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RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- Slovak Republic --

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More documents related to this discussion can be found at: http://www.oecd.org/daf/competition/antitrust-enforcement-in-competition.htm

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-- Slovak Republic --

1. General overview

1. In Slovakia, public enforcement of competition law is designed as administrative procedure via the decision-making practice of the Antimonopoly Office of the Slovak Republic (Office). The Office is central state administrative body. Within the procedure, only administrative fines on undertakings can be imposed. The decisions of the Office are subject to judicial review carried out by courts.

2. Public enforcement by Office remains the main domain of competition law enforcement. Over the last decades, this type of enforcement has been perceived as effective one with sufficient deterrent effect and has gained its stable position in the legal environment. Although the law provides for actions for damages in general, i.e. without special mechanisms or regime for harm suffered as a result of violation of competition law, this possibility was almost unknown for undertakings, consumers or competition law practitioners. Its use in practice was negligible. From the Office´s practice it can be concluded, that those, who felt harmed by certain allegedly anticompetitive behaviour, preferred to lodge an complaint to the Office seeking for a cease and desist order rather than turning to the court claiming for damages.

3. The concept of private enforcement as an independent pillar of competition law enforcement appeared for the first time following the increased activities of the European Commission (Commission) starting in 2005. Since the Office was actively involved in the Commission´s work, it tried to increase the public awareness of this concept and carried out a survey among the stakeholders, together with the Comenius University in Bratislava organised an international conference in 2010 and some workshops mainly with the law firms. Nevertheless, apart from some academic work, private enforcement as a tool of competition law enforcement still remains underdeveloped.

4. Beside the general issues of proper functioning of the private enforcement regime, in the centre of the Office´s attention was the effectiveness of its leniency programme. Therefore, in 2014, the leniency programme was revised and in order to enhance its attractiveness the new regulation provides for limited liability of the successful leniency applicant.

5. After the adoption of the Directive 2014/104/EU on antitrust damages actions Slovak Republic is obliged to implement it in due time and proper manner. Although the Directive only regulates the compensation as a consequence of the violation of the EU antitrust law, we will take this opportunity to set rules also for the harm occurred as a result of the breach of national competition rules. Taking into account the existing experience, it is hard to predict whether the implementation of the Directive will boost the claims for damages.

2. Legal Background

6. As stated above, the right for private litigants to claim damages exists in our jurisdiction. Rules governing these claims are general ones, applicable to all claims for damages. There are no specific mechanisms for antitrust cases. The rules are set in private law regulations – Civil Code and Commercial Code.

7. Nor are there specialised judges or courts, however, since 2004, this agenda falls into the competence of a particular general court – District court in Bratislava II (“Okresný súd Bratislava II”). . The reason for entrusting a concrete court with this agenda stems from the entry of Slovakia into EU – Regulation 1/2003 foresees a direct application of art. 101 and 102 TFEU by courts so it was generally considered as useful to have only one court charged with these issues. The Code of Civil Procedure also provides for *amicus curiae* intervention by the Commission or by the Office, but only in cases where EU law is applied.

8. There is the right for full compensation. Anyone who has suffered harm can claim compensation for actual loss (*damnum emergens*), for gain of which that person has been deprived (loss of profit or *lucrum cessans*), plus interest. Compensation is not of punitive nature.

9. There are no limitations as to the standing to file an action. Anyone, who claims to suffer harm, can turn to the court. There is also the possibility of collective claims. The Code of Civil Procedure provides for filing a common action for damages or for joining the already running litigation. Both stand-alone actions and follow-on actions are possible. In the latter case, the court is bound by the Office´s decision.

10. As regards the evidentiary issues, there burden of prove rests with the claimant. This approach is even emphasised in the draft of the new Code of Civil procedure.

11. In terms of access to file, there are rules governing access to the Office´s file, however, the Office has some discretion on whether it will allow the access to its file to the litigants for this purpose. In every case, when a person different from the party to the proceedings before the Office asks for access to file, such request must be reasoned and the person has to prove legal interest in this regard. Confidential information including leniency documents are excluded from access to file. On the other hand, the court can order the Office (or anyone else) to furnish it with documents in its possession where the court considers it relevant for the proceedings. Having regarded the current wording of the Competition Act, based on which the Office is entitled to submit the documents only to the court, it can be submitted, that only the court is entitled to have full access to these documents and is not authorized to transmit them to other persons. However, there is no practical experience in this regard so far.

12. As far as it quantification of harm concerns, the Code of Civil Procedure enables the court to estimate it in cases, where the quantification if impossible or connected with significant difficulties.

13. Since there very limited practical experience, the case-law is missing and a lot of questions which would be otherwise very important for the litigation remain open.

3. Practical experience

14. In 2010 we have carried out a survey among stakeholders. We have asked for the opinion on the effectiveness of the current legal regulation of private enforcement and its shortcomings. We were also interested in the public opinion on the Commission´s activities. Despite the fact that beside the public consultation opened on the Office's website we have also directly contacted the most relevant undertakings, their associations, consumers and law firms, we have received only a few answers. In our opinion, this also shows the lack of awareness or low importance of this issue in the everyday life of the business community.

