Ondrej Blažo (Ed.)

Private Enforcement of Competition Law and Public Procurement Rules in Selected Central and Eastern European Union Countries

Wolters Kluwer

Citation:
BLAŽO, O. (Ed.) 2025. *Private enforcement of competition law and public procurement rules in selected central and eastern European union countries*. 1st edition. Prague : Wolters Kluwer ČR, a. s., 2025, 452 p.

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This book was prepared and financed with the support of the project VEGA 1/0710/23 "Damages in competition law and public procurement – limits and challenges to effective enforcement of the European Union Law".

First edition, Wolters Kluwer ČR, a. s., December 2025

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The authors are responsible for the professional side of the text, proofreading and the final version of publication.

ISBN 978-80-286-0488-2 (hardcover)
ISBN 978-80-286-0489-9 (pdf)

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
BgAPC	Bulgarian Act on Protection of Competition; *Law on Protection of Competition, State Gazette No. 102, as amended [Закон за защита на конкуренцията Обн. ДВ. бр.102]*
BgCPC	Bulgarian Code of Civil Procedure; *Code of Civil Procedure, State Gazette No. 59, as amended [Граждански процесуален кодекс Обн. ДВ. бр. 59]*
BgLOC	Bulgarian Law on Obligations and Contracts; *Law on Obligations and Contracts, State Gazette No. 275, as amended [Закон за задълженията и договорите обн. ДВ. бр. 275]*
BgNCA	Bulgarian National Competition Authority; *Commission for Protection of Competition, Комисия за защита на конкуренцията*
BgTSPL	Bulgarian Trade Secrets Protect Law; *Law on Trade Secrets Protect Law, State Gazette No. 28, as amended [Закон за защита на търговската тайна обн. ДВ. бр. 28]*
CDR	Consensual dispute resolution
CJEU	Court of Justice of the European Union
CzAPC	Czech Act on Protection of Competition; *Act. No. 143/2001 Coll., on the protection of competition, as amended [Zákon č. 143/2001 Sb. o ochraně hospodářské soutěže v znení neskorších předpisů]*
CzCC	Czech Civil Code; *Act. No. 89/2012 Coll., Civil Code, as amended [Zákon č. 89/2012 SB., občanský zákoník]*

CzCDA	Czech Competition Damages Act; *Act. No. 262/2017 Coll., Competition Damages Act, as amended [Zákon č. 262/2017 Sb. O náhrade škody v oblasti hospodářské souteže a o změně zákona č. 143/2001 Sb., o ochraně hospodářské soutěže a o změně některých zákonů (zákon o ochraně hospodářské soutěže), ve znění pozdějších předpisů, (zákon o náhradě škody v oblasti hospodářské soutěže]*
CzComC	Czech Commercial Code; Act. No. 513/1991 Coll., Commercial Code [Zákon č. 513/1991 Sb. Obchodný zákoník]
CzCPC	Czech Civil Procedure Code; *Act. No. 99/1963 Coll., Civil Procedure Code, as amended [Zákon č.99/1963 Sb, Občanský soudní řád]*
CzNCA	Czech National Competition Authority; *Office for Protection Of Competition, Úřad pro ochranu hospodářské soutěže*
CzPPA	Czech Public Procurement Act; *Act No. 134/2016 Coll., on Public Procurement, as amended [Zákon č. 134/2016 Sb. zadávání veřejných zakázek]*
DD/Damages Directive	Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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. (OJ L 349, 5.12.2014, pp. 1–19)
DKOM	Croatian State Commission for Supervision of Public Procurement Procedures, *Državna komisija za kontrolu postupaka javne nabave*
DKom	Slovenian National Review Commission, *Državna revizijska komisija za revizijo postopkov oddaje javnih naročil*
EU	European Union
ECB	European Central Bank

EGO	Emergency Government Ordinance
ECHR	European Convetion on Human Rights
JISHM	Slovakian central mobilisation information system
LPP	legal professional privilege
LtCC	Lithuanian Civil Code; *Act. No. VIII-1864 Civil Code, as amended, Official Gazette [Lietuvos Respublikos Civilninis kodeksas Nr. VIII-1864, Valstybės žinios]*
LtCPC	Lithuanian Civil Procedure Code; *Act. No. IX-743 Code of Civil Procedure of the Republic of Lithuania, as amended, Official Gazette [Lietuvos Respublikos civilinio proceso kodeksas Nr. IX-743, Valstybės žinios]*
LtCL	Lithuanian Law on Competition; *Act. No. 220-0, The Constitution of the Republic of Lithuania, as amended, Official Gazette [Lietuvos Respublikos Konstitucija, Lietuvos aidas]*
LtNCA	Lithuanian Competition Council; *Konkurencijos Taryba*
LvCC	Latvian Civil Law; *Civil Law, 1937, Government Gazette No. 41, as amended [Civillikums, 1937, Valdības Vēstnesis 41]*
LvCL	Latvian Competition Law; *Competition Law, 2001, Latvian Gazette No. 151, as amended [Konkurences likums, 2001, Latvijas Vēstnesis, 151]*
LvCPC	Latvian Civil Procedure Law; *Civil Procedure Law, 1998, Latvian Gazette No. 326/330, as amended [Civilprocesa likums, 1998, Latvijas Vēstnesis, 326/330]*
LvNCA	Latvian Competition Council; *Konkurences padome*
Mediation Directive	Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ L 136, 24.5.2008, pp. 3 – 8)

NCA	National Competition Authority
NCSC	Romanian National Council for Solving Complaints
NrF	non-repayable financial contribution
OZ	Slovenian Code of Obligations, *Official Gazette of the RS No. 83/01* with later amendments *[Obligacijski zakonik, OZ]*
PlACCP	Polish Act on Competition and Consumer Protection; PL: *Act on Penal Code, as amended, Journal of Laws, No. 88, item 554 [Kodeks karny]*
PlACD	Polish Act on Claims for Damages for Infrigements of Competition Law; Act on Claims for Damages for Infringements of *Competition Law, Journal of Laws 2017, item 1132 [Ustawa o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji]*
PlACUC	Polish Act on Combating Unfair Competition; *Act on Combating Unfair Competition, as amended, Journal of Laws 1993, No. 47, item 211 [Ustawa o zwalczaniu nieuczciwej konkurencji]*
PlCC	Polish Civil Code; *Civil Code, as amended, Journal of Laws 1964, No. 16, item 93 [Kodeks cywilny]*
PlCPC	Polish Civil Procedure Code; *Civil Procedure Code, as amended, Journal of Laws 1964, No. 43, item 296 [Kodeks postępowania cywilnego]*
PlNCA	Polish National Competiton Authority, *Office of Competition and Consumer Protection, Urząd Ochrony Konkurencji i Konsumentów*
PlPC	Polish Act on Penal Code; *Act on Penal Code, as amended, Journal of Laws, No. 88, item 554 [Kodeks karny]*

PlPPA	Polish Procurement Act; *Act on Public Procurement Law, as amended, Journal of Laws 2019, item 2019 [Prawo zamówień publicznych]*
RemD	Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30. 12. 1998, p. 33-35). Consolidated Version

Representative Actions

Directive	Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (OJ L 409, 4.12.2020, pp. 1 – 27)
RegSAP	Council Regulation 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification)
Regulation 1/2003	Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, pp. 1–25)
RoCC	Romanian Civil Code; *Act No. 287/2009 Civil Code, as amended, Official Monitor No. 505 [CODUL CIVIL din 17 iulie 2009, Legea nt. 287/2009]*
RoCL	Romanian Competition Law; *Act No. 21/1996 Competition Law, as amended, Official Monitor No. 153 [Legea concurenței nr. 21/1996]*

RoCPC	Romanian Civil Procedural Code; *Act No. 134/2010 Civil Procedure Code, Official Monitor No. 247[Codul de procedură civilă din 1 iulie 2010, Legea nr. 134/2010]*
RoNCA	Romanian National Competition Authority; *Competition Council, Consiliul Concurenței*
SkADAA	Slovakian Atitrust Damages Actions Act; *Act No. 350/2016 Coll. on Antitrust Damages Actions, as amended [Zákon č. 350/2016 Z. Z. o niektorých pravidlách uplatňovania nárokov na náhradu škody spôsobenej porušením práva hospodárskej súťaže a ktorým sa mení a dopĺňa zákon č. 136/2001 Z. z. o ochrane hospodárskej súťaže a o zmene a doplnení zákona Slovenskej národnej rady č. 347/1990 Zb. o organizácii ministerstiev a ostatných ústredných orgánov štátnej správy Slovenskej republiky v znení neskorších predpisov v znení neskorších predpisov]*
SkAPC	Slovakian Act on Protection of Competition; *Act No. 187/2021 Coll. on Protection of Competition and on Amendments to Certain Acts, as amended [Zákon č. 187/2021 Z.z. o ochrane hospodárskej súťaže a o zmene a doplnení niektorých zákonov]*
SkARA	Slovakian Act on Representative Actions; *Act No 261/2023 Coll. on actions for the protection of collective interests of consumers and on amendments and additions to certain acts [zákon č. 261/2023 Z. z. o žalobách na ochranu kolektívnych záujmov spotrebiteľov a o zmene a doplnení niektorých zákonov]*
SkASA	Slovakian Act on State Aid; *Act No 358/2015 Coll. on Regulation of Certain Relations in the Field of State Aid and De minimis Aid and on amendments to certain Acts (Act on State Aid) [zákon č. 358/2015 Z.z. zákon o úprave niektorých vzťahov v oblasti štátnej pomoci a minimálnej pomoci a o zmene a doplnení niektorých zákonov (zákon o štátnej pomoci)]*

SkASLD	Slovakian Act on State Liability for Damage; *Act No 514/2003 Coll. on liability for damage caused in the exercise of public authority and on amendments to certain laws [zákon č. 415/2003 Z.z. o zodpovednosti za škodu spôsobenú pri výkone verejnej moci a o zmene niektorých zákonov]*
SkCAJP	Slovakian Code of Administrative Judicial Procedure; *Act No 162/2015 Coll. Administrative Court Procedure [zákon č. 162/2015 Z.z. Správny súdny poriadok]*
SkCC	Slovakian Civil Code; *Act No 40/1964 Coll. The Civil Code, as amended [Zákon č. 40/1964 Zb. Občiansky zákonník]*
SkCDP	Slovakian Civil Dispute Procedure Act; *Act No 160/2015 Coll. Civil Dispute Procedure, as amended [Zákon č. 160/2015 Z. z. Civilný sporový poriadok]*
SkComC	Slovakian Commercial Code; *Act No. 512/1991 Coll. Commercial Code, as amended [Zákon č. 513/1991 Zb. Obchodný zákonník]*
SkNCA	Slovakian National Competition Authority; *Antimonopoly Office of the Slovak Republik, Protimonopolný úrad Slovenskej republiky*
SkPPA	Slovakian Act on Public Procurement; *Act No 343/2015 Coll. on public procurement and on amendments of certain acts [zákon č. 343/2015 Z.z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov]*
SkPPO	Slovakian Public Procurement Office, Úrad pre verejné obstarávanie
SMEs	small and medium-sized enterprises
SME Recommendation	Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises
TSO	Commercial Court in Osijek, *Trgovački sud u Osijeku*

TSS	The Croatian first instance Commercial Court in Split,, *Trgovački sud u Splitu*
URS	*Constitution of the Republic of Slovenia, as amended,* Official Gazette of the RS No. 33/91-I [Ustava Republike Slovenije, URS]
VSRH	The Supreme Court of the Republic of Croatia, *Vrhovni sud Republike Hrvatske*
VUSRH	High Administrative Court of the Republic of Croatia, *Visoki upravni sud Republike Hrvatske*
ZJN	Croatian Public Procurement Act; *Act No. 120/16 OG, The Public Procurement Act, as amended [Zakon o javnoj nabavi]*
ZJN-3	Slovenian Public Procurement Act; *Act on Public Procurement, Official Gazette of the RS No. 91/15 with later amendments [Zakon o javnem naročanju, ZJN-3]*
ZJNPOV	Slovenian Public Procurement in the Defence and Security Act; *Act on Public Procurement in the Defence and Security, as amended, Official Gazette of the RS No. 90/12 with later amendments [Zakon o javnem naročanju na področju obrambe in varnosti, ZJNPOV]*
ZJZP	Slovenian Public Private Partnership Act; *Act on Public-Private Partnership, Official Gazette of the RS No. 127/06 with later amendments [Zakon o javno-zasebnem partnerstvu, ZJZP]*
ZKolT	Slovenian Collective Actions Act; *Act on Collective Actions, as amended, Official Gazette of the RS No. 55/17 with later amendments [Zakon o kolektivnih tožbah, ZKolT]*
ZOO	Croatian Law on Obligations; *Act No. 35/05 OG, Law on Obligations, as amended [Zakon o obveznim odnosima]*

ZPOmK-1 Slovenian Act on Prevention of Restriction of Competition; *Act on Prevention of Restriction of Competition, Official Gazette of the RS No. 36/08 with later amendments [Zakon o preprečevanju omejevanja konkurence, ZPOmK-1]*

ZPP Slovenian Civil Procedure Code; *Act on Civil Procedure, Official Gazette of the RS No. 26/99 with later amendments [Zakon o pravdnem postopku, ZPP]*

ZPVPJN-C Slovenian Act Amending the Legal Protection in Public Procurement Procedures Act; *Act Amending the Legal Protection in Public Procurement Procedures Act, Official Gazette of the RS No. 72/19 [ZPVPJN-C]*

ZUP Croatian General Administrative Procedure Act; *Act No. 47/09 OG, General Administrative Procedure Act, as amended [Zakon o općem upravnom postupku]*

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Katja Štemberger Brizani is an assistant professor at the Department of Administrative Law at the Faculty of Law, University of Ljubljana. She joined the faculty in 2018 as a Teaching Assistant and was appointed Assistant Professor in 2024, following the completion of her PhD in Law in 2023. Between 2019 and 2020, she completed a voluntary judicial traineeship at the Higher Court in Ljubljana and successfully passed the State Bar Examination in February 2021. Since May 2023, she has also been affiliated as a Research Fellow with the Institute of Comparative Law at the same faculty. In addition to her work at the Faculty of Law, she regularly teaches at other faculties within the University of Ljubljana and collaborates with academic institutions abroad, including the Faculty of Law, Masaryk University in Brno, where she completed a three-month research and teaching visit in 2024. Her research and teaching focus on administrative law, particularly public procurement, concessions, and public-private partnerships. She is the author of numerous scientific and professional articles in these fields and regularly speaks at expert conferences in Slovenia. She is also the founder and coordinator of the Legal Clinic on Public Procurement, Concessions, and Public-Private Partnerships, and the Programme Director of the 1st Days of Concessions (2025), a national conference dedicated to concession law. In addition, she is a contributing author to the forthcoming comprehensive handbook on public procurement.

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LIST OF LEGISLATION

1. European Union

EU: Treaty on the Functioning of the European Union *(*OJ C 326, 26.10.2012, pp. 47 – 390).

EU: Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, pp. 1–25).

EU: Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.20212, pp. 1-32).

EU: Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification) (OJ L 248, 24.9.2015, pp. 9 – 29).

EU: Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC *(*OJ L 409, 4.12.2020, pp. 1 – 27*)*.

EU: Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335, 20.12.2007, pp. 31 – 46).

EU: Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ L 136, 24.5.2008, pp. 3 – 8).

EU: Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216, 20.8.2009, pp. 76–136).

EU: Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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. (OJ L 349, 5.12.2014, pp. 1–19).

EU: Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, pp. 1 – 64).

EU: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, pp. 65 – 242).

EU: Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, pp. 243 – 374).

EU: Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended (OJ L 395, 30.12.1989, pp. 33 – 35).

EU: Commission Notice on the enforcement of State aid rules by national courts 2021/C 305/01 (OJ C 305, 30.7.2021, pp. 1-28).

EU: Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) (OJ L 124, 20.5.2003, pp. 36 – 41).

EU: Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (OJ C 167, 13.6.2013, pp. 19 – 21).

EU: Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, pp. 33 – 42).

EU: Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 083, 27.03.1999, pp. 1-99).

EU: Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) *(*OJ L 265, 12.10.2022, s. 1 – 66).

2. Bulgaria

BG: Law on Protection of Competition, State Gazette No. 102, as amended [ЗАКОН ЗА ЗАЩИТА НА КОНКУРЕНЦИЯТА Обн. ДВ. бр.102].

BG: Code of Civil Procedure, State Gazette No. 59, as amended [ГРАЖДАНСКИ ПРОЦЕСУАЛЕН КОДЕКС Обн. ДВ. бр.59].

BG: Law on Obligations and Contracts, State Gazette No. 275, as amended [ЗАКОН ЗА ЗАДЪЛЖЕНИЯТА И ДОГОВОРИТЕ обн. ДВ. бр.275].

BG: Council of Ministers Decree No. 426 establishing the statutory rate of interest on overdue payments, State Gazette No. 106 [Постановление № 426 от 18 декември 2014 г. за определяне размера на законната лихва по просрочени парични задължения обн. ДВ. Брой 106].

BG: Law on Trade Secrets Protect Law, State Gazette No. 28, as amended [ЗАКОН за защита на търговската тайна обн. ДВ. бр.28].

3. Czechia

CZ: Act No. 134/2016 Coll., on Public Procurement, as amended *[Zákon č. 134/2016 Sb. zadávání veřejných zakázek].*

CZ: Act No. 143/2001 Coll., on the Protection of Competition, as amended [*Zákon č. 143/2001 Sb. o ochraně hospodářské soutěže v znení neskorších předpisů*].

CZ: Act No. 262/2017 Coll., Competition Damages Act, as amended [*Zákon č. 262/2017 Sb. o náhradě škody v oblasti hospodářské soutěžea o změně zákona č. 143/2001 Sb., o ochraně hospodářské soutěže a o změně některých zákonů (zákon o ochraně hospodářské soutěže), ve znění pozdějších předpisů, (zákon o náhradě škody v oblasti hospodářské soutěže*].

CZ: Act No. 513/1991 Coll., Commercial Code [*Zákon č. 513/1992 Sb. Obchodný zákoník].*

CZ: Act No. 63/1991 Coll., on the Protection of Competition [*Zákon č. 63/1991 Sb. o ochraně hospodářské souťěže].*

CZ: Act No. 69/2025 Coll., amending Act. No. 215/2004 on State Aid and some other acts *[Zákon č. 69/2025 Sb. kterým se mění zákon č. 215/2004 Sb., o úpravě některých vztahů v oblasti veřejné podpory a o změně zákona o podpoře výzkumu a vývoje, ve znění pozdějších předpisů, a další související zákony*].

CZ: Act No. 89/2012 Coll., Civil Code, as amended [*Zákon č.89/2012 Sb., Občanský zákoník*].

CZ: Act No. 99/1963 Coll., Civil Procedure Code, as amended [*Zákon č. 99/1963 Sb. Občanský soudní řád*].

4. Croatia

HR: Act No. 120/16 OG, The Public Procurement Act, as amended [*Zakon o javnoj nabavi – ZJN*].

HR: Act No. 47/09 OG, General Administrative Procedure Act, as amended [*Zakon o općem upravnom postupku – ZUP].*

HR: Act No.35/05 OG, Law on Obligations, as amended [*Zakon o obveznim odnosima -ZOO*].

HR: Act No.36/24 OG, Administrative Disputes Act [*Zakon o upravnim sporovima – ZUS*].

HR: Act No.69/17 OG, Concessions Act, as amended [*Zakon o koncesijama – ZK*].

5. Lithuania

LT: Act. No. 220-0, The Constitution of the Republic of Lithuania, as amended, Official Gazette [*Lietuvos Respublikos Konstitucija, Lietuvos aidas].*

LT: Act. No. IX-743 Code of Civil Procedure of the Republic of Lithuania, as amended, Official Gazette [*Lietuvos Respublikos civilinio proceso kodeksas Nr. IX-743, Valstybės žinios*].

LT: Act. No. VIII-1099 Law on Competition, as amended, Official Gazette [*Lietuvos Respublikos konkurencijos įstatymas Nr. VIII-1099, Valstybės žinios].*

LT: Act. No. VIII-1864 Civil Code, as amended, Official Gazette [*Lietuvos Respublikos Civilninis kodeksas Nr. VIII-1864, Valstybės žinios*].

6. Latvia

LV: Competition Law, 2001, Latvian Gazette No. 151, as amended [*Konkurences likums, 2001, Latvijas Vēstnesis, 151].*

LV: Civil Law, 1937, Government Gazette No. 41, as amended [*Civillikums, 1937, Valdības Vēstnesis 41*].

LV: Civil Procedure Law, 1998, Latvian Gazette No. 326/330, as amended [*Civilprocesa likums, 1998, Latvijas Vēstnesis, 326/330*].

7. Poland

PL: Act on Claims for Damages for Infringements of Competition Law, Journal of Laws 2017, item 1132 [*Ustawa o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji*].

PL: Act on Combating Unfair Competition, as amended, Journal of Laws 1993, No. 47, item 211 [*Ustawa o zwalczaniu nieuczciwej konkurencji*].

PL: Act on Competition and Consumer Protection, as amended, Journal of Laws 2007, No. 50, item 331 [*Ustawa o ochronie konkurencji i konsumentów*].

PL: Act on Counteracting Monopolistic Practices, Journal of Laws 1990, No. 14, item 88, no longer in force [*Ustawa o przeciwdziałaniu praktykom monopolistycznym*].

PL: Act on Counteracting Unfair Market Practices, Journal of Laws 2007, No. 171, item 1206 [*Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym*].

PL: Act on Penal Code, as amended, Journal of Laws, No. 88, item 554 [*Kodeks karny*].

PL: Act on Public Procurement Law, as amended, Journal of Laws 2019, item 2019 [*Prawo zamówień publicznych*].

PL: Act on the Pursuit of Claims in Group Proceedings, Journal of Laws 2010, No. 7, item 44 [*Ustawa o dochodzeniu roszczeń w postępowaniu grupowym*].

PL: Civil Code, as amended, Journal of Laws 1964, No. 16, item 93 [*Kodeks cywilny*].

PL: Civil Procedure Code, as amended, Journal of Laws 1964, No. 43, item 296 [*Kodeks postępowania cywilnego]*.

PL: Regulations of the Minister of Justice of 29.06.2020, Journal of Laws, item 1151 and 1152 [*Rozporządzenie Ministra Sprawiedliwości z dnia 29 czerwca 2020 r.]*.

8. Romania

RO: Law No. 134/2010 Civil Procedure Code, Official Monitor No. 247 *[Ccodul de procedură civilă din 1 iulie 2010, Legea nr. 134/2010]*.

RO: Law No. 21/1996 Competition Law, as amended, Official Monitor No. 153 [*Legea concurenței nr. 21/1996]*.

RO: Law No. 287/2009 Civil Code, as amended, Official Monitor No. 505 [*Codul Civil din 17 iulie 2009, Legea nt. 287/2009]*.

RO: Law No. 11/1991 on unfair trading practices, Official Monitor No. 24 [*Lege nr. 11 din 29 ianuarie 1991privind combaterea concurenței neloiale*].

RO: Emergency Government Ordinance No. 170/2020 concerning actions for damages in cases of violation of competition law provisions, as well as for the amending and supplementing Competition Law no. 21/1996, Official Monitor No. 952 [*Oordonanță de urgență nr. 170 din 14 octombrie 2020privind acțiunile în despăgubire în cazurile de încălcare a dispozițiilor legislației în materie de concurență, precum și pentru modificarea și completarea Legii concurenței nr. 21/1996*].

