

ACT ON ANTITRUST DAMAGES IMPLEMENTATION OF DIRECTIVE 2014/104/EU

7th COMPETITION FORUM OF UKRAINE

Michael MIKULÍK
Appellate Section



Private Enforcement Overview in the EU

Jurisprudence

- *Courage v. Crehan (C-453/99)* → a contractual party may claim damages caused by anticompetitive conduct
- *Manfredi (C-295/04)* → anyone may rely on nullity of an anticompetitive agreement under Art. 81 EC [101 TFEU] → causation between damages and anticompetitive conduct → actual loss + loss of profit + interest
- *Pfleiderer (C-360/09)* → EU law does not prevent access of an injured party to a leniency file → national courts
- *Donau Chemie (C-536/11)* → access to a file, including leniency parts, should not be conditional on an agreement of parties to the procedure → national courts ruling on this access should have power to weigh up various interests
- *Kone (C-557/12)* → umbrella pricing

Legislation

Green Paper (2005), White Paper (2008), Directive 2014/104/EU (“Directive“)

Directive 2014/104/EU

Directive Objectives

- To ensure the full effect of Articles 101 and 102 TFEU, and the proper functioning of the internal market for undertakings and consumers
- Approximation of relevant institutes of civil law so that victims of anticompetitive conduct can effectively claim damages
- Optimizing the interrelation between public and private enforcement of competition law
- Equality of legal arms of victims across EU Member States
- Increase of legal certainty → elimination of competitive advantages of undertakings → the impact on rights of establishment

Act on Damages

- **Right for damages** → anyone can claim damages caused by breach of Art. 101/102 TFEU/CCA: actual loss + loss of profits + interest
- **Joint and several liability of infringers** → exceptions: liability merely to direct/indirect purchasers or providers if an infringer
 - Imunised under Leniency Programme → N/A if full compensation impossible from other infringers
 - Small or medium-sized enterprise with the market share below 5 %, irretrievably jeopardise its economic viability and cause its assets to lose all their value → N/A if leading role, coercion or recidivism
- **Rebuttable presumption** of damages in case of horizontal by object agreements
- **5-year subjective limitation period** → cessation of violation + knowledge or reasonable expectation of knowledge of (i) an infringement, (ii) an infringer and (iii) damages → limitation period is suspended/interrupted during (preliminary) investigation and will end at the earliest 1 year after investigation was terminated → No objective limitation period

■ **Passing-on of overcharges and defences**

- Compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level → avoid overcompensation
- Courts may estimate the share of any overcharge passed on
- Defendant can invoke passing-on defence → burden of proving rests with him
- Existence/amount of a claim for damages depends on whether or to what degree an overcharge was passed on to the claimant → burden of proving the existence and the scope of such passing-on rests with a claimant → claimant is an indirect purchaser → **rebuttable presumption** that passing-on to him occurred if he showed that (i) defendant has committed an infringement, (ii) the infringement resulted in an overcharge for the direct purchaser of the defendant and (iii) the indirect purchaser has purchased the goods that were the object of the infringement of competition law or goods derived from or containing them.

- **Court's discretion to estimate the amount of damages** if its existence is established but quantification is excessively difficult or impossible
- **Disclosure of evidence → Discovery Procedure**
 - Claimant presents reasoned justification containing reasonably available facts and evidence → a court orders a defendant or a third party to disclose relevant evidence which lies in their control (items/categories of evidence) → proportionality as a limit to disclosure (legitimate interests of parties)
 - NCA's files → black list (leniency statements, settlement submissions → inspection solely by a judge), grey list (withdrawn settlement submissions, information prepared for or by the NCA), white list (pre-existing information)
- **Consensual dispute resolution**
- **Effect of national decisions**
 - Final decisions on the infringement issued by a domestic competition authority are binding for domestic courts and serve at least as *prima facie* evidence for courts in other EU Member States

Discovery procedure

- An injured party may bring a motion to discover documents before a court prior to commencing a lawsuit for damages
- Parties to the procedure: injured party + infringer + anyone having under its control documents or other tools necessary for ascertaining the facts
- Financial security 100 000 CZK for prospective damage resulting from access to documents → a court may increase its amount, upper threshold is not given → if not provided, motion for discovery of documents is dismissed
- Damages incurred by access to documents → action for damages within a 6-month period running from the access to documents → if awarded, compensation comes from the security

... Discovery procedure - continued

- Documents include confidential information protected by law → a court can assign „an impartial person with necessary qualification“ to make a detailed summary of documents → the person will be remunerated by a claimant
- An impartial person breaches duty to conceal confidential information → penalty up to 1 000 000 CZK + duty to pay damages + a court may rule that such evidence is inadmissible in proceedings for damages
- Violation, prevention or fundamental obstruction of finally adjudicated duty to disclose documents or a place where they are stored → penalty up to 10 000 000 CZK or 1% of net total turnover + facts are deemed to be proved if documents were not disclosed by an infringer of competition law + duty to reimburse costs of the proceeding

Conclusion

- Act on Damages introduces to the Czech legal system pro-litigation provisions → e.g. a discovery proceeding
- Act on Damages concerns solely damages caused by „undertakings“ and not by public bodies (§ 19a Competition Act)
- Act on Damages does not concern other rights that may result from a breach of competition rules → claims on unjust enrichment, nullity of forbidden agreements, refraining from illegal conduct
- Act on Damages introduces neither collective nor representative actions
- No objective limitation period in competition law damages

Thank you for your attention...



Michael MIKULÍK

michael.mikulik@compet.cz