15. Nevertheless, we have at least learned about few cases opened. These were filed following a decision of the Office mainly in abuse of dominance cases. Currently, we are aware also of some stand-alone actions.

16. The respondents have seen the length of the proceedings together with the high evidential threshold as the main obstacle. In general, the Commission´s initiative to introduce special rules for competition cases was perceived as a positive step forward.

17. Currently, we do not have any consistent track or knowledge of private enforcement cases. Pursuant to the Code of Civil Procedure the courts should inform Office when they apply Art. 101 /102 TFEU, however, we cannot say whether this is done systematically, since there are some cases we were informed about (but are, stand alone, as it seems). We have also knowledge of follow on actions of which we were not notified by courts. The number of cases still remains very limited probably given the same reasons we were notified in the 2010 survey. Recently, we have learned that despite the fact, that the court is entitled to estimate the quantification of harm in cases, where the quantification if impossible or connected with significant difficulties, it does apply this provision in practice and rejects the actions as lacking the quantification of harm as an essential condition of the action.

4. Balancing public and private enforcement

18. From a competition Authority perspective, the main issue in balancing the public and private enforcement consists in remaining the full effectiveness of the Office´s investigation, including the leniency programme and settlement procedure.

19. Since a well-functioning leniency programme is currently in the centre of the Office´s attention and we wanted to raise it attractiveness also with respect to private enforcement cases, in the amendment of Competition Act which entered into force in July 2014 we have addressed also the liability of the immunity applicant. Currently, the Act provides for exclusion of the successful immunity applicant from the obligation to compensate the damage provided the damage if this can be compensated by other cartelists. In such a case, the applicant is also excluded from the obligation to recover the compensation which was already paid by the other cartelists. In a scenario, where the damage cannot be compensated by the other cartelists, the applicant is liable only to the extent of the harm it has caused to its direct or indirect purchasers or suppliers.

20. This provision was drafted before the final wording of the Directive was adopted. It has to be noted that given the different wording of the Directive regarding the leniency applicant´s liability, it will be necessary to put this provision in line with the Directive. Practical experience with application of this provision is not known so far.

21. Until now, no disputes regarding access to file or access to leniency documents have arisen. The rules governing the access to file in the proceedings before the Office are clear and provide for protection of these documents. As regards the judicial proceedings, currently there are no explicit rules on protection of the documents contained in the Office ´s file once the file or a part of it will be required by the court. Therefore we welcome the precise rules formulated by the Directive.

22. Although for the moment we can hardly speak about a developed system of private enforcement, since the law provides also for stand-alone actions, divergent outcomes from the court compared to those of the competition authority can occur. There are no specialised competition courts and it is hard to imagine how the court without specialised investigative powers would be able to deal for instance with an abuse of dominance cases requiring relevant market definition etc. The court cannot initiate proceedings before the Office and the *amicus curiae intervention* of the Office is not of binding nature and nowadays is possible only in EU law cases. In such scenarios divergent outcomes from the Office´s ones and approaches are not excluded. On the other hand, the Office is not bound by the judgment in these cases; once it takes a case it carries out the whole investigation and based on this it draws conclusions. Nevertheless, it can have some impact on the predictability and legal certainty.

5. Future prospects

23. As an EU Member state Slovak Republic is obliged to implement the Directive 2014/104/EU on antitrust damages actions until 27 December 2016. The legislative work is already going on. The Directive only regulates the compensation as a consequence of the violation of the EU antitrust law, but within this procedure the same rules will be set also regarding the harm occurred as a result of the breach of national competition rules.

24. There is no doubt that the rules set in the Directive are much more precise and increase the position of the claimants compared to the current legislative framework. In theory, this can be helpful for the potential litigants. On the other hand, the survey has shown, that the main obstacle for the injured parties consist in the practical application of the rules – lack of confidence into swift and effective litigation impedes the use of this instrument as an effective tool. Having said that, it can be disputed whether the implementation of the Directive will lead to an increased number of litigations.

25. In terms of leniency issues, the precise rules stipulated by the Directive are welcomed by the Office as well as by the undertakings.

26. A well-functioning private enforcement system may enhance the compliance with competition rules in general and decrease the workload of the Office. From an Authority´s point of view, private enforcement cases may play a role in prioritising the Office´s cases. The Office has its prioritisation policy and this factor is mentioned as one that has to be taken into account. If there are ongoing private enforcement cases, this may be considered as an appropriate mean of remedy and a reason for not intervening.

27. Recently, within the process of drafting the new rules governing the private litigation, beside the possibility of the Office to intervene in EU antitrust cases, an *amicus curiae* intervention in national cases will be introduced. In our opinion, this can be useful for the courts especially in stand-alone actions and may minimise the risks of divergent outcomes.