RO: Emergency Government Ordinance No. 39/2017 concerning actions for damages in cases of violation of competition law provisions, as well as for the amending and supplementing Competition Law no. 21/1996, Official Monitor No. 422 [*Oordonanță de urgență nr. 39 din 31 mai 2017 privind acțiunile în despăgubire în cazurile de încălcare a dispozițiilor legislației în materie de concurență, precum și pentru modificarea și completarea Legii concurenței nr. 21/1996*].

RO: Emergency Government Ordinance No. 75/2010 concerning amending and supplementing Competition Law no. 21/1996, Official Monitor No. 459 *[Oordonanță de urgență nr. 75 din 30 iunie 2010 privind modificarea și completarea Legii concurenței nr. 21/1996]*.

RO: Law No. 100/2016 on Concesion Contracts for Works and Services, as amended, Official Monitor No. 392 [*LEGE nr. 100 din 19 mai 2016 privind concesiunile de lucrări și concesiunile de servicii*].

RO: Law No. 101/2016 on Remedies, as amended, Official Monitor No. 393 *[LEGE nr. 101 din 19 mai 2016 privind remediile și căile de atac în materie de atribuire a contractelor de achiziție publică, a contractelor sectoriale și a contractelor de concesiune de lucrări și concesiune de servicii, precum și pentru organizarea și funcționarea Consiliului Național de Soluționare a Contestațiilor]*.

RO: Law No. 149/2011 for approving Emergency Government Ordinance No. 75/2010 concerning amending and supplementing Competition Law no. 21/1996, Official Monitor no. 490 *[Lege nr. 149 din 5 iulie 2011pentru aprobarea Ordonanței de urgență a Guvernului nr. 75/2010* privind modificarea și completarea *Legii concurenței nr. 21/1996]*.

RO: Law No. 320/2024 for approving the Emergency Government Ordinance No. 170/2020 concerning damages actions in cases of violation of competition law provisions, as well as for amending and supplementing Competition Law No. 21/1996, Official Monitor No. 1308 [*Lege nr. 320 din 20 decembrie 2024 pentru aprobarea Ordonanței de urgență a Guvernului nr. 170/2020* privind acțiunile în despăgubire în cazurile de încălcare a dispozițiilor legislației în materie de concurență, precum și pentru modificarea și completarea *Legii concurenței nr. 21/1996*].

RO: Law No. 554/2004 on Administrative disputes, as amended, Official Monitor No. 1 154 [*Lege nr. 554 din 2 decembrie 2004 contenciosului administrativ*].

RO: Law No. 78/2022 for repealing the Emergency Government Ordinance No. 39/2017 concerning damages actions in cases of violation of competition law provisions, as well as for amending and supplementing Competition Law No. 21/1996, Official Monitor No. 356 [*Lege nr. 78 din 8 aprilie 2022pentru respingerea Ordonanței de urgență a Guvernului nr. 39/2017* privind acțiunile în despăgubire în cazurile de încălcare a dispozițiilor legislației în *materie de concurență, precum și pentru modificarea și completarea Legii concurenței nr. 21/1996*].

RO: Law No. 98/2016 on Public Procurement, as amended, Official Monitor No. 390 *[Lege nr. 98 din 19 mai 2016 privind achizițiile publice]*.

RO: Law No. 99/2016 on Sectoral Public Procurement, as amended, Official Monitor No. 391 [*Lege nr. 99 din 19 mai 2016 privind achizițiile sectoriale*].

RO: Emergency Government Ordinance No. 45 for amending and supplementing normative acts with an impact on the public procurement systém, Official Monitor No. 459 [Oordonanță de urgență nr. 45 din 24 mai 2018 pentru modificarea și completarea unor acte normative cu impact asupra sistemului achizițiilor publice].

RO: Government Ordinance No. 3/2021 for amending and supplementing certain normative acts in the field of public procurement, Official Monitor No. 821 *[Oordonanță nr. 3 din 25 august 2021pentru modificarea și completarea unor acte normative în domeniul achizițiilor publice].*

9. Slovenia

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1.10 Slovakia

SK: Supreme Court, Decision of 26 May 2010, No. 6Cdo/16/2010, *D.M. v M. on payment of interest*.

SK: Supreme Court, Decision of 30 January 2019, No. 1Cdo/144/2018, *CHEMES, a. s. v B.V.O. on protection of good reputation of legal entity*, ECLI:SK:NSSR:2019:8310211009.2

SK: Supreme Court, Judgement of 25 June 2013, No. 4 MCdo/2/2013, *S v Slovak republic for payment of EUR 4,979,087.83.*

SK: Supreme Court, Judgement of 25 June 2013, No. 4MCdo/2/2013, *S v Slovenská republika o zaplatenie EUR 4,9799,087.834*.

SK: Supreme Court, Judgement of 27 April 2015, No. 3Mcdo/40/2012, *MIHO a spol. v Obec Šelpice*, ECLI: SK:NSSR:2015:2108220433.1

SK: Supreme Court, Judgment of 21 October 2008, No. 4Obo/194/2007, *X, s.r.o. v S, a.s. for payment of SKK 464,482*.

SK: Supreme Court, Judgment of 21 October 2008, No. 4Obo/194/2007, *X., s.r.o. v S., a.s. o zaplatenie SKK 464 482*.

SK: Supreme Court, Judgment of 26 June 2020, No. 3Obdo/108/2019, *Union zdravotná poisťovňa, a.s. v Detská fakultná nemocnica s poliklinikou Banská Bystrica*, ECLI:SK:NSSR:2020:1213230629.2.

SK: Regional Court in Trenčín, Judgment of 29 June 2022, No. 8Cob/70/2021, ECLI:SK:KSTN:2022:3116212914.2

SK: Regional Court in Trenčín, Judgment of 29 June 2022, No. 8Cob/70/2021, *Slovenská republika – Ministerstvo hosporárstva Slovenskej republiky v STM POWER a. s. o zaplatenie EUR 5,998,810,98 s* príslušenstvom, ECLI:SK:KSTN:2022:3116212914.2

SK: Regional Court in Trenčín, Judgment of 31 January 2024, No. 19Co/154/2019, *A., B., C., D., E., F. v G. H. I. I.C. o zaplatenie EUR 4,189 s príslušenstvom*, ECLI:SK:KSTN:2024:3116204463.3.

SK: District Court in Svidník, Judgment of 17 March 2017, No. 1Cb/230/2004, *DAMIJO KOMPLET, spol. s r.o. v Východoslovenská vodárenská spoločnosť, a.s.*, ECLI:SK:OSSK:2017:8604114180.27

SK: District Court in Trenčín, Judgment of 8 January 2021, No. 36Cb/211/2016-925, *SR v STM POWER*, ECLI:SK:OSTN:2021:3116212914.13

SK: District Court in Trnava, Judgment of 14 September 2019, No. 39C/30/2017, *Mesto Trnava v 1) City-Arena, a.s. a 2) City-Arena PLUS, a.s. o určenie vlastníckeho práva*, ECLI:SK:OSTT:2018:2117221806.4

2. Public Procurement

2.1 CJEU

Judgment of 13 December 2012, *Forposta SA and ABC Direct Contact*, C465/11, ECLI:EU:C:2012:801

Judgment of 11 September 2014, *Fastweb*, C19/13, ECLI:EU:C:2014:2194

Judgment of 6 June 2024, *INGSTEEL*, C547/22, ECLI:EU:C:2024:478.

Judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C927/19, ECLI:EU:C:2021:700;

Judgment of 17 November 2022, *Antea Polska and Others*, C54/21, ECLI:EU:C:2022:888

Judgment of 8 June 2017, *Medisanus*, C-296/15, ECLI:EU:C:2017:431.

Judgment of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others*, C-568/08, EU:C:2010:751

Judgment of 30 September 2010, *Strabag and others*, C-314/09, EU:C:2010:567

2.2 Czechia

CZ: Constitutional Court, Ruling of 1 November 2007, No. I. ÚS 312/05, ECLI:CZ:US:2007:1.US.312.05.1

CZ: Constitutional Court, Ruling of 2 November 2021, No. Pl. ÚS 24/21, ECLI:CZ:US:2021:Pl.US.24.21.1.

CZ: Constitutional Court, Ruling of 30 April 2002, No. Pl. ÚS 18/01, ECLI:CZ:US:2002:Pl.US.18.01.1.

CZ: Supreme Court Judgment of 18 September 2019, No. 32 Cdo 2300/2019, ECLI:CZ:NS:2019:32.CDO.2300.2019.1.

CZ: Supreme Court, Judgment of 17 December 2024, No. 25 Cdo 380/2024, ECLI:CZ:NS:2024:25.CDO.380.2024.1.

CZ: Supreme Court, Decision of 22 October 2014, No. 25 Cdo 2912/2012, ECLI:CZ:NS:2014:25.CDO.2912.2012.1.

CZ: Supreme Court, Judgment of 17 December 2024, No. 25 Cdo 380/2024, ECLI:CZ:NS:2024:25.CDO.380.2024.1.

CZ: Supreme Court, Judgment of 21 April 2022, No. 25 Cdo 1417/2020, ECLI:CZ:NS:2022:25.CDO.1417.2020.1.

CZ: Supreme Court, Judgment of 21 February 2002, No. 21 Cdo 300/2001, ECLI:CZ:NS:2002:21.CDO.300.2001.1.

CZ: Supreme Court, Judgment of 26 April 2023, No. 23 Cdo 1051/2022, ECLI:CZ:NS:2023:23.CDO.1051.2022.1.

CZ: Supreme Court, Judgment of 26 July 2016, No. 25 Cdo 1409/2015, ECLI:CZ:NS:2016:25.CDO.1409.2015.1.

CZ: Supreme Court, Judgment of 27 October 2021, No. 29 Cdo 1675/2019, ECLI:CZ:NS:2021:29.CDO.1675.2019.1.

CZ: Supreme Court, Judgment of 27 September 2006, No. 25 Cdo 508/2005, ECLI:CZ:NS:2006:25.CDO.508.2005.1

CZ: Supreme Court, Judgment of 30 December 2024, No. 29 Cdo 456/2023, ECLI:CZ:NS:2024:29.CDO.456.2023.1.

CZ: Supreme Court, Judgment of 30 September 2020, Ref. No. 23 Cdo 408/2020, ECLI:CZ:NS:2020:23.CDO.408.2020.1.

CZ: High Court in Olomouc, Judgment of 22 August 2019, No. 4 Cmo 83/2019-405.

CZ: Municipal Court in Brno, Judgment of 11 September 2020, No. 36 C 122/2019-123.

CZ: Municipal Court in Prague, Judgment of 21 July 2023, No. 14 Co 125/2023-122.

CZ: Municipal Court in Prague, Judgment of 25 February 2019, No. 69 Co 62/2019-19.

CZ: Municipal Court in Brno, Judgment of 11 September 2020, No. 36 C 122/2019-123.

CZ: Regional Court in Brno, Judgment of 24 November 2021, No. 70 Co 10/2021-167.

CZ: Regional Court in Ostrava, Judgment of 10 December 2018, No. 8 Co 291/2018-73.

CZ: Regional Court in Ostrava, Judgment of 20 February 2019, No. 7 Cm 8/2015-343.

CZ: Regional Court in Brno, Judgment of 24 November 2021, No. 70 Co 10/2021-167.

CZ: District Court in Ostrava, Judgment of 17 May 2018, No. 131 C 55/2017-34.

CZ: District Court in Ostrava, Judgment of 28 July 2022, No. 131 C 55/2017-151; CZ: Regional Court in Ostrava, Judgment of 4 November 2022, No. 8 Co 203/2022-177.

CZ: District Court in Prague 1, Judgment of 10 February 2023, No. 75 C 109/2021-85.

CZ: District Court in Prague 3, Judgment of 25 January 2019, No. 21 C 31/2019-10.

CZ: District Court in Prague 1, Judgment of 10 February 2023, No. 75 C 109/2021-85.

2.3 Croatia

HR: Supreme Court, Judgement of 8 November 2023, Rev 139/2023-5, ECLI:HR:VSRH:2023:4865.

HR: Commercial Court in Osijek, Judgement of 22 October 2021, No. P 256/2020-13

HR: Commercial Court in Split, Judgment of 17 October 2023, No. 5 P-612/2022-17.

FR: Council of State, Decision of 17 October 2023, No. 465761, *SMAC v. Ryanair*, ECLI:FR:CECHR:2023:465761.20231017

2.4 Poland

PL: Supreme Court, Judgment of 14 January 2016, No. IV CSK 226/15.

PL: Supreme Court, Order of 22 October 2024, No. I PSK 84/23.

PL: Supreme Court, Order of 30 August 2022, No. I CSK 2960/22.

PL: Supreme Court, Order of 7 May 2010, No. V CSK 456/09.

PL: Supreme Court, Order of the of 27 November 2014, No. IV CSK 115/14.

PL: Supreme Court, Resolution of 25 February 2021, No. III CZP 16/20.

PL: Court of Appeal in Gdańsk, Judgment of 31 January 2017, No. V Aca 268/16.

PL: Court of Appeal in Katowice, Judgment of 24 January 2022, No. V AGa 350/21.

PL: Court of Appeal in Kraków, Judgment of of 12 July 2016, No. I Aca 340/16.

PL: Regional Court in Szczecin, Order of 21 December 2016, No. VIII Gz 218/16.

PL: Regional Court in Warsaw, Judgement of 18 December 2023, No. XXV C 250/21.

PL: Regional Court in Warsaw, Judgment of the of 25 March 2021, No. XXIII Zs 26/21.

PL: Regional Court in Warsaw, Order of 13 May 2019, No. XXIII GCo 5/19.

PL: Regional Court in Warsaw, Order of the of 22 February 2024, No. XXIII Zs 16/24.

PL: Regional Court in Warsaw, Order of the of 23 February 2021, No. XXIII Zo 3/21.

PL: Regional Court in Warsaw, Order of the of 31 January 2020, No. XXIII Ga 2162/19.

PL: Regional Court in Warsaw, Order of the of 6 November 2020, No. XXIII Ga 1711/20.

PL: District Court in Gdańsk, Judgment of 25 May 2017, No. XII Ga 191/17.

PL: District Court in Warsaw, Judgment of 18 December 2023, No. XXV C 250/21.

2.5 Romania

RO: Court of Appeal Bucharest, Decision 163/2025 of 14 March 2025.

RO: Tribunal in Bucharest, Decision 284/2024 of 7 February 2024, No. 29835/3/2023.

2.6 Slovenia

SI: Constitutional Court, Decision of 14 November 2002, No. U-I-169/00_2, ECLI:SI:USRS:2002:U.I.169.00.

SI: Supreme Court, Judgment of 26 June 2003, No. II Ips 479/2002, ECLI:SI:VSRS:2003:II.IPS.479.2002.

SI: Supreme Court, Judgment of 20 January 2016, No. I Up 4/2014, ECLI:SI:VSRS:2016:I.UP.4.2014.

SI: Supreme Court, Judgment of 21 April 2022, No. II Ips 112/2021, ECLI:SI:VSRS:2022:II.IPS.112.2021.

SI: Supreme Court, Judgment of 21 April 2022, No. II Ips 112/2021, ECLI:SI:VSRS:2022:II.IPS.112.2021.

SI: Supreme Court, Judgment of 21. April 2022, No. I Ips 112/2021, ECLI:SI:VSRS:2022:II.IPS.112.2021.

SI: Supreme Court, Order of 14 April 2021, No. I Up 164/2020, ECLI:SI:VSRS:2021:I.UP.164.2020.

SI: Supreme Court, Order of 12 January 2022, No. I Up 234/2021, ECLI:SI:VSRS:2022:I.UP.234.2021.

SI: Supreme Court, Order of 21 May 2024, No. III Ips 19/2023, ECLI:SI:VSRS:2023:III.IPS.19.2023.

SI: Higher Court in Ljubljana, Order of 13 April 2016, No. V Cpg 163/2016, ECLI:SI:VSLJ:2016:V.CPG.163.2016.

SI: Higher Court in Ljubljana, Order of 14 April 2021, No. I Cpg 148/2021, ECLI:SI:VSLJ:2021:I.CPG.148.2021.

SI: Higher Court in Ljubljana, Order of 25 April 2024, No. I Cpg 315/2023, ECLI:SI:VSLJ:2024:I.CPG.315.2023.

SI: Higher Court in Ljubljana, Judgment of 14 June 2016, No. I Cpg 407/2016, ECLI:SI:VSLJ:2016:I.CPG.407.2016.

SI: Higher Court in Ljubljana, Judgment of 19 April 2023, No. I Cpg 515/2022, ECLI:SI:VSLJ:2023:I.CPG.515.2022.

SI: Higher Court in Ljubljana, Judgment of 21 January 2015, No. I Cpg 82/2014, ECLI:SI:VSLJ:2015:I.CPG.82.2014.

SI: Higher Court in Ljubljana, Judgment of 7 April 2021, No. I Cpg 456/2020, ECLI:SI:VSLJ:2021:I.CPG.456.2020.

SI: Higher Court in Ljubljana, Judgment of 7 March 2018, No. I Cpg 1025/2016, ECLI:SI:VSLJ:2018:I.CPG.1025.2016.

SI: Administrative Court, Order of 1 September 2021, No. I U 855/2021-17, ECLI:SI:UPRS:2021:I.U.855.2021.17.

2.7 Slovakia

SK: Constitutional Court Ruling of 24 February 2016, No. II. ÚS 637/2015, *MIHO,* ECLI:SK:USSR:2016:2US.637:2015.1.

SK: Constitutional Court, Ruling of 4 August 2020, No. III. ÚS 294/2020, ECLI:SK:USSR:2020:3.US.294.2020.1

SK: Supreme Court, Decision of 17 March 2016, No. 3Cdo/1375/2015, *Procu, o.z. v Národný ústav celoživotného vzdelávania*, ECLI:SK:NSSR:2016:1012896219.1

SK: Supreme Court, Decision of 23 July 2025, No. 3Cdo/59/2025, *CEVEO s.r.o. v Združenie miest a obcí, región JE Jaslovské Bohunice Združenie miest a obcí, región JE Jaslovské Bohunice*, ECLI:SK:NSSR:2025:2121204541.1.

SK: Supreme Court, Decision of 24 November 2021, No. 1Obdo/90/2021, *Medika SK v Slovenská republika (Správa štátnych hmotných rezerv)*, ECLI:SK:NSSR:2021:1710207258.1

SK: Supreme Court, Decision of 29 May 2017, No. 7 Cdo/214/2017, *EU-REA v Ministerstvo výstavby a regionálneho rozvoja Slovenskej Republiky*, ECLI:SK:NSSR:2018:1208200696.1

SK: Supreme Court, Decision of 30 January 2019, No. 1Cdo/144/2018, *CHEMES, a. s. v B.V.O. on protection of good reputation of legal entity*, ECLI:SK:NSSR:2019:8310211009.2

SK: Supreme Court, Decision of 30 November 2021, No. 2Cdo/71/2020, *COOPEX Soft, spol. s r. o. v Slovenská republika*, ECLI:SK:NSSR:2021:1211222974.1

SK: Supreme Court, Judgement of 26 April 2018, No. 2Cdo/72/2017, *REL-CO s.r.o v Slovenská republika*, ECLI:SK:NSSR:2018:1112227495.1

SK: Supreme Court, Judgment of 13 December 2022, No. 9CdO/5/2021, ECLI:SK:NSSR:2022:1215218004.1

SK: Supreme Court, Judgment of 15 February 2008, No. 5Obo/56/2008, *X v Q.*

SK: Supreme Court, Judgment of 17 October 2017, No. 1Sžf/67/2015, ECLI:SK:NSSR:2017:1014201280.1.

SK: Supreme Court, Judgment of 21 June 2011, No. 2Cdo/121/2010, *I. s.r.o. v Slovak republic*.

SK: Supreme Court, Judgment of 27 April 2015, No. 3Mcdo/40/2012, *MIHO a spol. v Obec Šelpice*, ECLI:SK:NSSR:2015:2108220433.1

SK: Supreme Court, Judgment of 27 July 2019, No. 4CdO/98/2019, *ANITRAM EXPOS s.r.o. v 1) Železničná spoločnosť Cargo Slovakia, a.s., 2) Železničná spoločnosť Slovensko, a.s., and PP Office*, ECLI:SK:NSSR:2019:1205218147.1

SK: Supreme Court, Judgment of 3 May 2011, No. 1Obdo/34/2010, *E. v U*.

FOREWORD

The story of this book started in 2015 by two international conferences. First (in June) was organized by Csongor István Nagy in Budapest (The procedural aspects of the application of competition law: European frameworks – Central European perspectives) where civil law consequences were mentioned within the application framework of competition law in the Central and Eastern EU countries.[1] Second, organized by Tadeusz Skoczny and Anna Piszcz organized in Supraśl (Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective) was focused on emerging topic of private enforcement of competition law. Papers presented at this conference were subsequently published.[2] These two conferences put not only a basis for cooperation

[1] NAGY, Csongor István, ed. *The procedural aspects of the application of competition law: European frameworks - central European perspectives*. Groningen: Europa Law Publishing, 2016.

[2] CSERES, Katalin J. Harmonising Private Enforcement of Competition Law in Central and Eastern Europe: The Effectiveness of Legal Transplants Through Consumer Collective Actions. *Yearbook of Antitrust and Regulatory Studies*. 2015, vol. 8, no. 12. DOI: 10.7172/1689-9024.YARS.2015.8.12.2; JURKOWSKA-GOMUŁKA, Agata. How to Throw the Baby out with the Bath Water. A Few Remarks on the Currently Accepted Scope of Civil Liability for Antitrust Damages. *Yearbook of Antitrust and Regulatory Studies*. 2015, vol. 8, no. 12. DOI: 10.7172/1689-9024.YARS.2015.8.12.3; PISZCZ, Anna. Piecemeal Harmonisation Through the Damages Directive? Remarks on What Received Too Little Attention in Relation to Private Enforcement of EU Competition Law. *Yearbook of Antitrust and Regulatory Studies*. 2015, vol. 8, no. 12. DOI: 10.7172/1689-9024.YARS.2015.8.12.4; BUTORAC MALNAR, Vlatka. Access to Documents in Antitrust Litigation – EU and Croatian Perspective. *Yearbook of Antitrust and Regulatory Studies*. 2015, vol. 8, no. 12. DOI: 10.7172/1689-9024.YARS.2015.8.12.6; GULIŃSKA, Anna. Collecting Evidence Through Access to Competition Authorities' Files – Interplay or Potential Conflicts Between Private and Public Enforcement Proceedings? *Yearbook of Antitrust and Regulatory Studies*. 2015, vol. 8, no. 12. DOI: 10.7172/1689-9024.YARS.2015.8.12.7; MOISEJEVAS, Raimundas. The Damages Directive and Consensual Approach to Antitrust Enforcement. *Yearbook of Antitrust and Regulatory Studies*. 2015, vol. 8, no. 12. DOI: 10.7172/1689-9024.YARS.2015.8.12.8; STANIKUNAS, Rimantas Antanas and Arunas BURINSKAS. The Interaction of Public and Private Enforcement of Competition Law in Lithuania. *Yearbook of Antitrust and Regulatory Studies*. 2015, vol. 8, no. 12. DOI: 10.7172/1689-9024.YARS.2015.8.12.11; BLAŽO, Ondrej. Directive on Antitrust Damages Actions and Current Changes of Slovak Competition and Civil Law. *Yearbook of Antitrust and Regulatory Studies*. 2015, vol. 8, no. 12. DOI: 10.7172/1689-9024.YARS.2015.8.12.12; GALIČ, Aleš. Disclosure of Documents in Private Antitrust Enforcement Litigation. *Yearbook of Antitrust and Regulatory Studies*. 2015, vol. 8, no. 12. DOI: 10.7172/1689-9024.YARS.2015.8.12.5

in this under-researched area of law on our region but also created focal points for future research network between the competition law scholars in the region.

