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"Damage claims in competition matters: The dawn of a new era?"

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Špela Remec

Odvetniki Šelih & partnerji, o.p., d.o.o.
Komenskega ulica 36
1000 Ljubljana
Slovenia
+386 1 300 76 60
spela.remec@selih.si

General Reporters:

Sebastian Janka, Noerr LLP, Munich, Germany
Simone Gambuto, Macchi di Cellere Gangemi, Rome, Italy
Anouk Rosielle, Boekel N.V., Amsterdam, the Netherlands
Dina El-Gazzar, Stewarts Law LLP, Leeds, United Kingdom

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1. Status quo of private enforcement

Slovenia has not yet implemented the Directive[1]. However, the currently valid Competition Act[2] was adopted in April 2008 after the European Commission ("**EC**") published its Green Paper[3] and White Paper[4]. Consequently, the Competition Act includes some of the proposals made in these two documents, making it easier to bring a private damage claim for violations of antitrust laws in situations where such violations have been caused intentionally or negligently. Both stand-alone actions filed irrespectively of a prior decision adopted by the Slovenian Competition Protection Agency ("**CPA**") as well as follow-up actions filed after the CPA has already established a violation of antitrust rules in a given situation are possible under the Slovenian law.

2. Court and procedure

2.1 Competent court

Antitrust damage claims are brought before the general Slovenian civil courts and the procedure is conducted according to the provisions of the Civil Procedure Act[5]. An antitrust damage claim is treated the same as any other civil lawsuit and randomly assigned to a non-specialized judge.

2.2 Interim measures

Under the Enforcement Act[6], the court has the possibility of imposing interim measures before, during or after the completion of the court proceedings, for as long as conditions required for enforcement are fulfilled. Security means are not strictly defined in the Enforcement Act and the court may impose any kind of interim measure by which the security purpose of the measure can be achieved. It is, however, generally rather difficult to obtain an interim measure in Slovenia, as the conditions for its issuance are rather strict.

2.3 Court procedures in parallel with the investigations of the CPA

Under the Competition Act, the court is obliged to immediately notify the CPA about a lawsuit in which the plaintiff is seeking damages arising out of antitrust violations. In case the CPA is conducting its own investigation in respect of the same case, in parallel with the court procedure for damages, the court will have the possibility but will not be obliged to suspend the court procedure until the CPA's decision about the case. Until now there is no publicly available court practice on private stand-alone antitrust claim brought after April 2008 in connection with violations of antitrust laws, therefore it is hard to predict what

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[1] Directive 2014/104/EU ("**Directive**").

[2] Prevention of Restriction of Competition Act (*Zakon o preprečevanju omejevanja konkurence*), Official Gazette of the Republic of Slovenia No. 36/08, as amended ("**Competition Act**").

[3] Green Paper - Damages actions for breach of the EC antitrust rules, COM(2005) 672, 19.12.2005 ("**Green Paper**").

[4] White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165, 2.4.2008 ("**White Paper**").

[5] Civil Procedure Act (*Zakon o pravdnem postopku*), Official Gazette of the Republic of Slovenia No. 73/07, as amended ("**Civil Procedure Act**").

[6] Claim Enforcement and Security Act (*Zakon o izvršbi in zavarovanju*), Official Gazette of the Republic of Slovenia No. 3/07, as amended ("**Enforcement Act**").

course of action the courts might take in a case where a private claim would be filed before the CPA adopted a decision regarding the same case.

2.4 Appeal

Under the Civil Procedure Act, the decision of the first instance court may be subject to appeal before the Higher Court, and possibly even the Supreme Court. At the second instance the court will assess the merits of the case as well as the law, while at the third instance the court will generally only decide on questions of law.

3. Jurisdiction

Under the Civil Procedure Act, the general territorial jurisdiction of the court shall be determined by the defendant's domicile. In damages cases territorial jurisdiction is also given to the court having jurisdiction over the territory in which the alleged harmful act was carried out.

