# New hope for **antitrust** enforcement

Roman **Barinka**

Anticompetitive practices distorting free competition are among the most serious offenses against a market economy. Given that it is beyond antitrust agencies' capacity to detect all anticompetitive agreements, it is widely acknowledged that public enforcement of antitrust law should be complemented by private enforcement.

This notion refers to actions brought by aggrieved parties before national courts to obtain compensation for the harm suffered resulting from violations of antitrust rules. The damage actions may be directed against undertakings responsible for any kind of antitrust violations, i.e., against undertakings participating in cartel agreements or undertakings that have abused their dominant position in the market.

While in the U.S. private enforcement accounts for 90 percent of all antitrust cases, damage actions in the EU remain rather underdeveloped. For this reason, the European Commission in 2008 published the White Paper on Actions for Breach of the EC Antitrust Rules in order to remove the main obstacles preventing an efficient damage claim system in national legal orders.

## Collective redress

Damage caused by cartel agreements and similar practices is very often scattered among a large number of individuals who suffer a relatively minor injury. As a result, they are not sufficiently motivated to bring legal actions to obtain compensation.

For this reason, the white paper invites the member states to create conditions for collective redress that should have two basic forms. The first form should consist of representative actions filed on behalf of victims by qualified subjects such as consumer associations. This model enables maintaining a uniform litigation strategy, but it largely benefits the representing bodies at the expense of the claimants.

The second form of collective redress should consist of opt-in collective actions filed directly by the aggrieved individuals who have expressly decided to join their claims into one single action. The main disadvantage is that claimants may sometimes raise divergent or unrelated claims, thus making these disputes even more complicated.

Doubtless, the legislature will have to cope with these drawbacks to ensure that judicial proceedings are straightforward and that compensation is awarded primarily to those who have suffered anticompetitive harm. The task is difficult but it cannot be avoided since collective redress is vital for a viable private enforcement system.

## Access to evidence

Anticompetitive practices are hard to detect since the evidence needed is often concealed. Since private individuals do not possess investigative powers, the white paper suggests vesting national courts with the power to order defendant companies to disclose precise categories of relevant evidence that could prove (or disprove) the alleged anticompetitive behavior.

Concurrently, the white paper warns that claimants' right to demand evidence disclosure must not become a tool for abuse. Therefore, court orders should be issued only in cases where the evidence gathered by the claimant justifies suspicion of anticompetitive conduct. The evidence must be relevant and proportional, i.e., must not interfere with the defendant's legitimate rights beyond the necessary extent.

The quest for proportionality is crucial, since it enables maintaining a reasonable balance between the general interest in the detection of antitrust activities and the interest of defendant undertakings in the protection of sensitive commercial data.

Once the victim has established the existence of an anticompetitive practice, he must prove the exact amount of the suffered damage. To facilitate the role of national courts, the European Commission has commissioned a study describing nonbinding methods of calculating damage incurred by the victims of antitrust violations. However, the proper application of these sophisticated methods will require deep expertise in both competition law and economy, something that the courts may sometimes lack.

To avoid this difficulty, it might be useful to look for inspiration to Hungary which has recently introduced a rebuttable presumption to the effect that a detected cartel agreement has affected prices by 10 percent. This presumption is very difficult to rebut which considerably eases the evidentiary burden of claimants. Consequently, there is every reason to believe that introduction of a similar presumption into Czech law would greatly facilitate the efforts of victims to obtain adequate compensation of the suffered harm.

## Leniency programs

One of the last topics the white paper deals with is the relationship between damage actions and leniency programs. These programs enable reducing the fine otherwise imposed for an antitrust law violation or even grant total immunity to that cartel participant that is the first to disclose its existence to the antitrust agency and which fully cooperates with the agency's investigation. Given that anticompetitive agreements are secret, leniency programs represent the most effective investigative tools in the fight against cartels.

The effectiveness of leniency programs would be severely undermined if the evidence submitted by the cartel member seeking immunity could be provided by the antitrust agency to the cartel victims. For this reason, the white paper suggests that national legislatures introduce specific measures to ensure effective protection of the corporate statements of applicants for leniency against disclosure, irrespective of whether the application is in the end accepted or rejected.

The legislative ban on disclosure would represent a desired compromise between two diverging interests. It would preserve the effectiveness of leniency programs without undermining the evidentiary position of the victims of antitrust violations. They could still submit evidence gathered on their own initiative or apply for a court injunction ordering the disclosure of evidence to other cartel members.

The white paper's proposals constitute a promising ground for national measures that should introduce appropriate rules for private enforcement of antitrust law. Damage claims are seen as a powerful tool of antitrust compliance that affords aggrieved persons adequate compensation and that deters other competitors from similar practices. Therefore, it is to be hoped that the legislative measures are adopted after careful deliberation and within a reasonable time—for the benefit of private parties and for the sake of the market economy. ■

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*Roman Barinka is a junior associate with law firm Vejmelka & Wünsch, Prague.*

# CBW

Czech Business Weekly

Volume 07 | Issue 13 | March 29, 2010 | CZK 59 | € 2.50 | £ 1.70 | www.CBW.cz


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