Subsequent collective monograph edited by Anna Piszcz created a true building block of comprehensive overview of development in private enforcement of competition law in terms of transposition of the DD.[3]

Following the publication of the monograph and yet another conference in Supraśl, comparative analyses were published focusing on individual aspects of transposition of the DD: scope of the transposition,[4] institutional setting,[5] consensual dispute resolution,[6] type of liability,[7] joint and several liability,[8] quantification of harm,[9] passing-on of overcharges,[10] limitation periods,[11] disclosure

3 PISZCZ, Anna, ed. *Implementation of the EU Damages Directive in Central and Eastern European countries*. Warsaw: University of Warsaw. Faculty of Management Press, 2017.

4 PETR, Michal. The Scope of the Implementation of the Damages Directive in CEE States. *Yearbook of Antitrust and Regulatory Studies*. 2017, vol. 10, no. 5. DOI: 10.7172/1689-9024.YARS.2017.10.15.1

5 BLAŽO, Ondrej. Institutional Challenges for Private Enforcement of Competition Law in Central and Eastern European Member States of the EU. *Yearbook of Antitrust and Regulatory Studies*. 2017, vol. 10, no. 5. DOI: 10.7172/1689-9024.YARS.2017.10.15.2

6 MODZELEWSKA DE RAAD, Małgorzata. Consensual Dispute Resolution in the Damage Directive. Implementation in CEE Countries. *Yearbook of Antitrust and Regulatory Studies*. 2017, vol. 10, no. 5. DOI: 10.7172/1689-9024.YARS.2017.10.15.3

7 WOLSKI, Dominik. The Type of Liability in Private Enforcement in Selected CEE Countries Relating to the Implementation of the Damages Directive. *Yearbook of Antitrust and Regulatory Studies*. 2017, vol. 10, no. 5. DOI: 10.7172/1689-9024.YARS.2017.10.15.4

8 MISKOLCZI BODNÁR, Péter and Róbert SZUCHY. Joint and Several Liability of Competition Law Infringers in the Legislation of Central and Eastern European Member States. *Yearbook of Antitrust and Regulatory Studies*. 2017, vol. 10, no. 5. DOI: 10.7172/1689-9024.YARS.2017.10.15.5

9 MIKELĖNAS, Valentinas and Rasa ZAŠČIURINSKAITĖ. Quantification of Harm and the Damages Directive: Implementation in CEE Countries. *Yearbook of Antitrust and Regulatory Studies*. 2017, vol. 10, no. 5. DOI: 10.7172/1689-9024.YARS.2017.10.15.6

10 MOISEJEVAS, Raimundas. Passing-on of Overcharges and the Implementation of the Damages Directive in CEE Countries. *Yearbook of Antitrust and Regulatory Studies*. 2017, vol. 10, no. 5. DOI: 10.7172/1689-9024.YARS.2017.10.15.7

11 VLAHEK, Ana and Klemen PODOBNIK. Provisions of the Damages Directive on Limitation Periods and their Implementation in CEE Countries. *Yearbook of Antitrust and Regulatory Studies*. 2017, vol. 10, no. 15. DOI: 10.7172/1689-9024.YARS.2017.10.15.8

of evidence,[12] collective redress[13] and effect of decisions of the competition authorities.[14] Therefore, this book is continuation of work and cooperation that has started in 2015, i.e. more than ten years ago.

This book is prepared within the project of the Institute of European Law of the Faculty of Law, Comenius University, financed by grant VEGA 1/0710/23 "Damages in competition law and public procurement – limits and challenges to effective enforcement of the European Union Law"

This publication tries to expand the private enforcement of antitrust with the questions of private enforcement of state aid, which appears to be even more scarce than private enforcement of antitrust. The private enforcement of public procurement rules shall be herein compared with private enforcement of competition law. The reason for this comparison lies in their common trajectory, as the private enforcement of competition law was originally "harmonized by judgments" of the CJEU. This regulatory vacuum has not been overcome and therefore, it is useful to compare, side by side, the basic elements of liability for harm and damages.

Although the call for papers and chapters targeted scholars from all CEE EU countries, the book ultimately became a "victim" of the field's small academic community—some countries have fewer than three active scholars. In addition, several colleagues were unavailable or were simultaneously preparing other comprehensive publications. As a result, the "selection" of countries analysed in the volume reflects the availability of contributors at the time.

The book is structured in three main parts: A. Competition Law, B. Public Procurement, and C. Conclusions. In both Parts A and B, the chapters addressing individual jurisdictions follow a consistent structure, allowing readers to easily compare developments across countries.

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12 DRUVIETE, Inese, Jūlija JERŅEVA and Aravamudhan Ulaganathan RAVINDRAN. Disclosure of Evidence in Central and Eastern European Countries in Light of the Implementation of the Damages Directive. *Yearbook of Antitrust and Regulatory Studies*. 2017, vol. 10, no. 5. DOI: 10.7172/1689-9024.YARS.2017.10.15.10

13 PISZCZ, Anna. Compensatory Collective Redress: Will It Be Part of Private Enforcement of Competition Law in CEE Countries? *Yearbook of Antitrust and Regulatory Studies*. 2017, vol. 10, no. 5. DOI: 10.7172/1689-9024.YARS.2017.10.15.11

14 PÄRN-LEE, Evelin. Effect of National Decisions on Actions for Competition Damages in the CEE Countries. *Yearbook of Antitrust and Regulatory Studies*. 2017, vol. 10, no. 5. DOI: 10.7172/1689-9024.YARS.2017.10.15.9

Part A builds on the comprehensive study published in the 2017 volume edited by Anna Piszcz. To complement that work, the authors were invited to focus primarily on the modalities of transposition of the DD, rather than reproducing a detailed „*telle quelle*" harmonization, and on post-harmonization developments. Each chapter provides an overview of relevant case law, evaluates the effectiveness of private enforcement of competition law, and offers recommendations for further development. This approach not only adds value to the research of the team but also creates a practical resource for future scholarship, as well as for practitioners and law students interested in comparative competition law.

The task in the field of public procurement law proved more complex, as a general reference to "private enforcement" in this area can easily be misleading. In the jurisdictions under review, enforcement relies predominantly on administrative oversight and remedies grounded in administrative law, rather than on purely judicial mechanisms. For this reason, the authors were asked to approach "private enforcement" of public procurement in a manner analogous to competition law, focusing primarily on typically private-law concepts such as damages, the nullity of contracts, and the liability of the State for infringements of national or EU public procurement rules. This perspective allows the chapters to explore an enforcement dimension that is often overlooked in standard analyses of procurement law, and to provide a more coherent basis for comparison with the competition-law chapters in Part A.

Part C offers a comparative analysis of damages claims in competition law and public procurement law. It not only synthesizes the main features of damages actions across the jurisdictions examined, such as the identification of an infringement, the legal effects of administrative decisions, fault, causality, the quantification and types of harm, and available forms of damages, but also places these elements side by side in the two fields. By contrasting damages claims in competition law (both within and beyond the scope of the DD) with those arising under public procurement rules, the analysis highlights the differences between harmonised and non-harmonised frameworks.

I would like to express my sincere gratitude to the reviewers, Jana Duračinská, Konrad Kohutek, and Silvia Šramelová, for their insightful comments, suggestions, and support, and to Patrik Gábor, Dominika Krištofičová, Vanda Peťková, and Tomáš Žifčák for their invaluable assistance with the technical review, formatting, and the preparation of the references, case law, and legislation. My

thanks also go to all chapter authors for their commitment, expertise, and willingness to contribute to this collective project, without which this volume would not have been possible.

Ondrej Blažo

A. COMPETITION LAW

CHAPTER 1

Private enforcement of competition law in Bulgaria: between legislative reform and judicial restraint

by

Alexandr Svetlicinii*

1. Overview of applicable laws and court system

In Bulgaria, the main legislation relevant to private enforcement of competition law is the Law on Protection of Competition (BgAPC)[16] and the Code of Civil Procedure (BgCPC).[17]

The purpose of the BgAPC is to provide protection and conditions for the promotion of competition in Bulgaria. The BgAPC provides for protection against anti-competitive agreements, decisions of associations of undertakings and concerted practices, abuse of dominant position and other acts which may lead to the prevention, restriction or distortion of competition in Bulgaria and/or affect trade between Member States. The BgAPC also contains provisions against unfair competition or abuse of a superior bargaining position. The BgAPC was adopted on 28 November 2008 and entered into force on 1 December 2008.[18] The BgAPC was amended in December 2017 in order to implement the provisions of the DD.[19] The act amending the BgAPC entered into force on

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16 Law on Protection of Competition, State Gazette No. 102, as amended.

17 Code of Civil Procedure, State Gazette No. 59, as amended.

18 See KIRST, Philipp. The temporal scope of the damages directive: a comparative analysis of the applicability of the new rules on competition infringements in Europe. *European Competition Journal*. 2020, vol. 16, no. 1. DOI: 10.1080/17441056.2019.1705609.

19 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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, OJ L 349, 5.12.2014, pp. 1–19.

6 January 2018.[20] It should be noted that while the DD applies only to Articles 101 and 102 TFEU and their national equivalents, the right to full compensation applies to all the infringements of the BgAPC, including merger control, unfair competition and abuse of superior bargaining position.[21]

The BgCPC is a primary piece of legislation that regulates court proceedings in civil matters, including compensation for damages caused by competition law infringements. The BgCPC was adopted on 20 July 2007 and entered into force on 1 March 2008. The BgCPC was relevant for the transposition of Articles 2(4) and 17 of the DD.[22]

As regards the judicial system relevant for bringing damages actions arising out of competition law infringements, Bulgaria does not provide for the centralization of the relevant damages actions in one or a reduced number of courts. Damages actions are considered to be part of civil liability (tort), a matter that all general courts are competent to deal with. There are commercial chambers within general courts, which handle disputes arising in context of commercial or contractual relationships, so in fact many cases where competition rules are invoked are handled by such commercial chambers of the general courts[23].

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[20] The adoption of the amendments to LPC was prompted by the European Commission, which, in July 2017, sent reasoned opinions to Bulgaria, Cyprus, the Czech Republic, Greece, Latvia, Malta, and Portugal for failing to notify the Commission of their national transposition measures. See MALINAUSKAITE, Jurgita and Caroline CAUFFMAN. The Transposition of the Antitrust Damages Directive in the Small Member States of the EU—A Comparative Perspective. *Journal of European Competition Law & Practice*. 2018, vol. 9, no. 8. DOI: 10.1093/jeclap/lpy048; BUZOGÁNY, Aron. Beyond Balkan exceptionalism. Assessing compliance with EU law in Bulgaria and Romania. *European Politics and Society*. 2021, vol. 22, no. 2. DOI: 10.1080/23745118.2020.1729048; DIMITROV, Georgi and Anna PLACHKOVA. Bulgaria and Romania, twin Cinderellas in the European Union: how they contributed in a peculiar way to the change in EU policy for the promotion of democracy and rule of law. *European Politics and Society*. 2021, vol. 22, no. 2. DOI: 10.1080/23745118.2020.1729946.

[21] See PETR, Michal. *The Scope of the Implementation of the Damages Directive in CEE States*, p. 24.

[22] Article 17 EU Damages Directive introduces presumption that cartel infringements cause harm with the possibility for the infringer to rebut this presumption. See also RODGER, Barry J, Miguel Sousa FERRO and Francisco MARCOS. A panacea for competition law damages actions in the EU? A comparative view of the implementation of the EU Antitrust Damages Directive in sixteen Member States. *Maastricht Journal of European and Comparative Law*. 2019, vol. 26, no. 4. DOI: 10.1177/1023263X19861032.

[23] See also SCHÖNFELDER, Bruno. Judicial Independence in Bulgaria: A Tale of Splendour and Misery. *Europe-Asia Studies*. 2005, vol. 57, no. 1. DOI: 10.1080/09668130500031411.

With regard to subject matter jurisdiction, Article 104 BgCPC provides for the jurisdiction of district courts in disputes where the claim exceeds BGN 50,000 (~ EUR 25,500). Claims below this amount are heard by municipal courts. In municipal courts, the case is heard by a single judge according to the ordinary procedure for civil cases, while in district courts antitrust damages actions are heard by a panel of three judges according to the procedure for commercial disputes.[24]

With regard to other characteristics of the litigation process relevant in the context of private enforcement of competition law, Bulgarian law provides for rules on "contingency fees". The admissibility of third-party litigation funding, however, remains largely unregulated. Namely, the Bulgarian legislation does not prohibit contingency fees. The Code of Ethics issued by the Bulgarian Bar Association (Article 14) provides that the attorney's fee may be agreed upon as an absolute amount and/or a percentage of a certain interest in view of the outcome of the case. In 2017, the CJEU in its ruling *CHEZ Elektro Bulgaria* found that the Bulgarian legislation, which did not allow a lawyer and his client to agree remuneration in an amount below the minimum amount laid down in a regulation issued by the Supreme Council of the Legal Profession (Bulgaria), without that lawyer being subject to a disciplinary procedure, was capable of restriction competition within the meaning of Article 101(1) TFEU.[25] Third-party litigation funding is not regulated in Bulgaria. Although this does not constitute an obstacle to third-party funding, such practice is currently uncommon.

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[24] On the efficiency of Bulgarian courts see DIMITROVA-GRAJZL, Valentina et al. Courts in a transition economy: Case disposition and the quantity–quality tradeoff in Bulgaria. *Economic Systems*. 2016, vol. 40, no. 1. DOI: 10.1016/j.ecosys.2015.09.002.

[25] Judgment of 23 November 2017, CHEZ Elektro Bulgaria, C 427/16, ECLI:EU:C:2017:890. See also: RONZANO, Alain. Preliminary ruling: The Court of Justice of the European Union considers whether minimum fee amounts set by a lawyers' professional organisation is a restriction of competition (CHEZ Elektro Bulgaria). *Concurrences Review* [online]. Concurrences, 2017, no. N° 1-2018 [accessed 17.11.2025]. Available at: https://www.concurrences.com/en/review/issues/no-1-2018/alertes/preliminary-ruling-the-court-of-justice-of-the-european-union-considers-whether; ROEHRIG, Markus and Loana Laura STOICESCU. The EU Court of Justice holds that minimum-fee rules by 2 national professional bodies in the legal services sector restrict competition by object and clarifies the competition authorities' fining powers (Armeets / Lithuanian Chamber of Notaries). *e-Competitions Bulletin* [online]. Concurrences, 2024, vol. Art. N° 128341, no. January 2024 [accessed 17.11.2025]. Available at: https://www.concurrences.com/en/bulletin/news-issues/january-2024/the-eu-court-of-justice-holds-that-minimum-fee-rules-by-2-national-professional.

2. Types of damages that can be recovered

There are very few specific types of damages and harm in relation to competition law infringements reflected in Bulgarian law, which include interest on awards of damages. There is, however, no specific provision reflecting „passing-on" of damages. According to Article 106(3) BgAPC, full compensation must not be excessive in relation to the damage suffered. Therefore, in accordance with Article 3(3) of the DD, the BgAPC follows the principle of full compensation, which does not allow the imposition of punitive damages in relation to infringements of competition rules. The amended BgAPC does not list specific types of harm to be compensated in actions for damages arising from an infringement of EU or national competition law. Only compensation for loss of profits is explicitly provided for in Article 107 BgAPC. There is no case law on specific types of antitrust damages such as umbrella pricing or volume effects.[26]

The general rule on interest on damages awarded in damages actions in Bulgaria is set out in Article 86 of the Law on Obligations and Contracts (BgLOC).[27] It provides that in the case of non-performance of a pecuniary obligation, the debtor is liable to pay damages in the amount of the legal interest from the day of the delay. As a general rule, the starting point of delay is the date when pecuniary obligation becomes due (matures). According to Article 86 BgLOC, the interest rate is set by the Council of Ministers.[28] Therefore, the interest rate applicable to competition law damages actions is the standard statutory rate, set at the base interest rate determined by the Bulgarian National Bank applicable from 1 January or 1 July of the current year, plus 10 percentage points. Pursuant to Art. 84 BgLOC, the interest rate in tort cases begins to accrue from the moment the damage was caused by the unlawful act giving rise to civil (tort) liability. In damages actions, this would normally be the date on which the overcharge resulting from the competition law infringement was paid.

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[26] See SVETLICINII, Alexandr and Marco BOTTA. "Umbrella pricing" in private enforcement of EU competition law and US antitrust law: Another transatlantic divergence? *European law review* [online]. 2016, vol. 41, no. 3.

[27] Law on Obligations and Contracts, State Gazette No. 275, as amended.

[28] Council of Ministers Decree No 426 of 18 December 2014 establishing the statutory rate of interest on overdue payments, State Gazette No. 106.

According to Article 107 BgAPC, any person who has suffered damage, regardless of whether he/she is a direct or indirect purchaser, is entitled to compensation. At the same time, compensation for damages suffered at any level of the supply chain may not exceed the amount of the overcharge at that level. The injured party shall be entitled to compensation for lost profits, even if the overcharge is passed on in full or in part along the supply chain. Article 109 BgAPC establishes a presumption that an overcharge has been passed on to the indirect purchasers if the indirect purchasers can prove that: (1) the defendant has committed an infringement of competition law; (2) the infringement of competition law has resulted in an overcharge to the direct purchaser; and (3) the indirect purchaser has purchased the goods or services that are the subject of the infringement, or goods or services derived from or containing such goods or services.[29]

Bulgarian law provides specific rules for the exercise of contribution claims by and against co-infringers following the payment of damages to injured parties for infringements of competition law. According to BgAPC, the courts are instructed to consider the relative responsibility of the infringers for the damage caused by the infringement.[30] In case of a settlement between the claimant and one of the co-infringers, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm.[31] BgAPC also provides for the limitation of the liability of a successful leniency applicant who was granted immunity from fines. Its liability shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.[32]

3. Legal presumptions

Bulgarian law provides for several presumptions regarding the existence of harm in the context of competition law damages actions. However, these

[29] See also SVETLICINII, Alexandr and Marco BOTTA. "Umbrella pricing" in private enforcement of EU competition law and US antitrust law: Another transatlantic divergence? European Law Review. 2016, vol. 41, no. 3.

[30] BgAPC, Article 116.

[31] BgAPC, Article 112.

[32] BgAPC, Article 116.

presumptions do not affect the quantum of damages, but only the existence of harm. Since the case law on the antitrust damages is very limited, it is not possible to extract any specific rules on quantification of harm arising out of antitrust infringements.[33]

BgAPC establishes the presumption of the existence of harm caused by cartels.[34] Although the law does not establish any presumptions in relation to a certain level of overcharge, it facilitates the plaintiff's burden of proof. If it is established that the plaintiff has suffered damage, the court must award compensation,[35] even when it is impossible to determine the exact amount of the damage on the basis of the available evidence. In such cases, the courts are authorised to determine the amount of damages at their own discretion or on the basis of an expert's opinion.

Another novelty in Bulgarian law introduced by the BgAPC amendments is the possibility for the court to seek assistance from the Bulgarian NCA (BgNCA) in determining the quantum of damages. The law does not specify evidentiary value of the NCA's estimation of damages and it remains to be seen whether BgNCA, overloaded with the public enforcement work, will be able to effectively assist the courts in damages estimations.[36]

It should be also noted that assessment of harm caused by the cartels investigated by the BgNCA remains limited due to a number of factors. First, the NCA normally qualifies cartels as restrictions "by object" demonstrating the anti-competitive intent of the undertakings involved. As a result, the assessment of harm caused by the cartel is not formally required from the NCA. Second, even in those cases where the NCA includes the description of the effects of the cartel, such as increase or fixing of prices at a certain level, such assessments do not include the estimation of harm suffered by suppliers, customers, consumers, competitors or other stakeholders. As a result, the harm estimations included by the BgNCA in its infringement decisions presents limited value for the purpose of follow-on claims for damages that would stimulate the development of private

33 PETROV, Anton and Nikolai GOUGINSKI. Bulgaria. In: STAWICKI, Aleksander, Vassily RUDOMINO and Boris BABIC, eds. *Competition Law in Central and Eastern Europe. A Practical Guide*. Alphen aan den Rjin: Kluwer Law International, 2014.

34 BgAPC, Article 113.

35 BgCPC, Article 162.

36 Wolf Theiss, Bulgaria: Private damages directive implemented, 31 July 2020, https://www.wolftheiss.com/insights/bulgaria-private-damages-directive-implemented/.

enforcement in Bulgaria.[37] The proceedings that have been terminated when the NCA reached a settlement with the undertakings concerned also do not yield necessary evidence that could support an independent claim for damages.[38]

BgAPC establishes a presumption in favour of the decisions/judgments of the NCAs and courts of the Member States, as well as those of the European Commission.[39] Once these decisions/judgments become final, they may be used as evidence in civil proceedings and the courts will accept the existence of an infringement and the identity of the infringer(s) as proven facts. However, one should distinguish between the probative value of the decisions issued by the BgNCA or the European Commission, which establish irrebuttable presumption of fault of the infringer, and those adopted by the NCAs of the Member States, which will have solely evidential value in relation to the infringement.[40]

According to the general principles of civil procedure in Bulgaria, the claimants bear the burden of proving the existence of an illegal act, damages and

[37] MATEINA, Eleonora. Bulgaria transposes the Private Damages Directive (2014/104/EU) in its Competition Protection Act. *e-Competitions Bulletin* [online]. Concurrences, 2014, vol. Art. N° 85793, no. November 2014, p. See: [accessed 17.11.2025]. Available at: https://www.concurrences.com/en/bulletin/news-issues/november-2014/bulgaria-transposes-the-private--damages-directive-2014-104-eu-in-its.

[38] See: MATEINA, Eleonora. The Bulgarian Competition Authority approves commitments by oil companies suspected of cartel activities (Lukoil Bulgaria / Eco Bulgaria / Shell Bulgaria / OMV Bulgaria / NIS PETROL). *e-Competitions Bulletin* [online]. Concurrences, 2017, vol. Art. N° 84404, no. March 2017 [accessed 17.11.2025]. Available at: https://www.concurrences.com/en/bulletin/news-issues/march-2017/the-bulgarian-competition-authority-approves-commitments-by-oil-companies; NAYDENOVA, Kameliya. The Bulgarian Competition Authority publishes the result of an inquiry and opens proceedings regarding possible price--fixing cartels and abuse of dominance in the fuel sector (Lukoil). *e-Competitions Bulletin* [online]. Concurrences, 2016, vol. Art. N° 78837, no. February 2016 [accessed 17.11.2025]. Available at: https://www.concurrences.com/en/bulletin/news-issues/february-2016/the-bulgarian--competition-authority-publishes-the-result-of-an-inquiry-in-the-en; GOUGINSKI, Nikolai. The Bulgarian Competition Authority settles an alleged cartel case between large retail chains (Metro / Billa / Kaufland / Picadilly / Maxima / HIT). *e-Competitions Bulletin* [online]. Concurrences, 2012, vol. N° 57256, no. July 2012 [accessed 17.11.2025]. Available at: https://www.concurrences.com/en/bulletin/news-issues/july-2012/the-bulgarian-competition-authority-settles-an-alleged-cartel-case-between-en.

[39] BgAPC, Article 114.