Cases where there are more than one defendants may be brought before any court which has territorial jurisdiction over at least one of the defendants. The Slovenian courts have not yet dealt with forum shopping in antitrust damage cases and the law is also not clear on the possibility of forum shopping in respect of jurisdiction over defendants. Nonetheless, Slovenia is a member of the EU and past decisions of the EU courts, including their decisions in respect of forum shopping possibilities, would likely be considered by the Slovenian courts before rendering a decision in similar circumstances.

3.1 Duration of the proceedings

In general, court proceedings in Slovenia tend to be quite lengthy and the procedures at the first instance can easily take up to several years. Moreover, due to judges' limited experience with antitrust cases and the (usually) comprehensive amount of evidence material submitted to the court, enforcement of a private antitrust action at the first instance usually lasts quite a long time.

3.2 Litigation costs

Under the Civil Procedure Act, each litigating party will initially temporarily bear its own litigation costs. The ultimately unsuccessful party has to bear the other party's costs (with certain limitations), however if the party only partly succeeds in the litigation, the court may decide that each party must bear its own costs or decide on another cost split. In any case, the law forbids that a party is repaid any litigation costs which were not necessary for the conduction of the procedure. It should also be noted that remuneration of representation costs shall be determined by the legally prescribed attorney tariff even if the actual costs of representation are higher.

There are no special rules on transfer of claims arising out of antitrust violations under Slovenian law. Therefore, general provisions on assignment of claims, contained in the

Code of Obligations[7] would apply: these generally allow a holder of a claim to assign its claim to a third party without the obligor's consent to the assignment[8].

4. Particularities of antitrust damages litigation

4.1 Effect of national decisions and burden of proof

Under the Competition Act, the court is bound by a final decision in which the CPA or the EC established a violation of antitrust laws. Effectively that means that in a private antitrust claim where the violation has already been established by one of the competent authorities, the plaintiff (in addition to proving existence and height of damage, causal link between the breach and damage, and liability of the responsible person) will not have to prove that the defendant's acts were wrongful but only that the alleged damage arose out of the defendant's wrongful violation of the antitrust laws - as previously established by the CPA or the EC. In a recent judgement, the Higher Court in Ljubljana held that the court is not bound by a decision of the CPA with which the CPA accepted commitments offered by the investigated party and thereby terminated its procedure. The court said that such a decision has the nature of a settlement between the Republic of Slovenia and the investigated party; i.e. acting as the defendant in the private enforcement claim, and that in such a decision the CPA does not establish an antitrust violation which would bind the court in a follow-up action.

4.2 Limitation periods

Under the Slovenian law of obligations, damage claims shall be barred within three years after the injured party learned about the damage and the person who caused the damage, and in any case a damage claim shall be barred within five years after the damage occurred. However, under the Competition Act, the limitation period for bringing a private damage claim for damage arising out of an antitrust violation shall not run from the initiation of a procedure before the CPA or the EC and until the final conclusion of such procedures. In this respect, it should be noted that the procedure before the CPA is not initiated before the CPA at the time of complaint, but only if and after the CPA formally opens an investigation.

4.3 Responsibility of a parent company and lifting of the corporate vail

Generally, the person who causes damage to another shall be liable for damages to the person who suffered damage. Under the Companies Act[9], the shareholders of a limited liability company are generally not liable for the obligations of the company. However, in certain situations the Companies Act does provide for the possibility of disregard of the legal personality; i.e. the so-called lifting of the corporate veil institute, under which the

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[7] Code of Obligations (*Obligacijski zakonik*), Official Gazette of the Republic of Slovenia No. 97/07 ("**Code of Obligations**").

[8] The assignment still needs to be notified to the obligor, otherwise the obligor will be equally able to fulfill its obligation either to the old or the new holder of the claim.

