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RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- Lithuania --

15 June 2015

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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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-- Lithuania --

1. Overview of private enforcement in the Republic of Lithuania

1. Currently in Lithuania there are almost no special provisions and procedures related to private enforcement of competition law. The Law on Competition states that any person whose legitimate interests have been violated by actions that are prohibited by the competition law has a right to bring an action before the court seeking termination of illegal actions and compensation of damages. However application of liability for that kind of damages is regulated by general rules of civil and civil procedure law.

2. There are no exceptions from general civil liability rules and in order to recover damages the injured person must prove illegal anti-competitive actions, damages, causal link between illegal actions and damages, and fault. Taking into account the complexity of competition law infringements and difficulties of proving them and causation, cases of private enforcement are very rare and until now, according to the knowledge of the Competition Council, there were only few of them.

3. It is expected that recent developments of the European Union law will encourage private enforcement of the competition law. The European Parliament and the Council on 26 November 2014 adopted a directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (hereinafter – the Directive). Provisions of this Directive should be implemented and transferred to provisions of the national law by 27 December 2016.

4. The aim of the Directive is to set clear substantial and procedural rules that would make private enforcement more effective at the same time providing adequate safeguards for effective public enforcement of the competition law. Main provisions of the Directive are related to these issues:

- full compensation of harm;
- rebuttable presumption that cartels cause harm;
- rebuttable presumption of the passed-on overcharge;
- access to and disclosure of evidence and degrees of protection of certain groups of evidence (*e. g.* leniency statements, settlement submissions, evidence in the file of the ongoing infringement procedures);
- evidential value of decisions of competition authorities;
- five years limitation period which would be suspended or interrupted by infringement procedures of the competition authority;
- joint and several liability.

5. Although some of these issues are currently provided in the Lithuanian law (*e. g.* protection of the leniency statements is ensured by the Law on Competition, principle of full compensation of harm is established in the Civil Code), implementation of the Directive would ensure that more specific features of the competition law are properly taken into account. As private enforcement according to general rules of civil liability is very complicated and thus almost impossible, the Directive would ensure that persons will have not only theoretical but also actual possibilities to protect their injured interests against anti-competitive actions of the undertakings concerned.

6. Further in this contribution more detailed explanations are provided concerning private enforcement rules, where appropriate – in comparison with provisions of the Directive.

2. General rules of private enforcement

7. According to the Law on Competition (Article 47 (1)) any person who suffered harm from unlawful actions is entitled to seek for recovery of damages. This right is not limited to certain groups of potential litigants (natural or legal), if they demonstrate that their legitimate interests have been infringed by alleged unlawful actions according to rules of civil liability.

8. The Civil Code (Article 6.251) establishes the principal of full compensation (but no punitive damages) and there are no exceptions related to the antitrust claims. However, the court, having considered the nature of liability, the financial status of the parties and their interrelation, may reduce the amount of repairable damages if awarding full compensation would lead to unacceptable and grave consequences. As far as the case-law of the private enforcement of the competition law is still not developed, it is difficult to describe in what circumstances the court would reduce the amount of damages on these grounds.

9. An action for damages may be brought irrespectively of the public enforcement actions by the Competition Council. This means that a person is entitled to initiate private enforcement case even if the Competition Council does not investigate certain actions.

10. According to the Civil Code (Article 1.125 (8)) for actions for damages limitation period of three years is applied. This period starts from the day on which a person becomes aware or should have become aware of the violation of his right and in case of continuous violation it starts its run from every day of the violation (Article 1.127 (1) and (5) of the Civil Code). This limitation period and rules of its proceeding are common for any actions for damages if other laws do not specify otherwise. Thus currently a person does not have an ability to wait for the outcome of the public enforcement case, if such is initiated by the Competition Council, and only then decide whether to claim for damages, as investigation of the Competition Council may last several years including subsequent proceedings in the administrative courts. According to the Article 10 of the Directive the limitation periods for bringing actions for damages should be at least five years and it should be suspended or interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates.

3. Evidence and its disclosure

11. As there are no specific rules for private enforcement of competition law, general civil liability and civil procedure rules apply regarding issues of burden of proof, causation, quantification of damages. However these issues will be specified in national legislation according to requirements of the Directive, which, for instance, establishes a rebuttable presumption that cartels cause harm, a rebuttable presumption of the passed-on overcharge.