[40] See MATEINA, Eleonora. Better Later Than Never: Bulgaria Finally Implemented the Private Damages Directive in its Competition Protection Act. In: *Kluwer Competition Law Blog* [online]. 8. 1. 2018 [accessed 16.11.2025]. Available at: https://legalblogs.wolterskluwer.com/competition-blog/better-later-than-never-bulgaria-finally-implemented-the-private-damages--directive-in-its-competition-protection-act/.

causation. In damages actions, which are follow-on cases, the most critical elements for the claimant to prove in practice are usually the causal link and the quantification of harm. In determining the existence of harm and/or the amount of overcharge, Bulgarian courts use court-appointed experts to quantify antitrust damages. Already prior to the transposition of the DD, BgCPC empowered the courts to rely on their own assessment or to appoint an expert.[41] Experts in civil proceedings are always appointed by court order, even though such appointment may be requested by one of the parties.[42] The Supreme Court of Cassation, in an interpretative decision, advised courts to appoint experts ex officio and confirmed that such appointment does not violate the adversarial nature of the proceedings.[43] The court normally selects experts from a list of designated experts.

4. Limitation periods and consensual dispute settlement

The relevant limitation period for bringing antitrust damages action in Bulgaria is five years. The transposition of the DD did not change the limitation period, which was already set out in Article 42 BgAPC.[44] According to BgAPC, the limitation period begins to run from the day on which the infringement ceases, provided that the claimant knows or may be presumed to know of: (1) the conduct constituting an infringement of competition law; (2) the damage caused, and (3) the identity of the infringer.[45] Furthermore, in the event of a claim for damages against a person exempted from sanctions (i.e. a leniency recipient), the limitation period starts to run from the moment it is established

41 BgCPC, Article 162.

42 See: GUGUSHEV & PARTNERS. Litigation in Bulgaria. In: *CEE Legal Matters* [online]. 17. 4. 2025 [accessed 17.11.2025]. Available at: https://ceelm.com/litigation-2025/bulgaria-litigation-2025.

43 BG: Supreme Court of Cassation, Decision of 4 October 2001, No. 1/2000. Although the case did not concern antitrust damages, the ruling is relevant as it confirms the possibility to appoint experts by courts in private disputes.

44 PAPAZOVA, M. Bulgaria. Implementation of the Damages Directive. *European Competition and Regulatory Law Review*. 2018, vol. 2, no. 2. DOI: 10.21552/core/2018/2/7.

45 BgAPC, Article 111.

that full compensation cannot be obtained from the other infringers who are jointly and severally liable for the damage caused.[46]

In line with the DD,[47] BgAPC provides that if BgNCA takes action for the purpose of the investigation in respect of an infringement to which the action for damages relates, limitation period will be suspended. BgAPC also provides that in case of an out-of-court settlement of a dispute concerning a claim for damages, the limitation period is suspended for the duration of the settlement proceedings, and only in relation to the parties involved in the settlement.[48]

With regard to the interplay of antitrust damages actions and the effects of consensual dispute resolution, Articles 18 and 19 of the DD are transposed into Bulgarian law. In accordance with Article 18 of the DD, Article 111 BgAPC provides for the suspension of the limitation period in case of consensual dispute resolution. Furthermore, Article 112 BgAPC provides that the courts shall suspend the proceedings for a period of up to two years if the parties are involved in a consensual settlement of the dispute. Article 19 of the DD deals with the effect of consensual dispute resolution on subsequent damages and is transposed by Article 112 BgAPC, which provides that in the case of a consensual dispute resolution, the claim of the injured party is reduced by the share of the settling co-infringer agreed in the settlement. Thus, any remaining claim of the settling injured party can only be brought against the co-infringers who did not participate in the settlement.

5. Disclosure of evidence and protection confidential information

Bulgarian law provides for specific rules on disclosure of evidence in the context of damages action related to the infringement of competition law. According to BgAPC, the court may, upon a reasoned request of the claimant, based on reasonably available facts and evidence, order the defendant or a third

[46] It is based on Article 111(3) BgAPC. There are no other specific cases of exemption from sanctions that would be listed in the relevant provision of the BgAPC.

[47] Directive 2014/104/EU, Article 10(4).

[48] BgAPC, Article 111.

party to produce the evidence relevant to the case, and under their control.[49] The defendant has an equivalent right to request court-ordered disclosure of evidence. Unlike Article 5(2) of the DD, which refers to "relevant categories of evidence" defined as precisely and narrowly as possible on the basis of reasonably available facts, Article 117 BgAPC refers to a narrower concept of "evidence" to be specified as precisely and narrowly as possible in the request for evidence.[50] The BgAPC instructs the court to assess the proportionality of the request for evidence, considering the legitimate interests of all parties and third parties including the factors listed in Article 5(3) of the DD: (1) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence; (2) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure; (3) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.[51]

Pursuant to Article 117 BgAPC, the court shall order the disclosure of evidence containing confidential information if it considers it to be relevant to the action for damages. At the same time, the court shall take effective measures to protect evidence containing a manufacturing, commercial or other secret protected by law. The protection of trade secrets is regulated by the Trade Secrets Protect Law (BgTSPL).[52] According to Article 12 BgTSPL, in cases where the court determines that the information is confidential in accordance with paragraph 1 of the provision, the court may impose the following special measures to preserve the confidentiality of the information: (1) restrict access, in whole or in part, to a document submitted in the case that contains a trade secret or is alleged to contain a trade secret, by granting access to the document only to certain persons; (2) restrict access to court hearings and the relevant records or minutes, by ordering that the consideration of the case or the performance of only certain acts be conducted behind closed doors; (3) prepare a version of

[49] BgAPC, Article 117.

[50] PETROV, Anton. Implementation of the EU Damages Directive in Bulgaria. *SSRN Electronic Journal*. 2018. DOI: 10.2139/ssrn.3126799.

[51] BgAPC, Article 117(3).

[52] Trade Secrets Protection Law, State Gazette No. 28, as amended.

a judicial act, in which the trade secrets are deleted, for the persons to whom access to the trade secret is denied.

6. Collective and representative actions

Collective redress mechanisms for antitrust damages actions existed in Bulgaria prior to the transposition of the DD. The relevant provisions are contained in Chapter XXXIII of the BgCPC. The rules on collective redress contained in the BgCPC do not explicitly distinguish between representative and collective actions for consumers and for undertakings. Thus, a collective action may be brought on behalf of persons injured by a single violation, when, according to the nature of the violation, their circle cannot be determined precisely but is determinable.[53] This is a formalistic expression, which is used in relation to collective redress in order to emphasize that the identity of claimants/victims on behalf of whom the collective lawsuit is brought will be further determined in the course of the trial. Following an opt-out system, the court will decide on the precise opt-out mechanism that shall be applied in the lawsuit. Collective actions may be brought by a group of victims or by an organisation established for the protection of such victims.[54] Although this provision was specifically intended for protection of consumers, the general language used in the provision leads to the conclusion that businesses may be also viewed as victims and business association could be also eligible to launch the collective redress lawsuit. Thus, consumer organisations, such as the Commission for Consumer Protection,[55] can initiate collective redress actions. This collective redress mechanism operates on an opt-out basis. According to Article 382 BgCPC, the court determines the plan for the implementation of the opt-out mechanism during the first hearing. This decision concerns publication of the filing of the claim, including the number of announcements, the media and the duration. In addition, the court will determine a reasonable period after the publication of the claim during which injured parties may declare that they wish to pursue their claims independently (opt-out).

53 BgCPC, Article 379.

54 BgCPC, Article 379.

55 Commission for Consumer Protection, https://kzp.bg/en.

In order to transpose the DD,[56] a draft law proposing significant amendments to the Bulgarian Consumer Protection Act has been published for public consultation in 2024.[57] If adopted as proposed, the amendments will introduce representative actions for consumers, including specific rules on standing, procedure and compensation. The draft bill seeks to amend the Law on Consumer Protection and the BgCPC by introducing opt-in mechanisms for representative actions and specifying that qualified entities, such as consumer associations or public authorities, can initiate such claims. It is only a speculation at this point, but it may be reasonably expected that once Representative Actions Directive is transposed, the collective redress cases for protection of consumers will be brought under this specialized legislation rather than under BgAPC.

Bulgarian law allows transfer of claims by assignment. In the context of civil proceedings, BgCPC provides for the transfer of claims by assignment after the commencement of proceedings.[58] BgCPC also permits the change of plaintiff after the commencement of proceedings, which is permitted at any stage of the proceedings in the first instance with the consent of both parties and of the person intervening in the proceedings.[59] The joinder of claims filed by the same claimant is also available upon request.[60] BgCPC also provides for the joinder of the claims of several claimants.[61] The court will allow the joinder will if the claims concern common rights and obligations or rights and obligations based on the same cause.

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56 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, pp. 1–27.

57 See: EVERSHEDS SUTHERLAND. Bulgaria: Implementation of the European Directive on representative actions. In: [accessed 17.11.2025]. Available at: https://ezine.eversheds-sutherland.com/eu-class-actions-guide/bulgaria On 27 January 2023, the European Commission announced that it will start infringement procedures and send formal notices to 24 Member States that did not transpose the Directive on time, including Bulgaria. ; See: COOPER, Dan, Kristof Van QUATHEM and Anna Sophia Oberschelp de MENESES. National Transposition of the EU Representative Actions Directive: What is the Current Status? In: *Inside Privacy* [online]. 27. 2. 2023 [accessed 17.11.2025]. Available at: https://www.insideprivacy.com/eu-data-protection/national-transposition-of-the-eu-representative-actions-directive-what-is-the-current-status/.

58 BgCPC, Article 226.

59 BgCPC, Article 228.

60 BgCPC, Article 210.

61 BgCPC, Article 213.

7. Private enforcement in practice

In practice, the development of private enforcement in Bulgaria has been hindered by the judicial interpretations[62] to the effect that the infringement of the BgAPC can be established exclusively by a final decision of the BgNCA, which effectively precluded independent claims for damages. This approach was confirmed by the Supreme Court of Cassation in 2014, holding that courts should dismiss claims for damages caused by infringement of competition law unless the case was examined by the BgNCA and the latter had found that a violation of competition law was committed.[63] In that case, one of the parties requested the court to file a request for preliminary ruling with the CJEU as such conclusion appeared contradictory to the Regulation 1/2003. The Supreme Court of Cassation denied this request because EU law was not directly applicable to the case at hand. Although the ruling of the Supreme Court of Cassation was not uniformly adhered to by the lower courts, the independent claims for damages have been limited essentially to cases concerning acts of unfair competition, which are covered by BgAPC along with the antitrust infringements.[64]

The aforementioned judicial approach towards independent actions for damages based on alleged BgAPC violations could be demonstrated using the example of a case examined by Sofia City Court in 2017.[65] In that case, the claimant alleged that the actions of the copyright management organization, which refused to enter an agreement concerning authorization to use musical and literary works amounted to an abuse of dominant position. The claimant also lodged a claim for compensation of damages stemming out of this infringement. The court noted that BgAPC designated the BgNCA as the body responsible for the application of Articles 101 and 102 TFEU and the Supreme Administrative Court as the body exercising judicial control with respect to decisions of the

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62 BG: District Court in Varna, Judgment of 19 April 2013, No. 2282/2012; BG: Court of Appeal in Varna, Judgment of 29 July 2013, No. 423/2013; BG: Provincial Court of Pleven, Judgment of 29 April 2011, No. 53/2011; BG: Sofia City Court, judgment of 12 April 2017, No. 525/2017, BG:DC110:2017:20170900525.001; BG: Court of Appeal in Varna, Judgment of 23 October 2015, No. 310/2015; BG: Provincial Court of Pleven, Judgment of 10 February 2017, No. 915/2016.

63 BG: Supreme Court of Cassation, Judgment of 28 July 2014, No. 4004/2013.

64 PETROV, Anton. *Implementation of the EU Damages Directive in Bulgaria*.

65 BG: Sofia City Court, judgment of 12 April 2017, No. 525/2017, BG:DC110:2017:20170900525.001.

BgNCA. It follows that the civil courts that consider claims for damages suffered as a result of violations committed under BgAPC are bound by the decisions of the Supreme Administrative Court of Bulgaria to the extent that the establishment of the infringement with its content corresponding to the qualification given by the BgNCA. The remaining elements of the civil liability such as damage and the causal relationship between the infringement and the damage remain to be ascertained by the claimants. The court then made a conclusion that civil courts are not competent to establish the infringement itself, and it follows that in the event of a claim for compensation for an alleged violation of BgAPC, which was not confirmed by a decision of the BgNCA, civil court is not authorized to establish the existence of an infringement. Therefore, the court ruled that actions for damages that are not based on a preceding BgNCA decision confirming the existence of an infringement should be dismissed.

As a result, due to the judicial dismissals of the independent claims for damages and the limited number of antitrust infringements established by the BgNCA, the private enforcement of the competition law in Bulgaria took the form of invocation of competition law violations in contractual disputes where one of the parties challenges the validity of certain contractual clauses. For example, in a dispute concerning performance of a franchising agreement litigated before the Varna District Court, franchiser claimed that franchisee failed to performed certain obligations and owed to franchiser certain amounts.[66] In context of this dispute one of the parties invoked Article 101 TFEU to claim invalidity of the no-compete clauses included in the franchising agreement. The same party attempted to invalidate the penalty clauses also referring to Article 101 TFEU as applied to vertical agreements. The court analysed these claims and concluded that no-compete clauses were permissible given that the respective obligations were assumed for the duration of the franchising agreement.

In a similar case, Dobrich District Court assessed a distribution agreement, which contained an exclusivity clause providing that the supplier should not sell its products in Bulgaria independently or through other distributors.[67] The court was set to verify the validity of the exclusivity clause in favour of the distributor in accordance with Article 101 TFEU and its national equivalent in

[66] BG: District Court in Varna, Judgment of 22 December 2016, No. 1482/2015, BG:DC310:2016:20150901482.001.

[67] BG: District Court in Dobrich, Judgment of 10 June 2022, No. 12/2021, BG:DC320:2022:20210900012.001.

Article 15 BgAPC. The analysis of the above provisions led the court to establish the cumulative presence of the following elements: the parties have the status of an undertaking; the existence of an agreement; and the anti-competitive effect resulting in prevention, restriction or distortion of competition. The court found that since the supplier held a 100% of the relevant product market, the exclusivity clauses resulted in a substantial limitation of competition since the relevant products were sold through a sole distributor. Based on this analysis the court confirmed the invalidity of the exclusivity clauses.

In 2017, Sofia City Court heard a dispute between supplier and buyer of natural gas where the supplier claimed outstanding amounts for the supplied gas and corresponding interest for late payment.[68] The buyer attempted to dispute its obligations by arguing that the pricing provisions of the contract contradicted to Article 102 TFEU and its national equivalent as excessive and unfair prices imposed by an undertaking in a dominant position. The court noted that the prices for the supply of natural gas were supervised by the sector regulator and found no grounds for invalidating the contested contractual terms. In 2023, Plovdiv District Court assessed a similar claim concerning unfair prices in a natural gas supply contract, which according to the buyer constituted an abuse of dominant position pursuant to Article 102 TFEU and its national equivalent.[69] The court dismissed the claim and ordered the buyer to pay the outstanding amounts according to the contractual terms.

Competition rules were also invoked in context of administrative litigation where the parties attempted to challenge the decisions of administrative authorities as violating competition law.[70] Thus, in a 2021 case heard by the Varna Court of Appeals, applicant challenged the decision of local administration fixing the amount of compensation to be paid to the owners of expropriated immovable property. It was argued that the methods of calculating the compensation was in line with international and EU standards, which, according to applicant,

[68] BG: Sofia City Court, Judgment of 1 September 2017, No. 1719/2017, BG:DC110:2023:-20170901719.001.

[69] BG: District Court in Plovdiv, Judgment of 28 September 2023, No. 20225300900320/2022, BG:DC530:2023:20220900320.001.

[70] BG: Court of Appeal in Varna, Judgment of 7 December 2021, No. 20213000500457/2021, BG:AP300:2021:20210500457.001.

amounted to an abuse of dominant position in the form of fixing unfair prices.[71] This claim was rejected by the court.

The new impetus for reinvigoration of private damages claims based on competition law violations is expected from the 2018 amendments of the BgAPC, which introduced a number of presumptions that should facilitate the claimant's burden of proof. For example, in 2022, the Bulgarian courts have examined follow-on claims for damages based on the European Commission's prosecution of the truck cartel in 2017.[72] The Blagoevgrad District Court hearing one of such cases confirmed the indirect purchasers' right to claim compensation due to overcharge caused by the cartel but dismissed the claim due to expiration of the limitations period.[73] [74] This case could be considered as the first case where a claim for damages was brought on the basis of EU competition rules.

8. Summary

The development of competition law and policy in Bulgaria has followed the trajectory that is common to other transition economies in Eastern Europe that have acceded to the European Union.[75] The development of competition

71 See: SVETLICINII, Alexandr and Marco BOTTA. Article 102 TFEU as a Tool for Market Regulation: "Excessive Enforcement" Against "Excessive Prices" in the New EU Member States and Candidate Countries. *European Competition Journal*. 2012, vol. 8, no. 3. DOI: 10.5235/ECJ.8.3.473

72 European Commission, Decision of 27.9.2017 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (AT.39824 – Trucks).

73 BG: District Court in Blagoevgrad, Judgment of 24 August 2024, No. 20221200900159/2022.

74 See also IMGARTEN, Nils. Temporal Applicability of the Cartel Damages Directive: Case C-267/20 *Volvo and DAF Trucks*. *Journal of European Competition Law & Practice*. 2023, vol. 14, no. 2. DOI: 10.1093/jeclap/lpac051; RONZANO, Alain. Private action: The Court of Justice of the European Union provides important clarifications on the application ratione temporis of the rules governing the limitation period for bringing antitrust damages actions and on the rules governing the quantification of damages and the rebuttable presumption of the existence of cartel damages (RM / Volvo / DAF Trucks). *Concurrences Review* [online]. Concurrences, 2022, vol. N° 4-2022, no. N° 107281 [accessed 16.11.2025]. Available at: https://www.concurrences.com/en/review/numeros/no-4-2022/alertes/private-action-the-court-of-justice-of-the-european-union-provides-important.

75 See HOEKMAN, Bernard and Simeon DJANKOV. Competition Law in Post-Central-Planning Bulgaria. *The Antitrust Bulletin*. 2000, vol. 45, no. 1. DOI: 10.1177/0003603X0004500107.

law enforcement initially relied on the public enforcement carried out by the BgNCA while the courts were involved in this process primarily at the stage of judicial review of the BgNCA's decisions.[76] While both BgAPC and BgCPC contained rules concerning compensation of damages caused by the competition law infringement, no consistent private enforcement practice has been developed. The enforcement record of the BgNCA, particularly in the field of anti-cartel enforcement is dominated by the bid-rigging cases, [77] which does not

[76] FESSENKO, Dessislava. The Bulgarian Supreme Administrative Court holds that the absence of a party to a hard-core arrangement from the market concerned rules out an infringement of the local equivalent of Art. 81 EC by this party (Vegetable Oil Manufacturers and Suppliers / CPC). *e-Competitions Bulletin* [online]. Concurrences, 2009, vol. March 2009, no. N° 26203 [accessed 16.11.2025]. Available at: https://www.concurrences.com/en/bulletin/news-issues/march-2009/the-bulgarian-supreme-administrative-court-holds-that-the-absence-of-a-party--to-en; FESSENKO, Dessislava. The Bulgarian Supreme Administrative Court dismisses liability for participation in a cartel when the undertaking is not active in the market concerned (Vegetable Oil Cartel). *e-Competitions Bulletin* [online]. Concurrences, 2010, vol. August 2010, no. N° 32903 [accessed 16.11.2025]. Available at: https://www.concurrences.com/en/bulletin/news-issues/august-2010/the-bulgarian-supreme-administrative-court-dismisses-liability-for--en; FESSENKO, Dessislava. The Bulgarian Supreme Court dismisses mere price parallelism as a form of concerted practice in the absence of compelling evidence of such (Travel Agencies). *e-Competitions Bulletin* [online]. Concurrences, 2013, vol. September 2013, no. N° 61110 [accessed 16.11.2025]. Available at: https://www.concurrences.com/en/bulletin/news-issues/september-2013/The-Bulgarian-Supreme-Court-61110.

[77] See: BULGARIAN COMPETITION AUTHORITY. The Bulgarian Competition Authority concludes that 3 undertakings colluded to rig bids in the market for the production and sale of professional work shoes (Cavaler Union 2001 / Technomat-Mercury / Labor Producing Cooperation). *e-Competitions Bulletin* [online]. Concurrences, 2023, vol. June 2023, no. N° 113573 [accessed 16.11.2025]. Available at: https://www.concurrences.com/en/bulletin/news-issues/june-2023/the-bulgarian-competition-authority-concludes-that-three-undertakings-colluded; BULGARIAN COMPETITION AUTHORITY. The Bulgarian Competition Authority initiates proceedings against 7 work shoe and clothing producers for suspected bid rigging (Technomat Mercury / Kavaler Union 2001 / Apollo / Kriston / Lorton / Labor-Productive Cooperative of the Disabled Zdravohod / Krasi Style 8). *e-Competitions Bulletin* [online]. Concurrences, 2022, vol. Art. N° 107807, no. March 2022 [accessed 17.11.2025]. Available at: https://www.concurrences.com/en/bulletin/news-issues/march-2022/the-bulgarian-competition-authority-initiates-proceedings-against-7-work-shoe; MATEINA, Eleonora and Anastasiya GRUNOVA. The Bulgarian Competition Authority issues a statement of objection against undertakings for bid--rigging (Energy efficiency program). *e-Competitions Bulletin* [online]. Concurrences, 2019, vol. Art. N° 91347, no. June 2019 [accessed 17.11.2025]. Available at: https://www.concurrences.com/en/bulletin/news-issues/june-2019/the-bulgarian-competition-authority-issues-a-statement-of-objections-against; FESSENKO, Dessislava. The Bulgarian Commission for Protection of Competition closes a probe into alleged bid-rigging among suppliers of pharmaceuticals without establishing an infringement (Alta Pharmaceuticals, Roche). *e-Competitions Bulletin* [online]. Concurrences, 2010, vol. Art. N° 34785, no. December 2010 [accessed 17.11.2025].

stimulate the development of follow-on actions. On the other hand, the judicial interpretations have limited the scope of independent actions as the courts have frequently held that establishment of the competition law infringement is reserved for the BgNCA. As a result, independent actions have been limited to the invocation of the competition law in context of contractual disputes where the parties disputed the validity of contractual clauses arguing their inconsistency with competition law provisions. The delayed implementation of the DD has not contributed to the development of the private enforcement either. The 2018 amendments of the LPC have clarified a number of issues that should aid future damages claims including various presumptions easing burden of proof, disclosure of evidence that can be ordered by the courts and the possibility of involving the NCA in the estimation of harm in follow-on cases. BgAPC and BgCPC have clarified a number of issues that should aid future damages claims including various presumptions easing burden of proof, disclosure of evidence that can be ordered by the courts and the possibility of involving the BgNCA in the estimation of harm in follow-on cases. It is expected that these developments will serve as impetus for the further development of the private enforcement of competition law in Bulgaria.

Available at: https://www.concurrences.com/en/bulletin/news-issues/december-2010/The-Bulgarian-Commission-for; SVETLICINII, Alexandr. The Bulgarian Competition Authority issues guidelines on identification and prevention of bid-rigging practices. *e-Competitions Bulletin* [online]. Concurrences, 2010, vol. Art. N° 31752, no. May 2010 [accessed 17.11.2025]. Available at: https://www.concurrences.com/en/bulletin/news-issues/may-2010/the-bulgarian-competition-authority-issues-guidelines-on-identification-and-en.