[9] Companies Act (*Zakon o gospodarskih družbah*), Official Gazette of the Republic of Slovenia No. 65/09, as amended ("**Companies Act**").

shareholders can nonetheless be held liable for the obligations of the company. As one of the possibilities the statue provides that the corporate veil is lifted in case where the shareholders have abused the company in order to attain an objective that is forbidden to them as individuals. Thought not yet tested in practice, on the above basis a private victim of an antitrust violation could potentially claim that a shareholder; i.e. parent company of a subsidiary, is liable for the wrongful acts of the company if the shareholder misused, i.e. instructed, the company to commit the alleged violation.

4.4 Joint and several liability

While a member of a cartel established by the CPA cannot be held liable also for the administrative sentence imposed on other members of the cartel by the CPA, such a violator may be responsible for the damage caused to a third party by the other members of the cartel under the general liability provisions. Namely, under the Code of Obligations, if several persons caused the damage jointly then such persons shall be jointly and severally liable while the payer shall have the right of recourse against the other liable parties if it pays more than its share of the obligation. Moreover, if there is no doubt that the damage was caused by one of two or more persons, who are somehow related to each other, but it is not possible to determine which of those persons actually caused the damage, such persons shall also be jointly and severally liable. Also for such situations, the statute provides the payer the right of recourse against the other liable parties if it pays more than its share of the obligation. The size of the share of each individual debtor is determined by the court, according to the gravity of the individual's culpability and the gravity of the consequences arising from its actions.

5. Disclosure of evidence

Under the Civil Procedure Act, each litigating party shall propose evidence to substantiate its claims, however ultimately the court shall decide which evidence to produce. The provisions of the Civil Procedure Act regulate the following five types of evidence: visits, documents, witnesses, experts and hearings of the litigating parties. However, the statue does not expressly forbid the litigating parties from using other types of evidence. Consequently, the majority of the Slovenian legal commentators has taken the view that other types of evidence, not mentioned in the statute, are also permissible if such do not countervail the legal order and the general principals of the procedure. However, in one of its most recent decisions, issued in a private damage claim for violations of antitrust laws, the Higher Court in Ljubljana held that the five types of evidence enlisted in the Civil Procedure Act are the only permissible types of evidence. According to the court, in a litigation procedure the parties (or the court) can only use the five types of evidence mentioned in the statute.

Generally, the party referring to a document must submit such a document. If summoned by the court, the party will also have to submit any evidence in its possession. Moreover, if, upon the request of a litigating party, the court ordered the other party to produce a document and the summoned party refuses, than it shall be considered that the fact which the first party intended to show with the relevant document has been established.

Nonetheless, the attorney-client correspondence shall be protected from disclosure by legal privilege. The party is also not required to submit any evidence which would have severe negative financial consequents for the party or by which the party might become subject to a criminal procedure. However, the party cannot refuse to provide evidence under the above exception if the demanded evidence relates to legal transactions at which the party was present as a witness or which the party has concluded as a legal predecessor or representative of one of the litigating parties.

The court can also order a third party to submit evidence but only if the third party is obliged to disclose such evidence under the law or if the relevant evidence refers to a document which is common to the relevant third party and the litigating party referring to the document which needs to be submitted.

It is not entirely clear what are the possibilities of accessing the documentation in the CPA's file in a situation where the litigation proceedings are conducted simultaneously with the CPA's investigation of the case. Generally, under the Civil Procedure Act, the court may request an official document from the public authorities if the litigating party is unable to obtain the document on its own. But the law is silent about the court's possibility to request a confidential official paper. In its recent judgment in a private antitrust damage claim the Higher Court in Ljubljana compared the above situation to the provisions of the Civil Procedure Act under which a person cannot be examined as a witness if, by giving its testimony, such person might violate his or her duty to protect an official secret, until the competent authority releases him from such duty. The court did not finally decide on the issue, but the above clarification points to the conclusion that the court might be able to access a confidential document of the CPA if the CPA would decide that the CPA is allowed to disclose the requested confidential document.

