lacks resources. Until this is at least somewhat remedied, and steps are being taken in that direction,⁸¹ it could not be expected for these appointments to be readily accepted by the CPC. However, as it cannot be expected that the number of private actions requiring CPC expertise will increase rapidly in near future, it can also be argued that these appointments would not strain the CPC too much.

If measures are taken in both directions – substantive and procedural – it can be expected that calculation of damages, a truly neuralgic point of any private enforcement procedure, can become at least functional (if not perfect) in the Serbian legal system. Results cannot be expected over night, which is one more reason to act as soon as possible.

7 CONCLUSION

There seems to be no better way to conclude than to shortly reiterate what has been said and gather the proposed measures that are suitable to build the private enforcement system in one place. The current situation regarding private enforcement in Serbia is far from good. This is due to multiplicity of factors: 1) only nominal interest from the legislator for this area resulting in the lack of more detailed rules or at least

⁷⁹ For example, Schinkel & Rüggeberg, 'Consolidating Antitrust Damages in Europe: A Proposal for Standing in Line With Efficient Private Enforcement', (2006) 29(3) *World Competition: Law and Economics Review* 395.

⁸⁰ Komninos, 'Relationship between Public and Private Enforcement: quod Dei Deo, quod Caesaris Caesari', 16th Annual EU Competition Law and Policy Workshop, <http://ssrn.com/abstract=1870723>, 22.

⁸¹ See, for example, UNCTAD, fn. 3, 78-79.

guidelines in this area; 2) the inadequacy of the rules of civil procedure in many aspects; 3) passiveness of the CPC in investigating and punishing infringements suitable for compensation; and, 4) the non-existence of a developed competition law culture among businesses and consumers.

The measures that could improve the current situation in different areas could be summarised as follows:

- a) include private enforcement of competition law claims into the framework of consumer protection rules thus allowing a number of advantages, most prominently the enforcement by consumer associations;
- b) create a special mechanism by which the consumer associations would be allowed to claim compensation that would usually belong to consumers if they were in a position to prove the damage;
- c) give the same role of the enforcer of rights (of companies) to business associations;
- d) make follow-on actions as simple to conduct as possible by making sure that the CPC decision is as well argued and detailed as possible;
- e) consider including the CPC in the procedure as an *amicus curiae* with a task to explain the competition law aspects of a case;
- f) aid the relevant actors (the CPC, court, parties) in the complex issues of damage calculation by issuing a non-binding guidance;
- g) ideally complement this by establishing a court practice statement on damage calculation after a suitable test case;
- h) include the CPC in the process by promoting them to their role of court appointed experts tasked with damage quantification;
- i) launch a comprehensive informational campaign aimed at increasing awareness about competition law issues of all interested actors.

If these recommendations were to be implemented, at least partially, and if the CPC fulfilled the ‘mother of all conditions’, by intensifying investigation and punishment of infringements, it is the author’s deep conviction that the private enforcement system in Serbia would lift off from its standing start. Until then academics dwelling on theory and undiscovered and unpunished infringements will remain a common occurrence.