CHAPTER 2

Private enforcement of competition law in Czechia – Good teeth, but not much biting

by

Michal Petr* and Eva Zorková**

1. Introduction

Czech competition law attempted to promote the private enforcement from the very beginning. Already the original competition act from 1991[80] contained a dedicated section on its private enforcement. The Act on the Protection of Competition (CzAPC)[81] currently in force lacks such provisions, the rules on private enforcement are nonetheless contained in the Civil Code (CzCC)[82] and enforced by courts on the basis of the Civil Procedure Code (CzCPC).[83] With respect to claims for damages, the Competition Damages Act (CzCDA)[84] contains some specific rules, implementing the Damages Directive (DD).[85]

Despite this favourable legislative situation, private enforcement of agreements and abuse of dominance is relatively rare in the Czech Republic. It is almost non-existent with respect to other forms of anticompetitive conduct, including mergers and state aid. In this Chapter, we would like to discuss why

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80 Act No. 63/1991 Coll. on the protection of competition, no longer in force.

81 Act. No. 143/2001 Coll., on the protection of competition, as amended.

82 Act No. 89/2012 Coll., Civil Code, as amended.

83 Act No. 99/1963 Coll., Civil Procedure Code, as amended.

84 Act No. 262/2017 Coll., Competition Damages Act, as amended.

85 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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.

it is so. We will first introduce the Czech legislative framework (Section 2) and different types of private enforcement measures (Section 3). This will be followed by analysis of case-law relevant for private enforcement (Section 4) and specific private enforcement cases (Section 5). This will allow us to evaluate the private enforcement in the Czech Republic (Section 6) and to propose avenues for its further development.

2. Legislative framework

The legislation on private enforcement of competition law is as old as the law itself in the Czech Republic. We will however not discuss the older regulation, only the legislation in force.[86] In Section 2.1, we will describe the general rules applicable to private enforcement. Section 2.2 is dedicated specifically to damages claims, the regulation of which is contained in the CzCDA. Section 2.3 examines further developments.

2.1 Pre-DD legislation

Before the DD had been transposed into the Czech legal order, the only means to privately enforce competition law were regulated by general civil law. Since 2014, a new Civil Code has been in force. It provides the principal legal basis for private enforcement. Before that, the Commercial Code (CzComC)[87] provided the legal basis. As the principles of both the pieces of legislation are comparable, we will only outline the rules, contained in the CzCC.

According to the CzCC, anybody whose rights were violated or jeopardised by competition law infringements may file for a restraining (cease-and-desist) order, restitution order, satisfaction, damages and return of unjustified enrichment.[88] Nullity of a legal act breaching competition law may also be claimed.[89]

[86] For the analysis of the previous legislation, see KINDL, Jiří and Michal PETR. Czech Republic. *International Competition Litigation. A Multi-jurisdictional Handbook*. 2012.

[87] Act No. 513/1991 Coll., Commercial Code, no longer in force (CzComC); however is Slovakia it remained in force until now (SkComC).

[88] Sec. 2988 in conjunction with Sec. 2990 CzCC.

[89] Sec. 580 CzCC.

The actions for damages, based on the CzCDA, will be discussed in detail in Section 2.2. Other private enforcement measures, based on the CzCC, will be discussed below in Section 3.

2.2 Transposition of the DD

The DD was transposed by the CzCDA. No other piece of legislation was adopted; no other piece of legislation was amended.[90] The transposition has been discussed in detail in several publications.[91] It is not our aim to repeat this debate. In this section, we therefore only highlight the most important features of the transposition, based on our previous research, to which we refer the reader for further details.

The CzCDA governs only the claims for damages, not other claims based on anticompetitive conduct (e.g. nullity of contracts, unfair enrichment, restraining orders etc., see below in Section 3).[92] This is in line with the DD, and also in line with the legislation in most European countries, it may nonetheless cause problems in practice, as more claims are typically combined in a single proceedings (see below in Section 4). Similarly, the CzCDA applies only to anticompetitive agreements and abuse of dominance;[93] damages caused by other forms of anticompetitive conduct are thus not covered, which may complicate the legal position of potential claimants.

In this section, we will separately discuss the substantive (Section 2.2.1) and procedural law issues (Section 2.2.2) of the transposition, followed by description of competent courts (Section 2.2.3) and consensual dispute resolution (Section 2.2.4).

Substantive law issues

Czech law was to a large extent in line with the substantive requirements of the DD even before the CzCDA. However, certain principles needed to be

90 The CzCDA also amended the CzAPC, this amendment is however not relevant for this study.

91 For a detailed analysis, see PETR, Michal. Czech Republic · Harmonisation of Private Antitrust Enforcement. *European Competition and Regulatory Law Review*. 2017, vol. 1, no. 4. DOI: 10.21552/core/2017/4/9; PETR, Michal. Czech Republic. In: PISZCZ, Anna, ed. *Implementation of the EU Damages Directive in Central and Eastern European Countries*. 2017.

92 Sec. 1 CzCDA.

93 Sec. 1 CzCDA.

addressed, concerning in particular limitation periods and some exemptions from joint and several liability.

Concerning the limitation periods, Czech civil law distinguishes between two types of them: objective limitation periods, calculated from the facts themselves, i.e. when the relevant conduct or event actually took place, and subjective limitation periods, calculated from the moment the relevant person learned about these facts. According to general rules on damages (applicable in all areas of law), the objective limitation period is 10 years from the date of the offence (5 years in case of intentional conduct);[94] the subjective limitation period is three years long,[95] counted from the date the plaintiff became aware of the damage and the person responsible for it.[96]

These limitation periods would apply to private enforcement in general. Specifically with regard to damages claims, the CzCDA stipulates that the objective limitation periods shall not apply at all, and that the subjective limitation period shall be 5 years long,[97] starting from the day the plaintiff became aware (or could have become aware) of the anticompetitive conduct, the person responsible for it and the harm sustained.[98] The CzCDA further stipulates that the limitation period cannot start running before the infringement has ceased.[99]

The limitation period does not run while the allegedly anticompetitive conduct is being investigated by competition authorities (whether as a preliminary investigation or formal proceedings), both Czech and from other EU member states, as well as a year thereafter.[100] The limitation periods are also suspended as long as disclosure proceedings are in progress.[101]

In addition, the limitation period elapses only one year after the claimant learns that compensation cannot be obtained from immunity recipients, small and medium-sized enterprises (hereinafter, 'SMEs') or a party that has reached

94 Sec. 636 CzCC.
95 Sec. 629 (1) CzCC.
96 Sec. 620 (1) CzCC.
97 Sec. 9 (1) CzCDA.
98 Sec. 9 (2) CzCDA.
99 Sec. 9 (2) CzCDA.
100 Sec. 9 (3) CzCDA.
101 Sec. 9 (4) CzCDA.

a consensual settlement, because the rules of joint and several liability are limited for these entities.[102]

These leads us to the regulation of joint and several liability. According to Czech civil law, joint and several liability generally applies in cases concerning multiple infringers.[103] A person who has the duty to provide compensation for damages jointly and severally with other infringers shall settle with them in proportion to their participation in causing the damage;[104] a court may under exceptional circumstances reduce the extent of this settlement.[105] Specific provisions on joint and several liability in case of antitrust damages re-state these general principles, only exclude the power of a court to limit the extent of liability.[106] The CzCDA adds that immunity recipients are generally liable only to their direct and indirect purchasers and providers; other injured parties may claim damages from immunity recipients only if they cannot obtain compensation from other infringers.[107] Concerning compensation among co-infringers, contribution of immunity recipients shall not exceed the amount of harm they have caused to their direct and indirect purchasers and providers.[108] Similar rules were adopted for SMEs, the market share of which remains below 5% during the infringement, provided the application of the rules of joint and several liability would jeopardise their economic viability and on condition these SMEs have not led the infringement or coerced others to participate therein and that they have not previously infringed competition law.[109] Finally, the rules on joint and several liability are limited as a consequence of consensual dispute resolution, as will be described below in Section 2.2.4.

Unlike for the two issues above, there have been no legislative changes concerning the quantification of harm.[110] The CzCDA requires full compensation,[111] as is the general principle in Czech law, and excludes the court's power to reduce the amount of compensation under extraordinary circumstances, which

102 Sec. 9 (5) CzCDA.
103 Sec. 2915 (1) CzCC.
104 Sec. 2916 CzCC.
105 Sec. 2915 (2) CzCC.
106 Sec. 5 CzCDA.
107 Sec. 6 (1) CzCDA.
108 Sec. 6 (3) CzCDA.
109 Damages Act, Sec. 7(1) and (2).
110 A presumption that cartels cause damage was incorporated into Czech law (Sec. 3 CzCDA).
111 Sec. 4 (1) CzCDA.

is generally applicable in Czech damages proceedings.[112] Specific provisions on the possibility to claim interests from the time when the harm occurred until the time when compensation is paid,[113] uncommon under Czech law, were also included.[114]

The CzCDA also stipulates (for the third time in the Czech legal order) that the court may determine the quantum of damages on the basis of its fair assessment of the particularities of the case, provided that amount cannot be precisely determined.[115] The issue of qualification of harm will be discussed below in Section 5.

Concerning finally the passing-on defence, the CzCDA explicitly confirms that it may be invoked.[116] According to the DD, national courts should have the power to estimate the share of any overcharge that was passed on.[117] This provision was not implemented into Czech law and it would presumably need to be interpreted as part of the courts' power to estimate the amount of harm (see above).

Concerning the position of indirect purchasers, the CzCDA introduced a rebuttable presumption that there was a passing-on to indirect purchaser (claimant) if the claimant is able to show that the defendant has committed an antitrust infringement, the latter resulted in an overcharge to the defendant's direct purchasers, and the claimant purchased the effected goods or services.[118]

Conversely, the provisions on actions for damages by claimants from different levels in the supply chain were not subject to implementation,[119] they are nonetheless consistent with the principles of Czech law and presumably do not require any implementation. Similarly, there are no explicit implementation provisions concerning the requirement of full compensation and prohibition of overcompensation in relation to passing-on.[120] General principles will need to suffice.[121]

112 Sec. 2953 CzCC.

113 Art. 3 (2) and Recital (12) DD.

114 Sec. 4 (2) and (3) CzCDA.

115 Sec. 4 (4) CzCDA. An identical rule has already been contained in Sec. 2955 CzCC and Sec. 136 CzCPC.

116 Sec. 29 CzCDA.

117 Art. 12 (5) DD.

118 Sec. 30 CzCDA.

119 Art. 15 DD.

120 Art. 12 DD.

121 Sec. 4 (1) CzCDA.

Procedural law issues

No legislative changes were necessary concerning the standing of claimants, which is in principle unlimited under the Czech law: anybody claiming they were harmed may seek redress before a court, including indirect purchasers. As far as co-infringers are concerned, the CzCC generally states that if harm has been incurred (or its magnitude has increased) also as a result of circumstances attributable to the victim, the infringer's duty to compensate the damage shall be proportionately reduced, unless the victim's role was negligible.[122] Co-infringers are thus in principle entitled to claim damages, there is however no case-law to that extent.

Similarly, it was not necessary to do change the legislation concerning effects of NCAs decisions. As a general rule, Czech courts are bound by decisions of competent administrative authorities finding an infringement, as far that there was an administrative offence and who the offender was. Conversely, should the administrative authority find that there was no infringement, the civil court may revisit the question and eventually come to a different conclusion.[123] For some reason, the CzCDA repeats this provision specifically for the purposes of antitrust damages claims and extends this binding effect to the Commission's decisions and also to judgments of other courts,[124] which would presumably apply also to judgments in other jurisdictions. As far as the decisions of other NCAs finding an infringement are concerned, there is a rebuttable presumption that there was an infringement and who the perpetrator was.[125]

The most extensive legislative changes, brought about by the CzCDA, were connected with the disclosure procedure. Disclosure of evidence, comparable to the requirements of the DD, used to be unknown under the Czech law. The legislation contained in the CzCDA is therefore completely new, and the experience with its application is still rather limited. At the same time, the regulation is broader than expected by the DD. Most significantly, it allows for "pre-trial discovery", whereas the DD prescribes disclosure of evidence only after the proceedings concerning damages were initiated.[126] Disclosure may be requested also in the course of the proceedings on the merits under identical conditions as in

122 Sec. 2918 CzCC.
123 Sec. 135 (1) CzCPC.
124 Sec. 27 (1) CzCDA.
125 Sec. 27 (2) CzCDA.
126 Art. 5 DD.

the pre-trial phase.[127] Not only the claimant, but also the infringers may request disclosure of evidence.[128]

The burden to disclose evidence falls on to two categories of addressees: first, those who control the relevant evidence[129] (which corresponds with the DD's requirements),[130] and second, those who used to have the evidence under their control.[131] The second category is not covered by the DD and was only established by Czech legislation, constituting the second major broadening of Czech transposition; it is composed of any person who had an opportunity to make a copy of the evidence in question or was able to get acquainted with it.[132] Whereas those falling into the first category are obliged to disclose the evidence to the claimant, those falling into the second one have to inform the claimant wherefrom to obtain the evidence.[133].

The request for disclosure needs to contain as precise as possible a description of the evidence requested.[134] The request for disclosure needs to be substantiated by reasonably available evidence, supporting the plausibility of the damages claim.[135] Parties to the disclosure proceedings are the claimant, the defendant in the proceedings on the merits (i.e. the infringer), and the one who shall disclose the evidence.[136]

The one who shall disclose the evidence has a right to be heard.[137] The court shall however decide without an oral hearing if the written submissions and evidence produced suffice for the decision.[138] The court shall also inform the competition authority, competent to investigate the alleged anticompetitive conduct and allow it to submit its observations to the request.[139] In order to retain proportionality when setting the extent of the disclosure, the court shall take into

127 Sec. 18 CzCDA.
128 Sec. 18 (2) (b) CzCDA.
129 Sec. 10 (1) (a) CzCDA.
130 Art. 5 (1) DD.
131 Sec. 10 (1) (b) CzCDA.
132 Sec. 10 (2) CzCDA.
133 Sec. 10 (1) and 14 (1) CzCDA.
134 Sec. 10 (3) CzCDA.
135 Sec. 10 (1) CzCDA.
136 Sec. 11 (2) CzCDA.
137 Sec. 14 (3) CzCDA.
138 Sec. 11 (4) CzCDA.
139 Sec. 10 (4) CzCDA.

account to what extent is the evidence relevant to the proceedings on the merits, the costs of the disclosure, and the need to protect confidential information, if it is to be disclosed.[140]

The disclosure of evidence is not unlimited. Concerning, firstly, confidential information, the court may decide that it shall be disclosed only to a limited number of people.[141] Alternatively, the court may appoint one or several impartial experts who will get acquainted with all the information and produce a report for the purposes of the claimant, not containing confidential information.[142] Finally, the court may adopt 'other appropriate measures' in order to protect the confidentiality of the disclosed information;[143] according to the explanatory memorandum, these may include erasing confidential information from the disclosed documents.[144]

Secondly, confidentiality of legal professional privilege (hereinafter, 'LPP') needs to be guaranteed.[145] The protection of LPP is not provided for in the Czech legal order, even though in antitrust proceedings the courts require the same standard of LPP protection as under EU law.[146] According to the CzCDA, the disclosure must not conflict with the "professional secrecy of independent lawyers" (advocates),[147] which arguably does not necessarily correlate with the scope of LPP. These has been no practical experience with this provision yet.

And thirdly, there is a category of information that cannot be disclosed at all. This prohibition applies to leniency statements, excluding pre-existing information, and settlement submissions.[148] The CzCDA even includes a procedure according to which the court may ascertain, if need be with the help of the Czech Competition Authority (CzNCA), whether the requested information is indeed the leniency statement or settlement submission.[149]

In addition, information prepared specifically for the purposes of the competition authority's proceedings, information prepared by the competition

140 Sec. 14 (2) CzCDA.
141 Sec. 17 (1) (a) CzCDA.
142 Sec. 17 (1) (b) and (3) CzCDA.
143 Sec. 17(1) (c) CzCDA.
144 Explanatory Memorandum to CzCDA, p. 70.
145 Art. 5(6) DD.
146 See CZ: Supreme Administrative Court, Judgment of 29 May.2009, No. 5 Afs 95/2007.
147 Sec. 14 (4) CzCDA.
148 Sec. 15 (1) and Sec. 2 (2) (a) and (b) CzCDA.
149 Sec. 15 (2) and (3) CzCDA.

authority and sent to the parties as well as settlement submissions that have been withdrawn may be disclosed only after the competition authority's proceedings have been closed.[150] Whereas the DD protects information *prepared* specifically for the proceedings' purposes (i.e. excluding pre-existing information), the CzCDA originally protected information *submitted* in the proceedings. This was corrected in 2025 by the first amendment of the CzCDA,[151] prepared after the CJEU found the original wording incompatible with the EU law.[152]

Special rules apply with regard to NCAs. Concerning information contained in the competition authority's file (but possibly also held by other parties, e.g. as a copy), the judicial test of proportionality shall also take into account whether the request has been formulated specifically to cover such documents, whether it is indeed connected to the action for damages, and whether effectiveness of public procurement is not jeopardised.[153] NCA may be requested to disclose information contained in its file only if it cannot be reasonably accessed by other means.[154]

Information protected from disclosure (i.e. leniency statements and settlement requests) obtained from the NCA's file are inadmissible as evidence.[155] Correspondingly, information that can be disclosed only after the competition authority's proceedings are closed may be used as evidence only thereafter;[156] the court may stay its proceedings until such a date.[157] Admissible evidence obtained from the competition authority's file may be used only by the person that had legally obtained it, or by its legal successor.[158]

The claimant requesting disclosure of evidence needs to pay an up-front guarantee of CZK 100,000 (~EUR 4,000); this sum may be proportionately increased by the judge.[159] If those who have disclosed the evidence sustained harm as a result, they may claim damages from the requesting party. The damages claim needs to be submitted no later than six months after the evidence was

150 Art. 6 (5) DD.
151 Act No. 69/2025 Coll., amending Act No. 215/2004 on State Aid and some other acts.
152 Judgment of 12 January 2023, *RegioJet*, C-57/21, ECLI:EU:C:2023:6.
153 Sec. 16 (1) and (2) CzCDA.
154 Sec. 15 (5) and 16 (4) CzCDA.
155 Sec. 31 (1) CzCDA.
156 Sec. 31 (2) CzCDA.
157 Sec. 31 (4) CzCDA.
158 Sec. 31 (3) CzCDA.
159 Sec. 12 (1) and (2) CzCDA.

disclosed.[160] The guarantee is primarily used for compensating the harm[161] – if the evidence is not disclosed or the deadline for submitting the damage claim lapses, it shall be returned to the requesting party.[162]

In case the obligation to disclose evidence is not fulfilled, the court may impose a fine of up to CZK 10,000,000 (~EUR 400,000) or 1% of the undertaking's annual turnover.[163] The same fine may be imposed on those who make the fulfilment of such a duty impossible or more complicated.[164] For breaching the duty of protecting the confidentiality of the disclosed information, a fine of up to CZK 1,000,000 (~EUR 40,000) may be imposed.[165] Such fines may be imposed repeatedly,[166] within the period of five years after the obligation was breached.[167] All companies making up the undertaking as an economic entity are jointly and severely liable for the fine.[168]

In addition, if the obligation to disclose information is breached or made impossible, there is a legal fiction that what was to be proven by that evidence is in fact deemed to have been proven.[169] Conversely, if the confidentiality of the disclosed information is breached, the court may decide that the evidence is inadmissible.[170]

Competent courts

Regional courts are empowered to hear private enforcement cases in the first instance.[171] Regional courts generally act as courts of appeal in civil proceedings and they have a first-instance-jurisdiction only in more complex cases, including, among others, antitrust, unfair competition or intellectual property rights. Such cases are handled and decided by a single judge alone.[172] There are 8 regional courts in the Czech Republic.

160 Sec. 13 (2) CzCDA.
161 Sec. 13 (1) CzCDA.
162 Sec. 12 (4) CzCDA.
163 Sec. 20 (1) and (2) CzCDA.
164 Sec. 20 (1) (b) CzCDA.
165 Sec. 21 (1) CzCDA.
166 Sec. 23 (2) CzCDA.
167 Sec. 22 (1) CzCDA.
168 Sec. 22 (3) CzCDA.
169 Sec. 28 (1) CzCDA.
170 Sec. 28 (2) CzCDA.
171 Sec. 9 (2) (h) CPC; Sec. 25 CzCDA
172 Sec. 36a (3) CzCPC.

Since the CzCDA allows for pre-trial disclosure of evidence (see above), the court to decide on these requests shall be the same as the one competent to decide the case on the merits.[173] The same court shall also decide on claims for damages caused by the misuse of the disclosed evidence.[174] Correspondingly, should the right to compensation among joint and severally liable infringers be decided before the courts, regional courts will be empowered to do so.[175]

Consensual dispute resolution

The DD addresses consensual dispute resolution on four levels: in relation to limitation periods, the possibility to stay court proceedings,[176] the level of fines imposed by competition authorities[177] and the effect of CDR on subsequent actions for damages.[178]

The CzCDA implements some, but not all of these provisions. Concerning the limitation periods, even though they ought to be suspended for the duration of any consensual dispute resolution process,[179] there is no such provision under Czech law. Concerning court proceedings, the court shall suspend it for up to two years if it is informed by the parties that they are involves in CDR negotiations.[180]

There are no provisions on CDR's effects on fines. However, nothing prevents the CzNCA from taking it into account, and indeed, there is a provision, which was inserted into the Competition Act already in 2012, whereby the CzNCA shall consider to what an extent the infringer attempted to mitigate the negative effects of the infringement while setting the fine.[181]

Finally, there are specific rules concerning limiting joint and several liability of the infringers. In case the claimants have settled, the amount of their claim is reduced by the share of the co-infringer with whom he had settled. They cannot claim that amount from other joint and severally liable co-infringers, thus

173 Sec. 11 (1) CzCDA.
174 Sec. 13 (1) CzCDA.
175 Sec. 33 CzCDA.
176 Art. 18 (2) DD.
177 Art. 18 (3) DD.
178 Art. 19 DD.
179 Art. 18 (1) DD.
180 Damages Act, Sec. 26.
181 Sec. 22b (2) CzAPC.

preventing overcompensation.[182] The co-infringer who has settled also does not need to compensate other co-infringers.[183]

2.3 Post-DD adjustments

Most of the requirements of the DD were part of the Czech legal order even before the DD had been adopted. From this point of view, its implementation was relatively easy. Most of the DD's provisions were copied into the CzCDA, even those that were clearly not necessary (e.g. provisions on the effect of NCA's decisions, which is in an identical form contained in the CzCPC, or the power of the judge to quantify the damages by its estimate, contained already in the CzCC and the CzCPC).[184] Conversely, some DD's provisions were, without any clear reason, not transposed at all (e.g. the suspension of limitation periods in connection with CDR). And some DD's provisions were arguably not transposed adequately (e.g. the protection of LPP).

Some CzCDA's provisions, even though fully in line with the DD, may pose problems in practice. This concerns in particular the scope of the act, which covers only the actions for damages. In Czech practice, however, the claims for damages are frequently accompanied by other claims, typically for nullity of contracts or disgorgement of unjust enrichment. Similarly, the legal basis for damages claims is frequently not only competition law, but unfair competition as well (see below in Section 5). Even though we are not aware of any actual cases in which the limited scope of the CzCDA played a role, we put forward that such situations are likely to appear in the future.