12. Currently according to national legislation a plaintiff must submit evidence and prove all relevant facts and circumstances on which claim for damages is based. The court does not (only in specific cases, but they are not related to the competition law) collect evidence on its own initiative. Thus it is a task for a plaintiff to collect all relevant evidence and submit it to the court. For that purpose the plaintiff has a right to request certain information from the Competition Council. If there are no restrictions, for example, related to the nature of that information (it contains commercial secrets) the Competition Council submits copy of the information to the person who requested it. The court is entitled to help parties to collect evidence ordering other persons to submit certain written evidence. But in this case the party requesting

court's order must prove evidence relevance to the case and that the party cannot obtain the evidence without a court order. In any event requests or orders to submit documents cannot be abstract.

13. However there are no detailed rules and practice related to the disclosure of the Competition Councils case material in relation to private enforcement, thus it is difficult to describe how requests for information or documents in different situations would be treated.

14. There are also some issues that are or may be relevant in private enforcement cases of the competition law.

15. For instance, the Law on Competition provides limitations of disclosure of leniency documents. Article 38 (3) of the law states that information submitted to the Competition Council by the leniency applicant cannot be disclosed and used for any other purpose except for the purpose of exercising rights of defence during procedures of the Competition Council and subsequent procedures in the administrative courts. It is forbidden to disclose this information for other persons or other purposes or allow forwarding it. It means that this information cannot be used in private enforcement cases. In comparison, according to provisions of the Directive (Article 6 (6)) leniency statements are protected from its disclosure in private enforcement cases. The Directive also contains other provisions related to the disclosure of evidence and these provisions will have to be transferred to national legislation.

16. Another example – evidential value of the decision of the Competition Council. According to the Code of Civil Procedure the decision of the Competition Council could be treated as having higher (*prima facie*) evidential value compared to other evidence, as Article 197 (2) of the code states that official documents of state and municipal institutions are treated as official written evidence. This means that certain facts and circumstances that are established in these documents are presumed to be fully proved unless it is proven otherwise by other evidence (with exception of witnesses' oral statements). If decision of the Competition Council was appealed and reviewed by the administrative court, circumstances established by the final decision of the court could be treated as fully proved (*res judicata*).

17. However, according to provisions of the Directive a final decision not only of the court but also of a competition authority should be deemed to be irrefutably established for the purposes of an action for damages (Article 9). Decisions of foreign competition authorities should be treated as *prima facie* evidence.

4. Collective redress

18. Issue that may be important in private enforcement of competition law and could encourage claims for damages – recent changes (came into force in 2015) of the Code of Civil Procedure introducing more detailed rules regarding collective redress. Although collective redress was recognized from the adoptions of new version of the Code of Civil Procedure in 2002, lack of detailed regulation made it impossible to use this type of private enforcement in practice.

19. As the Competition Council is not aware of any collective action claims it is difficult to assess their influence on the effectiveness and the intensity of private enforcement of competition law in Lithuania.

5. Role of the Competition Council in private enforcement cases

20. The Law on Competition provides, that when the claim related to the private enforcement of Articles 101 or 102 of the Treaty on the Functioning of the European Union is received, the court is obliged to notify the European Commission and the Competition Council (Article 47 (2)). Although this obligation expressly is related only to the application of the EU competition rules, it does not limit the court upon its own initiative or request of the party to invite public authorities (including the Competition Council) to the case in order to give their opinion on relevant matters of the case (Article 49 of the Code of Civil Procedure). Following these general provisions the Competition Council is also entitled to request the court to involve it in the case for giving its opinion.

21. However the participation of the Competition Council in civil cases by giving its opinion does not mean that the Competition Council must decide on the essence of the case, for instance, decide whether there were unlawful actions, calculate damages, decide on evidence. These are issues that the parties must prove and the court must decide, so the Competition Council opinion on certain aspects of the case cannot replace assessment of the parties and especially the assessment of the court. The opinion of the Competition Council is treated as one of totality of evidence and does not by itself have higher evidential value.