6. Availability of the Passing-On Defence and Claims of Indirect Purchasers

The provisions of Slovenian law do not provide for the possibility of a so-called passing-on defence or the possibility of indirect purchasers to claim compensation for the damage they suffered due to an antitrust violation committed by a third party. However, as mentioned above, Slovenia is a member of the EU and decisions of the EU courts would likely be considered by the Slovenian courts before rendering a decision in similar circumstances.

7. Damages

In antitrust violation cases, Slovenian national courts may only award compensatory damages.

8. Quantification of Damage

8.1 Burden of proof

In general, four conditions must be met for existence of liability for damages – (i) breach of obligation; (ii) existence of damage; (iii) casual link between the breach and damage; and (iv) liability of the responsible person, among which the plaintiff has to prove breach, damage, and casual link. In respect of the third element; i.e. casual link, in litigation

proceedings for damages arising out of antitrust law violations the plaintiff will have to prove that it suffered damage due to the defendant's actions which are prohibited under the Slovenian (or EU) antitrust provisions. However, if the private claim is brought after the CPA or the EC have already issued a decision by which they established a violation of the antitrust rules; i.e. as a follow-up action, and their decision has become final, then the plaintiff will only have to prove that it suffered damage due to the defendant's actions which the competent competition authorities have already determined to constitute an antitrust violation.

8.2 Damage quantification

The purpose of damage compensation is to put the injured party in the same position as it would be if the wrongful act did not occur. Therefore, the plaintiff in an antirust damage claim will usually demand compensation of the lost profit it suffered due to the antitrust violation.

The lost profit is determined by calculating the difference between the plaintiff's actual profit and the profit it would have made in the absence of the antitrust violation. Methods for calculation of the lost profit are determined by court practice. In the past practice of the courts, the actual determination of the monetary amount of the lost profit has proved to be a demanding exercise and the courts usually turned to financial and economic experts to help them with the calculations. The experts usually prepared their opinions on the basis of data obtained from the litigating parties' annual reports and assessments of market conditions. In a few cases the courts grounded their determination of the amount of lost profits on a Civil Procedure Act provision which allows the court to determine the amount of damages in its judicial discretion if the amount of compensation cannot be determined or the determination would be disproportionately burdensome. However, the Supreme Court said that in order to determine the amount of lost profits by way of judicial discretion at least some points of reference on which the damage can be assessed should exist. If even such points of reference are absent than the decision regarding the lost profits and thereby the damages amount cannot be substantiated as the calculations of the court would become mere speculations.

Due to the fact that the CPA has not been very successful in imposing fines on antitrust violators, until now the courts did not have the opportunity to consider such fines in the determination of the damages amount in the private litigation proceedings.

9. Alternative Dispute Resolution

Under the Slovenian law, the two available forms of alternative dispute resolution are arbitration and mediation. While in case of arbitration a court procedure is excluded, mediation may be conducted independently or in parallel to a court procedure. Upon the proposal of the litigating parties, the court may suspend the court procedure for a maximum period of three months in order to allow the litigating parties to resolve the dispute by way of an alternative dispute resolution. However, due to the fact that so-far in private enforcement of antitrust claims the Slovenian courts have been more favourable to the defendants than the plaintiffs, a defendant would probably not be keen on reaching a

settlement. Therefore, under the current situation mediation seems to be the only alternative to a court procedure which would be used in practice.

10. Settlements

The litigating parties may reach a court settlement at any time during the litigation proceedings and the agreement may relate to the whole or part of the clam or any other issue which is disputed between the parties. Before conducting the first hearing, the court will always invite the parties to try to reach a settlement and will continue to monitor the parties' willingness to settle throughout the procedure. If the parties reach a settlement then the court will not approve it only if it contravenes the mandatory provisions or general moral rules. The court settlement is concluded when both parties sign the minutes of the settlement.