On the other hand, some provisions of the DD, again without any clear justification, were implemented in a much broader way. The Czech disclosure procedure applies also to "pre-trial discovery" and imposes obligations on persons not actually disposing with the evidence being sought. Still, the disclosure procedure is only rarely used in practice.

Overall, the implementation of the DD in the Czech Republic may be viewed as a success. Since the CzCDA had been adopted in 2017, there has been only one, relatively limited amendment at the beginning of 2025 concerning the

182 Sec. 8 (1) CzCDA.

183 Sec. 8 (3) CzCDA.

184 Sec. 4 (4) CDA, Sec. 2955 CzCC and Sec. 136 CzCPC.

protection of information submitted to NCAs (see above in Section 2.2.1); this amendment was adopted as a reaction to the CJEU's ruling in the *RegioJet* case.[185]

3. Types of private enforcement measures

According to the CzCC, anybody whose rights were violated or jeopardised by competition law infringements may claim a (i) restraining (cease-and-desist) order, (ii) restitution order (*restitutio in integrum*), (iii) adequate satisfaction, (iv) damages and (v) return of unjustified enrichment.[186] Nullity of a legal act breaching competition law may also be claimed.[187] Furthermore, claimants also have the right to request that the court issues a preliminary injunction in their case.[188]

Concerning cease-and-desist orders and restitution orders, the claimant only needs to establish that the plaintiff's action (or inaction) constitutes a breach of competition law; fault is not required. The claimant also needs to formulate the specific obligation that should be imposed by the court on the plaintiff to remedy the breach of law.

Concerning the satisfaction, it is aimed at compensating principally immaterial injuries.[189] It can also be employed to remedy injuries which have material consequences, but cannot be financially quantified, because if they were quantifiable, it would be appropriate to seek damages.[190] The satisfaction has as a matter of principal non-pecuniary form, as long as it constitutes a real and sufficiently effective compensation; only in other cases is pecuniary satisfaction

185 Judgment of 12 January 2023, *RegioJet*, C-57/21, ECLI:EU:C:2023:6.

186 Sec. 2988 in conjunction with Sec. 2990 CzCC.

187 Sec. 580 CzCC.

188 Sec. 74 *et seq*. and Sec. 102 CzCPC.

189 See e. g. CZ: Supreme Court, Judgment of 5 May 2006, No. 32 Odo 511/2006, ECLI:CZ:NS:2006:32.ODO.511.2006.1; this judgement was delivered in an unfair competition case, it is however applicable to private enforcement of competition law as well.

190 CZ: Supreme Court, Judgment of 14 November 2008, No. 32 Cdo 1664/2008, ECLI:CZ:NS:2008:32.CDO.1664.2008.1.

admissible.[191] As a specific form of satisfaction, publication of the court judgement has been sought in the past.

Concerning the disgorgement of unjust enrichment gained by the undertaking in breach of competition law,[192] the plaintiff needs to demonstrate that the defendants enriched themselves without a legal entitlement. There have been several such claims in the past, but currently they are rather rare.

Concerning the nullity of a legal act, the claimant needs to ask the court to declare the act void.

The Czech law is very specific in this regard: "*A declaration whether there is or there is not a specific legal relationship or a right may be claimed only if there is a pressing legal interest thereupon*".[193] Thus, unlike in case of injunctive relief (or claims for damages), the claimant must first establish his *pressing interest* on the declaration, i.e. that in order to protect his rights, he specifically needs the declaration and not other remedies. After that, he must establish that the conduct of the plaintiff breaches competition law.

Finally, an interim injunction may be issued if it is necessary to provisionally settle relationships between parties to the proceedings.[194] An interim injunction order may have both negative (an order to refrain from something) as well as positive (an order to do something) form.[195] The court may order an interim injunction both before initiation of the court proceedings on the merits[196] and in course of them.[197] The interim injunction may be set for a definite or non-specified period of time; in any event, the interim injunction would elapse at the latest should the action of the plaintiff be dismissed or, in case the plaintiff was successful with the action, 15 days after the final judgement became enforceable.[198] Interim injunctions are frequently sought in conjunction with restraining orders.

191 Sec. 2951 (2) CzCC.
192 Sec. 2991 *et seq. Cz*CC.
193 Sec. 80 CzCPC.
194 Sec. 74 *et seq CzCPC.*
195 Sect. 76 of the CzCPC.
196 Sec. 74 CzCPC.
197 Sec. 102 (1) CzCPC.
198 Sec. 77 CzCPC.

4. Case law relevant for private enforcement of competition law

Private enforcement stands on the same principles as Czech civil law in general, with the exception of a few specific provisions for damages claims, contained in the CzCDA. Therefore, all the relevant Czech case-law is applicable. In this section, we will discuss the jurisprudence concerning causality, as it is important for all the private enforcement claims, and the harm. We will also refer to jurisprudence concerning the eligibility of claims for nullity.

4.1 Case-law on causality

The causal nexus between the illegal conduct and the harm needs to be substantiated to the extent of near certainty; it is not enough to claim it is probable.[199] [200] The causation is normally treated as a condition *sine qua non* – without the infringement, the harm would not have occurred (or would have occurred differently);[201] [202]it is a matter of facts, not a matter of law.[203]

This basic reasoning is further refined by identification of conditions relevant from the legal point of view and assessment of the intensity of the cause. Thus, as a second step, it is often necessary to perform an analysis of *adequate causality* – not only would the harm not have happened without the cause, but the harm is under general course of affairs and general experience the consequence of the conduct in question.[204] The reason behind this second step is the fact that the consequences of a conduct for which the infringer is to be held

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199 CZ: Supreme Court, Judgment of 27 September 2005, No. 25 Cdo 508/2005, ECLI:CZ:NS:2006:25.CDO.508.2005.1.

200 See also HULMÁK, Milan et al. *Občanský zákoník VI. Závazkové právo. Zvláštní část (§ 2055-3014). Komentář*. C.H,Beck, 2014, p. 1550.

201 CZ: Constitutional Court, Judgment of 1 November 2007, No. I. US 312/05, ECLI:CZ:US:2007:1.US.312.05.1.

202 See also HULMÁK, Milan et al. *Občanský zákoník VI. Závazkové právo. Zvláštní část (§ 2055-3014). Komentář*, p. 1551.

203 CZ: Supreme Court, Judgment of 21 February 2002, No. 21 Cdo 300/2001, ECLI:CZ:NS:2002:21.CDO.300.2001.1.

204 CZ: Supreme Court, Judgment of 24 March 2011, No. 28 Cdo 3471/2009, ECLI:CZ:NS:2011:28.CDO.3471.2009.1. (MISSING PARA?)

liable need to be foreseeable – if a reasonable person would not be able to foresee the consequence, there is no causal link. The theory of adequate causality is generally used in competition cases.[205]

The final step is typically the assessment of the protective purpose of the legislation;[206] in essence, it is only possible to claim damages in respect of the harm that the legislation breached was supposed to prevent.[207] Competition law protects economic rights of undertakings and consumers; other harmful effects, e.g. deterioration of health as a consequence of stress caused by anticompetitive conduct would not be covered.[208]

4.2 Case-law on harm

The infringement of competition law must cause harm to a victim. This *harm* cannot be equalled to the distortion of competition; the distortion of competition is a necessary condition for a conduct to be anticompetitive, and thus, illegal. In addition to that, the illegal conduct must cause *specific* harm to the victim.[209] As will be discussed below, the harm may constitute of both the actual damage and the lost profit.[210]

The harm needs to be precisely substantiated. As far as the *actual damage* is concerned, it covers the loss which has already occurred; according to the case-law of the Constitutional Court, it is the harm to assets which can be expressed in money, consisting in the reduction, decrease or diminution of assets already possessed by the victim, as well as the expenses necessary to remedy such diminution.[211] Concerning the *lost profit*, it covers the profit the victim would have achieved, but has lost it because of the illegal conduct. According to the case law

[205] MELZER, Filip and Petr TÉGL. *Občanský zákoník : velký komentář. Svazek IX, § 2894-3081*. Leges, 2018, p. 1216.

[206] HULMÁK, Milan et al. *Občanský zákoník VI. Závazkové právo. Zvláštní část (§ 2055-3014). Komentář*, p. 1556.

[207] CZ: Constitutional Court, Judgment of 1 November 2007, No. I. ÚS 312/05, ECLI:CZ:US:2007:1.US.312.05.1.

[208] MIKULÍKOVÁ, Lucie. *Soukromoprávní vymáhání soutěžního práva v ČR. Teorie a praxe*. C. H. Beck, 2020, p. 245.

[209] *Ibid*., p. 145.

[210] Section 2952 of the CzCC.

[211] CZ: Constitutional Court, Judgment of 30 April 2002, No. Pl. ÚS 18/01, ECLI:CZ:US:2002:Pl.US.18.01.1.

of the Supreme Court, it applies to situations where the conduct leading to profit has already started (or was without doubt about to start), but it was interrupted by the illegal conduct; under regular course of affairs, the profit would have emerged.[212] The fact that certain conduct could not have been realised by the victim is not enough to substantiate the lost profit.[213] It is not enough to show that the profit was probable, it needs to be substantiated that but for the illegal conduct of the infringer, the profit would have occurred.[214]

In one of the few antitrust damages cases already decided by courts, the Municipal Court in Prague dismissed the action stressing that in order to establish lost profit, it is necessary to show "*certainty, not just probability*" of profit, and that "*mere hypotheses based on several economic models*" were not enough;[215] it is not necessary for the claimant to be able to quantify the damages precisely at this stage of the proceedings, he only needs to demonstrate that an activity that would – under ordinary course of affairs – bring profit, was stopped by the defendant. In another antitrust case, decided by the Higher Court in Prague, the court declared that "*the construction of the hypothetical lost profit, which is subject to fulfilment of further conditions*", was not sufficient.[216] In another case, construction of the lost profit based on a hypothetical agreement that has not yet been concluded was also rejected.[217]

The courts are rather strict in requiring specific circumstances leading to the lost profit to be demonstrated by the claimant. In the predatory pricing case mentioned above, the claimant has already started its business activities, the only reason it stopped was the predatory conduct of the defendant; for three months, the claimant attempted to stay in the market by constantly modifying its prices, but he was ultimately forced to leave it; the conduct finished after 3 months.

Thus, unless the claimant is able to prove that he has actually done everything necessary to achieve the profit, and only the action of the defendant

[212] CZ: Supreme Court, Judgment of 25 October 2014, No. 25 Cdo 2912/2012, ECLI:CZ:NS:2014:25.CDO.2912.2012.1.

[213] CZ: Supreme Court, Judgment of 28 January 2009, No. 25 Cdo 3586/2006, ECLI:CZ:NS:2009:25.CDO.3586.2006.1.

[214] CZ: Supreme Court, Judgment of 17 April 2012, No. 28 Cdo 1824/2010, ECLI:CZ:NS:2012:28.CDO.1824.2010.1.

[215] CZ: Municipal Court in Prague, Judgment of 10 December 2014, No. 21 Cm 14/2014.

[216] CZ: Higher Court in Prague, Judgment of 29 July 2015, No. 3 Cmo 316/2014.

[217] CZ: Municipal Court in Prague, Judgment of 25 February 2004, No. 19 Cm 246/2001.

prevented it, it is unlikely that a Czech court would award damages. At least a detailed business plan would be required, but the court could also ask for actual steps in order to achieve it.

Under exceptional circumstances, when the quantum of damages cannot be precisely determined or can be determined only with disproportionate difficulties, the quantification may be done by court.[218] Those provisions may be of help when a claimant establishes that it suffered a loss as a consequence of the unlawful conduct of the defendant but the exact amount of the loss suffered cannot be established. There are no reported private competition litigation cases when these provisions had been used. The court's assessment must be based on the facts of the case at hand that allow the court to make certain (even though they may be approximate) conclusions as regards the quantum of the pursued claim;[219] furthermore, the "estimation" of the harm suffered by the court can occur only when its precise calculation is practically impossible, i.e., it cannot be calculated even with the assistance of a court expert.[220]

4.3 Case-law on nullity

The purpose of claims for declaration under the Czech law is prevention, to avoid future disputes. As the Supreme Court puts it: "*A claim for declaration has a preventive character and finds its place in situations where, on the one hand, it may be used to eliminate a threat to a right or an uncertainty in a legal relationship, and an appropriate remedy cannot be made in another way, or, on the other hand, when the claim for declaration is more effective than other legal instruments in addressing the content and characteristics of a legal relationship and it may be used to create a legal framework, which guarantees prevention of future disputes among parties to the proceedings. […] In addition to that, the claim for declaration […] is an instrument enabling granting legal protection to the legal position of the claimant before this position has been harmed, and its purpose is therefore in principal to grant a preventive protection; it is therefore not suitable in particular*

[218] Identical provisions of Sec. 4 (4) CzCDA, Sec. 2955 CzCC and Sec. 136 CzCPC.

[219] CZ: Supreme Court, Judgment of 21 February 2008, No. 32 Odo 871/2006, ECLI:CZ:NS:2008:32.ODO.871.2006.1.

[220] CZ: Supreme Court, Judgment of 26 May 2010, No. 23 Cdo 1299/2008, ECLI:CZ:NS:2010:23.CDO.1299.2008.1.

in situations when the legal relationship or right had been infringed and where it is appropriate to use a claim for performance".[221]

Thus, claims for nullity cannot be routinely employed under the Czech law. They are reserved for situations when nullity itself is the ultimate goal the claimant seeks. If the claimant has already been harmed or he seeks to change the behavior of the defendant, other actions need to be used, e.g. claims for damages or injunctions.

5. Private enforcement cases

It is problematic to provide a complete and exhaustive overview of the private enforcement case law in the Czech Republic. Although there have been attempts in this area in the past,[222] the data presented cannot be assessed as fully complete. First of all, it must be stated that Czech civil courts do not keep any separate records of competition cases, but register them together with disputes concerning unfair competition, and relevant decisions are also not published in one designated place, so identifying relevant cases is not only time-consuming, but often also quite financially demanding.[223],[224]

Regarding the number of cases over the past twenty-five years, the volume of claims has been negligible, with annual figures ranging from zero to three new lawsuits. The average duration of court proceedings is approximately five years; however, this figure is somewhat distorted by an outlier, as the longest case lasted for more than fourteen years.[225]

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221 CZ: Supreme Court, Judgment of 22 January 2019, No. 26 Cdo 2147/2018, ECLI:CZ:NS:2019:26.CDO.2147.2018.1.

222 PETR, Michal and Eva ZORKOVÁ. Soukromé prosazování v České republice. *ANTITRUST*. 2016, vol. 2.; PETR, Michal and Eva ZORKOVÁ. Zkušenost se soukromým prosazováním soutěžního práva v ČR. *ANTITRUST*. 2020, vol. 3.

223 The problem is undoubtedly the overall inconsistency in providing information and generally in responding to requests for information under the Act No. 106/1999 Coll., Act on Free Access to Information (*Zákon o svobodném přístupu k informacím*) across individual courts in the Czech Republic.

224 For more details see also ZORKOVÁ, Eva. *Uplatňování nároků na náhradu škody z porušení soutěžního práva*. 2020, PhD thesis, Palacký University in Olomouc.

225 CZ: Supreme Court, Judgment of 21 December 2010, No. 23 Cdo 3217/2009, ECLI:CZ:NS:2010:23.CDO.3217.2009.1.

Regarding the claims invoked by plaintiffs, breaches of competition law are raised as an independent ground for action in only a limited number of cases. More commonly, the alleged basis for initiating a claim also involves a violation of another legal provision, most frequently contract law or the law on unfair competition. Nevertheless, Czech court decisions often reveal instances where competition law and unfair competition law overlap.[226] For example, the reasoning in *Neovize v. Lexum*[227] suggests that the court, when evaluating the possible fulfilment of the elements of the general clause on unfair competition, effectively applied the so-called *Akzo test*, which is routinely employed by both the CzNCA and the Commission in assessing potential below-cost pricing under Article 102 TFEU. This approach includes the application of a rebuttable legal presumption: prices set below the level of average variable costs are considered an abuse of a dominant position, provided that the long-term criterion is also satisfied (the so-called first Akzo rule), whereas prices above average variable costs but below average total costs may be deemed predatory if their purpose is to eliminate competitors from the market (the so-called second Akzo rule).[228]

Analogously to the cases discussed above, in the proceedings of *Czech Products v. DM Drogerie*, the requirement of a dominant position on the part of the defendant was not met for the potential application of (public law) competition rules. While the courts did not assess the case from the perspective of unfair competition, they found that the fees charged to support the opening of new stores were contrary to good faith and therefore constituted unjust enrichment by the defendant. The claim, however, was only partially successful, as part of the restitution claim was barred by the statute of limitations. The courts additionally noted that, had the defendant achieved a certain market share, the conduct would have constituted a violation of competition law even in the public-law context.[229] Given the nature of the alleged practice, it cannot be excluded that the conduct in question might be assessed not only under the lens of abuse

[226] MIKULÍKOVÁ, Lucie. Souběh nekalé soutěže a omezování hospodářské soutěže v judikatuře civilních soudů. *Právní rozhledy*. 2024, no. 13–14.

[227] CZ: Municipal Court in Prague, Judgment of 11 July 2017, No. 2 Cm 29/2014.

[228] The Judgment of 27 March 2012, *Post Danmark (Post Danmark I)*, C-209/10, EU:C:2012:172, summarized both "Akzo rules." To establish an intention to exclude competitors, indirect evidence is also sufficient; see also Judgment of 3 July 1991, *Akzo v. Commission*, C-62/86, EU:C:1991:286, para. 60.

[229] CZ: Supreme Court, Judgment of 30 April 2009, No. 23 Cdo 2184/2007, ECLI:CZ:NS:2009:23.CDO.2184.2007.1.

of a dominant position, had the defendant held such a position. The common feature of the cases analyzed above was, therefore, the absence of a dominant position on the part of the defendant. As a result, civil courts in two instances evaluated the conduct under the general clause on unfair competition; however, no breach of good commercial conduct was established.

The civil court took a different approach to the potential overlap between the restriction of competition and unfair competition in the case of *Volný v. O2 Czech Republic*.[230] In this case, the plaintiff sought damages exceeding CZK 4,000 million (~EUR 160 million) from O2 Czech Republic, representing lost profits for the period from 1 January 2004 to 31 December 2010, allegedly caused by the defendant's abuse of a dominant position through margin squeezing in the broadband internet access market. The plaintiff also considered this conduct to constitute unfair competition. The Municipal Court in Prague, acting as the court of first instance, found the claim time-barred with respect to the portion of the damages relating to 2004 and 2005. The remaining part of the claim was dismissed on the grounds that, from at least 2006 onwards, the defendant no longer held a dominant position.[231] The court of first instance assessed this part of the claim under both public-law and private-law competition rules.

Based on above mentioned qualitative analyses of civil court decisions, several fundamental and recurring issues have been identified that hinder plaintiffs in asserting their rights. Foremost among these is the surprising fact that civil courts sometimes decline jurisdiction to decide on competition law matters. In the past, numerous disputes have arisen concerning the division of competencies between the CzNCA and civil courts. The most well-known of these is arguably the *Dalkia* case, concerning the alleged abuse of a dominant position by Dalkia companies. The civil court requested that the CzNCA initiate proceedings under the Act on the Protection of Competition (CzAPC); however,

[230] CZ. Municipal Court in Prague, Judgment of 25 April 2018, No. 41 Cm 13/2011895; and CZ: High Court in Prague, Judgment of 7 September 2020, No. 3 Cmo 114/20191073, which were overturned by CZ: Supreme Court, Judgment of 29 June 2022, No. 23 Cdo 659/20211156, ECLI:CZ:NS:2022:23.CDO.659.2021.3.

[231] It is noteworthy that the court of first instance rendered its decision on the claim before the CCA had decided to discontinue the administrative proceedings, having found no breach of Section 11CzAPC / Article 102 TFEU; see the subsequent CCA decision of 23 January 2019, No. ÚOHS-S109/2011/DP-02225/2019/830/JVj (*O2 Czech Republic*). The company Volný subsequently filed a complaint with the Commission.

after the CzNCA refused to commence proceedings even following a second request from the regional court, the civil court decided to continue the proceedings itself.[232] This was subsequently confirmed by the High Court in Olomouc.[233] However, a substantive decision was not reached, as the proceedings were discontinued following a merger between the claimant and the defendant.

Another issue is the repeatedly observed misunderstanding of the concept of an undertaking, which is particularly evident in the "older" case of *KOVOŠROT Děčín*. The defendant, a shareholder in a company engaged in waste management, was evidently equated by the Regional Court with a "competitor". The High Court in Prague disagreed with this interpretation and classified the defendant as an undertaking. However, based on the Court's formulation that "*the defendant may be considered, within the meaning of competition law, an indirect participant in competition*,"[234] it cannot be stated with certainty that the precise meaning of the term was clear to the court.[235].

The absence of reasoning influenced by competition law doctrine also appears problematic in relation to certain fundamental concepts, such as prohibited agreements[236] and, in particular, a dominant position and its abuse. Courts have frequently relied on reasoning that is unusual in competition law or does not meet the standards established by the CzNCA and the Commission. Proving that an abuse occurred is difficult for the claimant, even in situations where the CzNCA has already reached this conclusion, i.e., in follow-on claims. A very early example can be found in a case in which a physician based his claim on the allegation that the General Health Insurance Company (VZP) had abused its dominant position by refusing to enter into a contract for the provision and reimbursement of medical care. Although the claimant succeeded with his claim at first instance,[237] the High Court in Prague concluded on appeal that the abuse of dominance had not been proven. In reaching this decision, the Court evidently reasoned solely within the framework of sectoral health care regulation,

232 CZ: Regional Court in Ostrava, Resolution of 7 January 2005, No. 1 Cm 221/2000179.

233 CZ: High Court in Olomouc, Resolution of 31 October 2005, No. 7 Cmo 83/2005253.

234 CZ: Supreme Court, Judgment of 26 March 2008, No. 32 Odo 1042/2005, ECLI:CZ:NS:2008:32.ODO.1042.2005.1.

235 For more details see PETR, Michal. Who Bears Civil Liability for Competition Law Infringements in Central and Eastern Europe? *Global Competition Litigation Review*. 2019, no. 1.

236 CZ: High Court in Prague, Judgment of 15 March 2005, No. 3 Cmo 254/2004-115.

237 CZ: Regional Court in Hradec Králové, Judgment of 7 March 2002, No. 33 Cm 161/2000-71

rather than competition law.[238] The opinion of the High Court was subsequently confirmed by the Supreme Court.[239]

In other cases, it appears that courts understand the concept of abuse too narrowly, for example in the case of *Elektrobazar v. ELECTROWIN*. The High Court in Prague seemingly equated the concept of abuse of a dominant position solely with discrimination.[240] Subsequently, the Supreme Court also ruled in the case, confirming that, in the circumstances at hand, the refusal of a dominant undertaking to enter into the requested transaction (the sale of collected electronic waste) with any entity, nor the actions of the network owner of the take-back system for electrical equipment that prevented another undertaking from using it, could be considered an abuse of a dominant position.[241]

In some past decisions of Czech civil courts, the reasoning of the judgment gives the impression that a dominant undertaking deserves a certain degree of protection, for example in the case of *KARSIT HOLDING v. ŠKODA AUTO*. At first instance, the Regional Court in Prague adjudicated a dispute in which the claimant, *Karsit Holding*, sought the annulment of a settlement agreement and compensation for damages incurred in connection with its conclusion. Both companies operate in the automotive industry, and the claimant had been selected by the defendant, Škoda Auto, as a supplier for serial production. While the Regional Court correctly summarized in its judgment, at least in theory, what it means for a specific undertaking to hold a dominant position in the relevant market, including the special responsibilities of a dominant undertaking, it subsequently employed reasoning from which it rather follows that the claimant should bear some form of special responsibility. The court stated that the claimant "*must have been aware of the defendant's dominant position […] at the time it entered into the contractual relationship (a fact sufficiently well known), and therefore had to reckon with a certain degree of economic pressure that the dominant position of an undertaking in the market inevitably entails*".[242]

238 CZ: High Court in Prague, Judgment of 9 April 2004, No. 33 Cm 161/2000-71.

239 CZ: Supreme Court, Judgment of 29 September 2004, No. 32 Odo 32/2004, ECLI:CZ:NS:2004:32.ODO.32.2004.1.

240 CZ: High Court in Prague, Judgment of 20 May 2015, No. 3 Cmo 390/2014-288.

241 CZ: Supreme Court, Judgment of 6 January 2016, No. 23 Cdo 5730/2015, ECLI:CZ:NS:2016:23.CDO.5730.2015.1.

242 CZ: Regional Court in Prague, Judgment of 15 May 2008, No. 59 Cm 20/2008-18.

Even if the claimant succeeds in proving that anticompetitive conduct occurred, it is extremely difficult to quantify the damage, particularly in relation to lost profits, which is especially true for older cases, prior to the adoption of the CzCDA. An example of such a case can be found in *GTS v. ČESKÝ TELEKOM*, where the claim for damages was entirely dismissed by the court on the grounds that "*not all prerequisites for the defendant's liability for damages have been met*," as the claimant sought hypothetical amounts and submitted calculations based on a non-existent agreement that was supposed to be predicated on reciprocal performance by the parties.[243]

Problems may also arise in proving the causal link between anticompetitive conduct and the occurrence of damage, as well as in the presentation and disclosure of evidence, where courts have historically taken a very formalistic approach. In recent years, claimants have, of course, sought to make use of the CzCDA. For example, in the case of *RegioJet v. České dráhy*, the claimant requested the disclosure of evidence pursuant to Section CzCDA.[244] In connection with this case, the Supreme Court had also submitted a preliminary ruling request to the CJEU.[245]

The disclosure of evidence pursuant to Section 18 (1) CzCDA was also addressed in case *SPR v. ČEZ Distribuce*.[246] In these proceedings, the plaintiff sought an order compelling the defendant to disclose specified documents in connection with a claim for damages amounting to CZK 213,577,230, allegedly resulting from an abuse of a dominant position. The Regional Court dismissed the plaintiff's request on the grounds that she had failed to substantiate the credibility of her claim for damages. The High Court in Prague subsequently upheld this decision. The Supreme Court later dismissed the plaintiff's appeal,

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243 CZ: Supreme Court, Judgment of 30 November 2011, No. 23 Cdo 3170/2011, ECLI:CZ:NS:2011:23.CDO.3170.2011.1.

244 CZ: Municipal Court in Prague, Resolution of 17 April 2024, No. 32 Cm 23/2015, and CZ: High Court in Prague, Resolution of 18 October 2018, No. 3 Cmo 79/2018-509, which confirmed the CZ: Municipal Court in Prague, Resolution of the of 14 March 2018, No. 32 Cm 23/2015-462. See also CZ: Supreme Court, Resolution of 28 March 2023, No. 23 Cdo 616/2020-795, ECLI:CZ:NS:2023:23.CDO.616.2020.4; which dismissed the appeal against the cited resolutions, in connection with the Judgment of 12 January 2023, *RegioJet*, C-57/21, EU:C:2023:6.

245 CZ: Supreme Court, Resolution of 28 March 2023, No. 23 Cdo 616/2020, ECLI:CZ:NS:2023:23.CDO.616.2020.4.

246 CZ: Supreme Court, Resolution of 26 June 2024, No. 23 Cdo 3963/2023, ECLI:CZ:NS:2024:23.CDO.3963.2023.1.

thereby confirming the findings of the lower courts. The Constitutional Court ultimately rejected the plaintiff's constitutional complaint, which further affirmed the decisions rendered by the lower courts.

Evidence was also discussed in another case concerning passenger transport, namely in the case of *Leo Express v. České dráhy*.[247] In the aforementioned decision, the court addressed the issue of preserving the duty of confidentiality with respect to the annexes to an expert report, which had been prepared for the proceedings and submitted to the court as a means of evidence. The dispute was brought before the Supreme Court, which, in the concluding part of its ruling, emphasized that the special regime of protective measures concerning trade secrets is explicitly provided in Section 17 CzCDA. Nevertheless, the imposition of such a measure – namely, an obligation of confidentiality – may be ordered only in the context of a decision on an application for the disclosure of evidence within the meaning of Sections 10 CzCDA. It must, however, be taken into account that in the case at hand, the contested information had not been submitted to the court by the defendant pursuant to a judicial order based on Sections 10 CzCDA, but was instead disclosed to the expert in the course of the defendant's statutory duty to cooperate in the preparation of the expert report. Consequently, the imposition of a duty of confidentiality under the requirements of the CzCDA was not warranted in this particular instance.

In the Czech Republic, it is evident that, particularly in recent years, that disputes between transport operators have frequently arisen in the context of private enforcement of competition law. In 2022, the Supreme Court issued another decision in this field, namely in the case of *Asiana Transport v. Student Agency.*[248] Although this ruling does not concern the merits of a claim for damages, it constitutes an important precedent for the resolution of cases involving joint ventures and for delineating the rights and obligations of parties in such proceedings, particularly within the framework of competition law. The judgment addresses a scenario in which each partner within a consortium functions as a separate legal entity. The Supreme Court affirmed that each individual partner possesses locus standi in collective proceedings, thereby entitling them to participate in the proceedings as an independent party.

247 CZ: Supreme Court, Resolution of 31 August 2021, No. 23 Cdo 3596/2020, ECLI:CZ:NS:2021:23.CDO.3596.2020.1.

248 CZ: Supreme Court, Judgment of 29 June 2022, No. 23 Cdo 1995/2021, ECLI:CZ:NS:2022:23.CDO.1995.2021.1.

Another significant ruling within the area of private enforcement is the Supreme Court's judgment in case *Asahi Chemical v. Czech Republic*[249], which addresses the statute of limitations for claims for damages. In this context, it is particularly noteworthy that the Supreme Court declined to apply Section 9 (2) CzCDA, as it only entered into force on 1 September 2017 and cannot operate retroactively with respect to events occurring prior to that date. The CzCDA is effective in the Czech Republic since 1st of September 2017. Pursuant to its Section 36, proceedings concerning damages resulting from anti-competitive conduct that were initiated after 25 December 2014 are to be concluded under this Act, whereas the legal effects of acts performed before this date remain preserved. This provision constitutes the national transposition of Article 22 DD, which expressly prohibits the retroactive application of domestic measures enacted to implement the substantive provisions of the DD.

With regard to the claimant's success on the merits, success has been achieved in only approximately ten percent of cases, and only partially. In the majority of all finally concluded cases, the claim was dismissed, while in the remainder the claim was either withdrawn, or a settlement was reached between the parties. In many of the aforementioned cases, the reason for dismissal of the claim was an informational imbalance, which manifested itself in the claimant's inability to bear the evidentiary burden relating to the proof of a public law infringement of competition law. In most claims, the claimant asserted multiple claims in a single filing (e.g., contesting the validity of a contract while simultaneously seeking damages).

The most common claims are for damages, followed by claims seeking injunctions. As regards preliminary injunctions, these are granted in approximately one quarter of cases, in some instances even repeatedly. Immediately following damages claims, the most frequent claims are therefore those seeking an injunction, i.e., an order to act in a certain manner, and claims for the annulment of a contract, most often due to a conflict with competition law. Less common are claims for restitution of unjust enrichment and, more frequently in the past, claims for adequate satisfaction and publication of the judgment. For example, in the case of *Neovize v. Lexum*, the claimant sought adequate satisfaction in the form of an apology for alleged non-pecuniary harm caused

[249] CZ: Supreme Court, Judgment of 18 June 2024, No. 30 Cdo 912/2024, ECLI:CZ:NS:2024:30.CDO.912.2024.1.

by the defendant's conduct, which allegedly consisted of offering laser eye surgeries at below-cost prices. The defendant, at its clinic in Brno, offered surgery on one eye for CZK 6,900 (~EUR 275), whereas the claimant argued that the normal price for this service should have been approximately CZK 29,000 (~EUR 1,150). The promotional offer lasted for approximately three months. According to the claimant, this conduct was aimed at restricting her business activities as well as the activities of other competitors in the market.[250]

All the case mentioned above concern anticompetitive agreements and (mostly) abuse of dominance. Only one case we are aware of concerned State Aid. The case of *RegioJet and Student Agency v. České dráhy and Správa železnic*[251] concerned the recovery of allegedly unlawful State Aid and the question whether a national court may order the restitution of such aid once the limitation period governing the Commission's powers under EU law has expired. The claimants (RegioJet and Student Agency) challenged the sale of part of railway assets between České dráhy and Správa železnic, arguing that the purchase price had been artificially inflated and thereby constituted selective State Aid granted to České dráhy, which distorted competition. The Municipal Court and the High Court in Prague dismissed the action. The High Court reasoned that, even assuming the measure in question constituted State Aid, payment of the purchase price had already become "existing aid" within the meaning of Regulation 2015/1589, since the limitation period applicable to the Commission had elapsed. Consequently, a claim for recovery could not be pursued. The Supreme Court, however, noted that the dispute turned on the interpretation of EU law—specifically, whether the expiry of the Commission's limitation period under Article 17 of Regulation 2015/1589 (RegSAP)[252] precludes a national court from ordering restitution of aid granted in breach of the notification obligation laid down in Article 108 (3) TFEU. The Supreme Court therefore stayed the proceedings and referred a preliminary question to the CJEU, asking whether national courts remain obliged to order recovery of unlawful aid notwithstanding

[250] CZ: Municipal Court in Prague, Judgment of 11 July 2017, No. 2 Cm 29/2014.

[251] CZ: Supreme Court, Judgment of 29 February 2024, No. 23 Cdo 1180/2021, ECLI:CZ:NS:2024:23.CDO.1180.2021.3.

[252] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification) (*OJ L 248, 24.9.2015, pp. 9 – 29).*

the fact that, at the time of their decision, the Commission's limitation period had expired.

Following the CJEU's judgment,[253] the Supreme Court annulled the lower courts' decisions and remitted the case for further proceedings. The CJEU clarified that the expiry of the ten-year limitation period under Article 17 (1) of RegSAP, which prevents the Commission from adopting a recovery decision, is not sufficient to render the aid lawful ex post or to extinguish liability vis-à-vis third parties adversely affected by the aid. Aid that has not been notified and authorised under Article 108 (3) TFEU remains unlawful aid. National courts are therefore empowered–and indeed required–to order the recovery of such unnotified and unauthorised State Aid, even where the Commission is time-barred from exercising its own powers. The Commission's limitation period, established under secondary EU law, does not constrain the competence of national courts when adjudicating actions brought by competitors or other interested parties. This interpretation opens the way for actions by competitors or other claimants who allege that they have suffered harm as a result of unnotified aid, as national courts may still order recovery in their favour. The CJEU confirmed that Article 108(3) TFEU, which requires prior notification of aid to the Commission before it is implemented, enshrines the so-called standstill obligation, and that a breach of this obligation cannot be cured by the mere expiry of the Commission's limitation period. National courts must therefore ensure effective remedies, including restitution of the unlawful aid, even if the Commission itself is no longer entitled to require recovery.

6. Evaluation of the environment for private enforcement of competition law

In our opinion, the legislation on private enforcement is adequate in the Czech Republic. Some improvements are of course possible, as will be discussed in the section below, we are however not aware of any significant deficiencies in the legislation. Even though follow-on suits used to be very rare, as when the CzNCA issued a final decision, the private claims were frequently time-barred,

[253] Judgment of 7 December 2023, *RegioJet a STUDENT AGENCY,* C-700/22, ECLI:EU:C:2023:958.

this problem was remedied – at least with regard to damages claims – by the transposition of the DD.

Several factor may be causing the limited extent of private enforcement. Firstly, court proceedings in the Czech Republic are relatively long. According to our previous research, the average duration of court proceedings in private enforcement of competition law is approximately five years. Secondly, the courts are unpredictable. Whereas some, in particular the Municipal Court in Prague, deciding the majority of antitrust cases, has gained sufficient level of expertise, other courts not familiar with even the basic principles of competition law, leading to absurd judgments, as reported in the previous section. Thirdly, the awareness concerning private enforcement is limited. Vast majority of the cases cannot be found, there is no public list of them, most of the judgments are not published. In addition to that, there are no "big cases" demonstrating successful private enforcement. Only a single case where damages were awarded is known in the Czech Republic, and the claimant was only partially successful.

7. Suggestions for further development

In light of the foregoing considerations, several suggestions strengthening the private enforcement of competition law in the Czech Republic can be made.

Firstly, special rules on private enforcement of competition law should not concern only claims for damages, but private enforcement in general. For example, without limitation periods starting to run only after the NCA's decision, any follow-on private enforcement (but for the claims for damages) is practically impossible.

Secondly, it would be beneficial to designate a single specialized regional court to adjudicate all the matters concerning the private enforcement of competition law, thus allowing for the necessary specialization. Feedback obtained from the legal profession suggests that the establishment of a court with exclusive competence in competition law would be perceived positively.[254] As regards practical experience in this field, the largest number of private enforcement

[254] PETR, Michal and Eva ZORKOVÁ. *Zkušenost se soukromým prosazováním soutěžního práva v ČR*.

cases to date has been handled by the Municipal Court in Prague, approximately equal to the combined caseload of all other regional courts. Nevertheless, even this most active court has dealt with an average of merely one case every two years, which is an extremely low volume for developing genuine expertise. Such specialization should not be confined to the application of the CzCDA, but apply to the private enforcement of competition law in its entirety. Thirdly, for a meaningful development of private enforcement of competition law, it is also necessary to increase awareness of private enforcement not only among professionals but also among the general public. According to the lawyers we surveyed in our previous research and who are actively involved in competition law, the interest of their clients in the private enforcement of competition law has increased, although this interest has not been fundamentally reflected in the number of new cases.[255] In connection with this, the private enforcement judgments need to be published in a readily accessible form. If the courts informed the CzNCA about their cases, the CzNCA could prepare a database of them.

8. Summary

Private enforcement of competition law is rather limited in the Czech Republic. If at all, it concerns the "traditional" cases of anticompetitive agreements and abuse of dominance, not mergers or state aid.

The legislation is not necessarily to blame, even though it is heavily tilted in favour of claims for damages; these rules, contained now on the CzCDA, should be extended to private enforcement in general, as damages claims are in most cases accompanied by other claims.

Further specialization of civil judges would also be beneficial, though it is admittedly difficult in situation where the cases themselves are rare.

[255] ZORKOVÁ, Eva. *Uplatňování nároků na náhradu škody z porušení soutěžního práva*.

CHAPTER 3

Private enforcement of competition law in Lithuania: any success stories?

by

Jurgita Malinauskaite*

1. Introduction

After regaining independence in 1991, Lithuania started major transformations to return to its European roots, including the preparation to joining the EU, which involved launching competition law and establishing a competition authority. Lithuania enacted its first Law on Competition (LtCL, *Lietuvos Respublikos konkurencijos įstatymas*) in 1992.[257] After the major amendments, especially in terms of aligning with EU competition, the 1999 LtCL was launched, which also established an independent body (in terms of decision-making) responsible for the enforcement of competition law in Lithuania known as the Competition Council – *Konkurencijos Taryba* (LtNCA). The LtNCA has power to adopt resolutions which specify the circumstances of the violation of the LtCL, evidence of the fault of the offender, explanations of the offender, the applicant and other persons submitted to the LtNCA, and their evaluation, reasons for the ruling and legal basis. The main objectives of competition policy are summarised in the LtCL and in the LtConstitution, which is a supreme law in the Republic.[258] According to Article 46 of the LtConstitution, 'the law shall prohibit the

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257 Act. No. VIII-1099 Law on Competition, as amended, Official Gazette.

258 Article 7 of the Constitution provides that 'Any law or other act, which is contrary to the Constitution, shall be invalid'. 1992, No. 33-1014 (1992-11-30). The current Constitution of the Republic of Lithuania was adopted by way of a referendum on 25 October 1992, following the re-establishment of the independence of Lithuania after fifty years of Soviet occupation. For further discussion, see JARUKAITIS, Irmantas and Gintaras ŠVEDAS. The Constitutional Experience of Lithuania in the Context of European and Global Governance Challenges. In: ALBI, Anneli and Samo BARDUTZKY, eds. *National Constitutions in European and Global*

monopolisation of production and the market, and shall protect freedom of fair competition. The State shall defend the interests of the consumer'. In terms of the anticompetitive provisions, Article 5 of the LtCL mirrors Article 101 TFEU (save a 'cross-border trade' element), whereas the national equivalent of Article 102 TFEU is Article 7 (previously, Article 9) of the LtCL.[259]Competition law enforcement in Lithuania is based on two main enforcement pillars: public enforcement and private enforcement. Lithuania had statutory provisions allowing for the recovery of damages even before the transposition of the Antitrust Damages Directive (DD),[260] mainly through the ordinary litigation procedure (i.e. regulated by the Code of Civil Procedure – LtCPC[261]). Despite these rules, judicial practice was scarce. If one focuses on the compensatory goal of private enforcement, this has not been very effective, as compensation has barely been awarded in Lithuania.[262]

To react to the underdevelopment of private enforcement in the majority of the EU Member States, the DD was issued, seeking to remove a number of obstacles to damages actions brought before national courts by victims of anti-competitive behaviour, providing, *inter alia,* rules on the parties' access to evidence, limitation periods, and the passing-on defence. This type of legislation allows flexibility to address cultural intricacies of the national systems of the EU Member States.

This chapter will discuss private antitrust enforcement in Lithuania the preas well as post- transposition of the DD, including the challenges that the affected parties face in invoking their claims for damages resulting from infringement of the antitrust provisions in practice.

As far as the methodology is concerned, to find the relevant court judgments, several databases were explored, including *Infolex* (www.infolex.lt) by

Governance: Democracy, Rights, the Rule of Law. The Hague: T.M.C. Asser Press, Springer Open, 2019.

259 Law No. XIII-193 on Amendments to the Act No. VIII-1099 Law on Competition, TAR.

260 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 (OJ L 349, 05/12/2014, p. 1–19).

261 Act. No. IX-743 Code of Civil Procedure of the Republic of Lithuania, as amended, Official Gazette.

262 MALINAUSKAITE, Jurgita. Private Enforcement of Competition Law in Lithuania: a Story of Underdevelopment. *Global Competition Litigation Review*. 2013, no. 3, pp. 123–135.

subscription only and *Liteko* (www.liteko.teismai.lt). While *Liteko* is a free of charge database, it is not easy to navigate, unless a case number is known. There have also been private enforcement cases in Lithuania where antitrust provisions were used, not as a "sword" (i.e. used by parties as a basis for claiming damages or injunctive relief), but as a "shield" (i.e. when competition law provisions are used in defence against a contractual claim, mainly to defend against enforcement of the contract). The focus of this chapter is "sword" cases covering both stand-alone as well as follow-on claims initiated prior to and after the transposition of the DD, as "shield" cases are barely possible to identify. Given that details of settlements are usually not public, as secrecy is a condition; all competition litigation settlements were eliminated from this research.

2. Legislative framework

In Lithuania, the LtCL,[263] is the main legal act transposing the DD and thus, governing EU Antirust Damages Actions. The amendments to the LtCL that transposed the DD were adopted on 12 January 2017 and published in the Lithuanian Register of Legal Acts on 18 January 2017, entering into force on 1 February 2017.

Lithuania did not expand the scope of the DD, meaning that compensation for the harm caused by an infringement of Article 5 or 7 of LtCL or Article 101 or 102 TFEU can be claimed (Article 43 of the LtCL). Article 44(2) of the LtCL further states that full compensation for harm must place the injured party who is to be compensated for harm in a position in which that person would have been had the infringement referred to in Article 43 of the LtCL not been committed, yet, unjust enrichment shall be prohibited. Full compensation for harm covers direct loss and loss of profit as well as interest calculated from the moment of occurrence of that harm.

While the DD does not specify which national court should have jurisdiction for antitrust damages claims, Lithuania assigned one national court. Art. 51(2) of the LtCL stipulates that the Vilnius Regional Court has exclusive jurisdiction over antitrust damages claims. The judgments of Vilnius Regional Court can be appealed to the Court of Appeal of the Republic of Lithuania,

[263] No. VIII-1099, published in Valstybės žinios, 1999-04-02, No. 30-856

and then to the Supreme Court of the Republic of Lithuania (the final court of appeal). One must note that the Court Reform in 2024 in Lithuania, which introduced some changes to the administrative court system, may have impact on public enforcement of competition law and consequently, on private antitrust enforcement. Until 2024, there were two regional administrative courts: 1) Vilnius Regional Administrative Court and 2) Regional Administrative Court of Regions (i.e. Kaunas, Klaipėda, Šiauliai, and Panevėžys). To optimise the resources and workload of these two courts, the Regional Administrative Court of Regions was joined to the Vilnius Regional Administrative court with the name being changed to the Regional Administrative Court.[264] While in the past only the Vilnius Regional Administrative Court had exclusive jurisdiction to review the LtNCA's decisions, this is no longer the case. This is concerning, as the LtNCA's decision was recently overturned by the non-Vilnius Regional Administrative Court in 2025. It may also have impact on private enforcement in the future, as the majority of private enforcement cases in Lithuania are based on follow-on claims.

2.1 Substantive law issues

2.1.1 Limitation periods

Article 49(2) of the LtCL provides that the limitation period for bringing actions for damages of infringements identified in Article 43 of the LtCL are five years. Pursuant to Article 1.125 § 9 of the LtCC (Lithuanian Civil Code)[265] the statutory limitation period for lodging claims for damages is three years. Therefore, prior to the DD, there was no special provision in relation to damages arising from the anticompetitive infringements. Article 49(1) of the LtCL denotes that limitation periods for bringing actions for damages for infringement under Article 43 of the LtCL shall begin to run when the infringement has ceased and when the claimant knows, or can reasonably be expected to know all the following circumstances:

– of the behaviour of a defendant and the fact that it constitutes an infringement of Article 43 LtCL;

[264] MALINAUSKAITE, Jurgita. Judicial review of competition law decisions: an empirical study of the Lithuanian context. *Journal of Antitrust Enforcement*. 2025. DOI: 10.1093/jaenfo/jnaf003.

[265] Act. No. VIII-1864 Civil Code, as amended, Official Gazette.

– of the fact that the infringement of competition law caused harm to it;
– the undertaking which is liable for damages for an infringement.

2.1.2 Joint and several liability

The concept of joint and several liability is a well-established principle in Lithuania, yet, it was still literally transposed.[266]

As far as the exceptions to the joint and several liability are concerned, Lithuania deviated from the DD by adding to the conditions for the SME exemption a third criterion, similar to that which the DD provides for immunity recipients, namely that the exemption only applies where full compensation can be obtained from the other undertakings that were involved in the same infringement of competition law. Therefore, an SME is still liable towards other injured parties than its direct and indirect purchasers or suppliers if the other injured parties are not able to recover full compensation from the other infringers.

2.1.3 Quantification of harm

There are no specific types of damages and harm under Lithuanian law. Instead, the general types of harm apply under civil law. These include lost profits and interest on awards of damages as well as a specific provision reflecting "pass-on" of damages. There is no quantified rebuttable presumption of cartel damages in Lithuania like in Hungary, Latvia or Romania.

Article 44(4) of LtCL provides that where, in the cases of an infringement (regarding Articles 101/102 TFEU and/or domestic equivalents), it is practically impossible or excessively difficult for the court to precisely quantify the suffered harm on the basis of the evidence available in the case, the court shall notify the parties to the proceedings that without being able precisely to quantify the harm, it shall estimate the level of the harm. Article 44(5) of the LtCL further states that where the court orders an expert examination in the proceedings for damages, the court's experts must, when conducting the expert examination, act in all cases pursuant to the European Commission's methodological documents concerning the quantification of harm. The Ministry of Justice defines state policy related to experts. Among other things, it also manages the list of experts of the Republic of Lithuania.

[266] Article 45 of the LtCL.

2.1.4 Passing-on of overcharges

The DD recognises the indirect purchaser's right to claim damages, yet, it instructs the Member States to provide that in such cases, the burden of proving the existence and scope of such a passing-on shall rest with the claimant (indirect purchaser), who may reasonably require disclosure from the defendant or from third parties.[267] The unique aspect of the DD is that it embraces a rebuttable presumption holding that the indirect purchaser shall be deemed to have proven a passing-on where that indirect purchaser has demonstrated that: (a) the defendant has committed an infringement of competition law; (b) the said infringement has resulted in an overcharge for the direct purchaser of the defendant; and (c) the indirect purchaser has purchased the goods or services that were the object of the said infringement, or has purchased goods or services derived from or containing them. The defendant (infringer of the competition rules) is entitled to rebut the presumption by demonstrating 'credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the indirect purchaser'.[268]

Before the transposition of the DD, Lithuania did not specifically include indirect purchasers in damages cases and therefore, they had difficulties in proving their standing to initiate such claims. The revised LtCL incorporated notions of 'direct purchaser' (*tiesioginis* pirkėjas*)* and 'indirect purchaser' (*netiesioginis pirkėjas)*[269] and their explicit right to damages claims.[270] The Lithuanian legislator literally transposed the DD's chapter on passing-on of overcharges almost by the letter. Upon the receipt of the damages action claim, a court will assess whether (and to what extent) the share of any overcharge was passed on to claimant's purchasers. These assessments will be calculated pursuant to the European Commission guidance.[271]

267 Article 14(1) of the DD.
268 Article 14(2) of the DD.
269 Article 3 (20) and (12) of the LtCL.
270 Article 47(2) the LtCL.
271 Article 47(1) the LtCL.

2.2 Procedural law issues

Disclosure

Generally, it is accepted that in most Member States the access to evidence was one of the main obstacles to private enforcement.[272] Due to so-called 'information asymmetries' it was difficult for the victims to bring forward the necessary evidence held exclusively by the infringer or by third parties to prove their case. Therefore, the DD embedded some provisions to facilitate this access by introducing a more active role of judges in 'disclosure of evidence'. Even though under Lithuanian civil litigation a request to access to evidence could be made,[273] it was difficult to obtain any form of evidence retained by the opposing party in practice. For instance, the judge of the Supreme Court of Lithuania Stripeikiene observed that 'no requirement to disclose information is established in Lithuanian Law'.[274]

To avoid any fishing expeditions, the access requesting party must reasonably specify such evidence. An 'alien' element unknown to the Lithuanian legal system is to order the disclosure of relevant categories of evidence. Therefore, the LtCL indicates that these categories of evidence must be clearly defined specifying their nature, format, subject matter or content, and period when the requested documents were prepared.[275] As a result of these detailed instructions,

[272] Commission staff working document, Impact Assessment Report, Damages actions for breach of the EU antitrust rules, Accompanying the proposal for a Directive of the European Parliament and of the Council 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, SWD(2013) 203 final, 11.6.2013. Available at: http://ec.europa.eu/competition/antitrust/actionsdamages/impact_assessment_en.pdf.

[273] For instance, Article 199 of the Act. No. IX-743 Code of Civil Procedure of the Republic of Lithuania, as amended, Official Gazette the claimant to request the court to order the disclosure of evidence from the defendant or third parties subject to the certain conditions (i.e. the relevance of such information to the case in question and the fact that the defendant or a third party actually possesses it).

[274] STRIPEIKIENE, Janina. Klevo Lapas v. ORLEN Lietuva. In: MONTI, Giorgio and Pier Luigi PARCU, eds. *European Networking and Training for National Competition Enforcers (ENTraNCE 2012) Selected Case Notes* [online]. Badia Fiesolana: European University Institute, 2014, p. 37. Available at: https://cadmus.eui.eu/bitstream/handle/1814/31771/RSCAS_2014_68.pdf?sequence=1; MALINAUSKAITE, Jurgita and Caroline CAUFFMAN. *The Transposition of the Antitrust Damages Directive in the Small Member States of the EU—A Comparative Perspective*, Journal of European Competition Law & Practice, 9(8), 2018, pp. 496-512.

[275] Article 52(2) of the LtCL.

it is most likely that specified items of evidence instead of relevant categories of evidence will be favoured (at least by courts).[276] Article 52 of the LtCL which specifically notes that the request for disclosure must be proportionate: the court will balance the legitimate interests of all parties involved in a claim and other third parties concerned, including legitimate interests of confidentiality.

Article 52(5) of the LtCL provides that the court has the power to order disclosure of evidence containing confidential information, if it is relevant to the civil claim for damages. It also denotes several measures that could be undertaken by the court to protect this information: i) by identifying the proceeding participants responsible for the protection of the confidential information; ii) by prohibiting the confidential part of evidence to be used for any other purpose than for the claim in question; iii) by instructing to prepare materials without confidential parts in order for it to be available to all the parties to proceedings; iv) prohibiting this information to be copied and/or disseminated; or v) by imposing other measures to secure the confidential information.[277] Similarly to Article 5(6) of the DD, it is provided that the information covered under legal professional privilege as well as other information inadmissible as evidence in civil proceedings is not disclosable.[278]

Effect of national decisions

The DD provides that an infringement of the competition law provisions established either by the NCA or the review court constitutes an irrefutable fact in the same Member State for a claim of damages that it is at least *prima facie* evidence of the fact that an infringement of competition law has occurred if this decision was concluded either by the NCA or review court of another Member State.[279] These provisions were duly transposed in Lithuania in Article 51(3) and 51(4) of the LtCL. Only the final (*res judicata*) decision of the LtNCA is binding.

Furthermore, Article 51(4) of the LtCL states that a final decision of a court of another Member State of the EU adopted in that Member State and recognised under regulations of the EU or a final decision of the competition authority of another EU Member State regarding an infringement of

[276] MALINAUSKAITE, Jurgita and Caroline CAUFFMAN. *The Transposition of the Antitrust Damages Directive in the Small Member States of the EU—A Comparative Perspective*, pp. 496–512.

[277] Article 52(5) of the LtCL.

[278] Article 52(6) of the LtCL.

[279] Article 9 of the DD.

Article 101 or 102 TFEU shall constitute an official written evidence and have greater evidential value (*prima facie* evidence) that the infringement of Article 101 or 102 TFEU has been committed. However, in practice there have not been any cases to confirm this, so far. There was one case in the past before the transposition of the DD. For instance, in the *BAB flyLAL-Lithuanian Airlines v Air Baltic Corporation A/S* case, the claimant relied on the Latvian NCA's decision of 22 November 2006. Some Lithuanian courts took this into consideration.

In terms of the European Commission's decisions, UAB "Vlantana" filed a damage claim against Daimler AG due to overpriced Daimler trucks as a result of the cartel based on the Commission infringement decision. UAB "Vlantana" claimed EUR 8 5230328,33 in damages plus interest (6%). Daimler AG sought to dismiss the case arguing that Lithuanian courts do not have jurisdiction. The first instance court suspended the proceedings because of the Tibor-Trans preliminary reference which was upheld by the Vilnius Regional Court[280] even though UAB "Vlantana" argued that the facts were different from Tibor-Trans as UAB "Vlantana" bought the trucks directly from Daimler AG. It also argued Lithuanian courts have jurisdiction since there are follow-on damages claims against Daimler AG at least in 15 Member States.

2.3 Pre-DD legislation

Previously, private enforcement of competition law in Lithuania were governed by the general provisions of the LtCPC, and LtCC. In addition, there were some provisions in the LtCL. However, the former LtCL had the narrow standing rules where only undertakings that had been harmed were allowed to seek compensation for damages incurred stemming from infringement of competition law.[281]

According to the general rules of the LtCPC,[282] the parties have to prove their allegation on which they base their claims. In order to establish civil liability and reasonably claim for compensation of damages, the injured party must prove

[280] LT: Court of Appeal, Judgment of 18 April 2019, No. e2-436-302/2019.

[281] Article 50(1)(2) of the LtCL, 24 September 2009 – No XI-434. Although ex Article 50(1) provided that only undertakings were entitled to bring an action for compensation for damages incurred, actions for damages could also be taken by consumers relying on Article 43(1) ex Article 46(1) of the Law.

[282] Article 178, LtCPC.

the following elements: a) unlawful acts (in this case, infringement of competition law);[283] b) damages;[284] c) causal link between the unlawful act and damages;[285] and d) fault.[286] While the LtCPC does not provide the standard of proof, it is generally accepted that a claim is proven if there are no reasonable doubts as to whether the available evidence is substantial, relevant, and admissible.[287] The evidence must not be misnomer and must direct to a reasonable conclusion of the existence of the circumstance in question.[288] The burden of proof of the infringement of the LtCL and of the occurrence of damage and its amount lies on the claimant, which can be problematic as it requires obtaining specific market data, which usually are not accessible to injured parties. Once the unlawful act is established the fault of the defendant is presumed.[289] However, the defendant, conversely, has a right to refute the plaintiff's allegations and bring in evidence to the contrary.

Similar to other civil law systems, the Lithuanian code of civil procedure does not provide rules on discovery. Yet, the parties may seek the court to obtain/disclose material from the other parties to the proceedings or from third parties. Such claims must pre-identify requested evidence, indicate grounds as to why this person might possess the requested evidence and finally relevant circumstances to be proven by such evidence.[290] Although the protection of business secrets is not explicitly defined as a ground for refusal to disclose, the court may, upon request of the parties or *ex officio*, declare that the file containing business secrets or other confidential information is not available for public access.[291]

283 Article 6.246 of the LtCC

284 Article 6.249 of the LtCC

285 Article 6.247 of the LtCC

286 Article 6.248 of the LtCC

287 LAUŽIKAS, Egidijus, Valentinas MIKELĖNAS and Vytautas NEKROŠIUS. *Civilinio proceso teisė : vadovėlis*. Justitia, 2003, p. 416.

288 *Ibid*.

289 Article 6.248 of the LtCC

290 Article 199 of the LtCPC.

291 Article 10 of the LtCPC.

3. Transposition of the DD

The Member States were under an obligation to transpose the DD into national law within two years from its issuing by 27 December 2016. As noted above, Lithuania with some delays transposed the DD on 1 February 2017 by amending the LtCL.

The transposition of the DD caused confusion in Lithuania (similar to other CEE countries), predominantly centred on the issue of 'discovering' a suitable position in their national legal systems. First of all, in civil law legal systems, there is a strict distinction between material and procedural rules featuring in distinct codes. When handling a damages-claim resulting from any material law infringement, it is customary for practitioners and judges to follow the norms contained in the LtCPC e.g. collection of evidence, admissibility of evidence, suspension of proceedings). However, due to the unique features of the DD, which do not sit neatly with the existing national procedural rules for damages claims, standard rules for ordinary damages claims could not be followed.

The proposal for the implementation of DD was prepared and led by the Ministry of Economy of the Republic of Lithuania (Ūkio Ministerija). The full integration of the DD into the LtCPC (or general tort laws), or the combined integration of the DD into the LtCPC and into the Competition law – were discussed in Lithuania, but seemingly not seriously contemplated. Therefore, to ensure legal clarity, certainty and transparency, as noted above, the DD was transposed by adding a section to the existing LtCL. One must note that this transposition fragmented national legal system in Lithuania, introducing special procedural rules which apply only to antitrust damages claims.

4. Types of private enforcement measures

Generally speaking, the LtCPC provides two types: the mechanism linked to the protection of the public interest (Article 49 of the LtCPC) and the group action proceeding (the chapter 24/1 of the LtCPC). In practice, the protection of the public interest is typically used to gain injunctive relief whereas the group action proceeding is employed for both injunctive and compensatory relief.

In Lithuania, collective redress in the context of EU Antitrust Damages Actions can occur in the form of either a joinder of claims or a class action, as set out in the LtCPC. Art. 51(6) of the LtCL states that, prior to the adoption of a court decision, if claimants have brought an antitrust damages action against the same defendant based on the same infringement, the court shall join all cases together in order to properly establish the total amount of harm caused and the amounts caused to individual claimants. The LtCPC regulates procedural rules concerning class action and joint proceedings. Such class actions are not limited to a specific group of victims, as any natural or legal entity can initiate collective proceedings.

In Lithuania, collective redress in the context of EU Antitrust Damages Actions can occur in LtCPC regulates procedural rules concerning class action and joint proceedings. Such class actions are not limited to a specific group In Lithuania, collective redress is still in its infancy. Therefore, following the Trucks cartel, the Lithuanian National Road Carriers Association 'Linava' has organised a collective claim joining approximately 300 Lithuanian firms allegedly affected by the cartel. They joined mega suits in the Netherlands.[292] UAB 'Vlantana', on the other hand, filed a separate damage claim against Daimler AG due to overpriced Daimler trucks as a result of the cartel based on the Commission infringement decision. Articles 18 and 19 of the DD were transposed almost word by word in Lithuania.[293] Article 51(6) of the LtCL provides that if it appears in the course of the proceedings for damages for the infringement of the LtCL (mainly, Articles 101 and 102 TFEU and/or domestic equivalents), prior to adoption of a court decision, that other claimants have also brought actions for damages for the same infringement against the same defendant/defendants, the court shall, in order to properly establish the total amount of the harm caused and the amounts of the harm caused to individual claimants, join all cases together. Procedural rules concerning class action and joint proceedings are regulated by the LtCPC. Article 4413 of the LtCPC defines the general conditions essentials for a class action claim, such as: 1) the class action is based on identical or similar facts and aims at the same remedies to enforce the group of natural (or legal) persons which are identical or similar substantive rights or legitimate interests; 2) a pre-court dispute resolution procedure has been exhausted; and

[292] The case is pending in the Amsterdam court.

[293] Articles 48 and 50 of the LtCL.

finally, 3) the group has a representative. In addition, there are also the specific conditions: i) there are at least 20 natural (or legal) persons, expressing their will in writing to be members of the group and to bring legal action; ii) the group is represented by an attorney-at-law (except when this requirement is exempted under the specified conditions).[294]

5. Case law relevant for private enforcement of competition law

The modern Lithuanian legal system and litigation are relatively new. The Republic of Lithuania regained independence on 11 March 1990, but international recognition of Lithuania only came a year later after the final collapse of the Soviet Union. Lithuania's history has been marked with a constant threat from its large neighbours shadowed by several occupations, which have stalled the development of the uniform Lithuanian legal system. For instance, during its independence phase of 1918-1940, the national Lithuanian legal system was highly divided: the Russian Imperial Civil Law of 1840 was employed in most of the territory, the Uznemune region used the 1804 Napoleon Civil Code, while the German's Civil Code BGB of 1900 was applied in Klaipeda (Memel) and finally the 1864 Collection of Civil Laws of the Baltic Provinces was used in Palanga and Zarasai. [295] While there were some endeavours to unify Lithuanian private law throughout the period of 1937 -1940, progress to produce the LtCC was delayed due to the Soviet invasion in 1940 and was never accomplished.[296] The draft of World War II Lithuanian Code disappeared without trace and the new Codes were started from scratch when Lithuania regained its independence in 1991. This means that modern private enforcement in Lithuania is in

[294] These conditions are defined by Article 4411 point 3, which are as follows:
1) a group representative is also a group member and has a law university degree.
2) the group is represented by an association or other public body, a trade union and the claim in court is conducted by an employee of this association, or other public body, or a trade union, with a law university degree.

[295] MIKELENAS, Valentinas. Unification and Harmonisation of Law at the Turn of the Millennium: the Lithuanian Experience. *Uniform Law Review - Revue de droit uniforme*. 2000, vol. 5, no. 2, pp. 243, 245. DOI: 10.1093/ulr/5.2.243.

[296] *Ibid*.

its offspring, which officially started since the introduction of the new LtCC in 2001 and the LtCPC in 2003 providing a legal basis for private enforcement (alongside the reforms of the courts system). The DD introduced the specific aspects as noted above in relation to damages claims based on infringements of Articles 5 and 7 of the LtCL (and Articles 101 and 102 TFEU). However, for other infringements, such as, for instance, unfair competition practices, the general rules of the LtCPC apply, as confirmed by the UAB 'EZCO v I.S. and M.B. *Tiesioginis Skrydis* case.[297]

6. Private enforcement cases

Lithuanian law included provisions for private enforcement of competition rules even before the transposition of the DD. Any person, whose interests had been violated by the breach of competition rules, could apply to ordinary civil courts for compensation of direct and indirect damages, under the LtCPC. As illustrated by Table 3.1, this study has identified 11 cases before the transposition of the DD, 6 out of 11 were follow-on (partly follow-on) cases. Almost all cases (save one) related to national law rather than EU law. The success rate is very low. The early cases demonstrate several obstacles that the affected parties faced to obtain damages. For instance, the first damage case, LUAB 'Klevo lapas' v. AB *Mazeikių nafta* (the parent company AB 'ORLEN Lietuva'), was dismissed as unfounded by both the court of first instance and the Court of Appeal of Lithuania. The court of first instance stated that there was no reason to suggest that the defendant applied dissimilar competitive conditions for the claimant,[298] disregarding the decision of the LtNCA. It then argued that *Klevo lapas* was in a bad financial status before the defendant's discounted prices to the certain undertakings and therefore it was not the defendant's fault for its insolvency. The Court of Appeal, on the other hand, focused on the causal relationship, by stating that the prohibiting decision of LtNCA against *Mazeikių nafta* for its abuse of a dominant position and the bankruptcy of UAB 'Klevo lapas' lacked the causality. The Supreme Court of Lithuania, the last resort court, then confirmed that that general national provisions apply in order to prove civil liability

297 LT: Regional Court in Vilnius, Judgment of 26 August 2021, No. e2S-2267-794/2021.

298 LT: Supreme Court, Judgment of 17 May 2010, No. 3K-3-207/2010, p. 2.

and claim compensation stemming from an infringement of competition law in Lithuania. The decision of the LtNCA of an infringement of competition law proved only one of the conditions, the unlawful fact. Other conditions, such as actual damages and the causal link between the unlawful act and the damages must be proven by an aggrieved party. An infringement of the competition rules on its own is insufficient to seek damages. In contrast to the lower court reasoning, it seems that the Supreme Court was willing to give evidential value to the LtNCA's infringement decision even before the transposition of the DD. Furthermore, the court rejected the claimant's argument that had *Klevo lapas* an opportunity to receive the products at a discounted rate it would have stayed in the market. In parallel to the lower courts, it held that the claimant was in a bad financial position before the infringement of competition law occurred. This led to the conclusion that *Klevo lapas* was forced to declare bankruptcy not because of the defendant's anti-competitive practice, but because of its poor business management.[299] .

One of the partially successful cases is the *UAB 'Šiaulių tara' v. SPAB 'Stumbras'* case,[300] with the amount of damages sought by the claimant approximately EUR 830,000 and rewarded only – EUR 87,000, despite the fact that the quantification of damages was estimated by the well-known international audit company. If there is any consolation, this litigation followed by two further settlements with other retailers *Palink* and *Belvedere prekyba*, for an undisclosed amount.[301] Apart from the follow-on claims, there were also some stand-alone cases. For instance, in 2016, UAB *Krovinių terminalas* filed a claim against *Klaipėdos nafta and Orlen Lietuva* alleging that the defendants concluded a vertical agreement in breach of Article 5 LtCL, where *Orlen Lietuva* would use exclusively the light oil product handling services provided by *Klaipėdos nafta*. Given that *Orlen Lietuva* stopped using the claimant's services, it suffered losses. *Krovinių terminalas* claimed EUR 5,994,765,72 in damages. In agreement with the first instance court decision, the Appeal Court of Lithuania also dismissed the claim, specifically, due to the failure to prove the breach of competition

299 MALINAUSKAITE, Jurgita. *Private Enforcement of Competition Law in Lithuania: a Story of Underdevelopment*.

300 LT: Court of Appeal, Judgment of 26 May 2006, No. 2A-41/2006, Šiauliu tara v Stumbras

301 MIKELĖNAS, Valentinas and Rasa ZAŠČIURINSKAITĖ. Lithuania. In: PISZCZ, Anna, ed. *Implementation of the EU Damages Directive in Central and Eastern European Countries*. Warszawa: University of Warsaw Faculty of Management Press, 2017.

rules: (i) negative effects on competition were not demonstrated; and (ii) not all the competitors in the relevant market were identified by the claimant. The court ruled that no wrongdoing was proved and, therefore, no damages could be awarded. The Supreme Administrative Court dismissed a further appeal, upholding the Court of Appeal's decision.[302]

Table 3.1: Lithuanian antitrust cases: Pre-DD transposition*

Case Name	Year	Type of action	Competition law provisions	Outcome for the claimant
LUAB 'Klevo lapas' v AB 'ORLEN Lietuva'	2000-2010	Follow-on	Domestic Art 102 TFEU	Rejected
UAB Šiaulių tara v. SPAB Stumbras	2003-2006	Follow-on	Domestic Art 102 TFEU	Partially satisfied (17% of the claimed amount awarded)
UAB Palink v AB Stumbras	2003-2006	Follow-on	Domestic Art 102 TFEU	Settlement
UAB Belvedere prekyba v AB Stumbras	2003-2006	Follow-on	Domestic Art 102 TFEU	Settlement
UAB MBR parduotuvių ir restoranų įranga v IĮ E.A.	2004-2004	Stand-alone	Domestic Art 101 TFEU	Rejected

[302] MALINAUSKAITE, Jurgita. Central and Eastern European countries. In: RODGER, Barry J., Miguel Sousa FERRO and Francisco MARCOS, eds. *Research handbook on private enforcement of competition law in the EU*. Chelthenham: Edward Elgar Publishing, 2023, pp. 504–526.

Case Name	Year	Type of action	Competition law provisions	Outcome for the claimant
AB flyLAL-Lithuanian Airlines v Air Baltic Corporation A/S and Airport Riga	2008-2021	Partly follow-on**	Arts 101/102	Rejected
UAB Naftos grupe v AB Klaipedos nafta	2011-2022	Stand-alone	Domestic Art 101 TFEU	No final decision available Settlement
AB Energijos kodas v AB Litgrid	2013-2016	Stand-alone	Domestic Arts 101/102 TFEU	Rejected
UAB Eurocash1 v UAB G4S Lietuva	2014-2020	Follow-on	Domestic Arts 101/102 TFEU	No final decision available Settlement
AB Amilina v UAB Lietuvos duju tiekimas and AB Lietuvos dujos	2015-2017	Stand-alone	Domestic Art 101 TFEU	Rejected
UAB KROVINIŲ TERMINALAS v AB Klaipėdos nafta and AB Orlen Lietuva	2016-2020	Stand-alone	Domestic Arts 101/102 TFEU	Rejected

* disclaimer: there is a possibility that not all relevant cases were identified

** some reliance on the infringement decision issued by the Competition Council of Latvia

Table 3.2: Lithuanian antitrust cases: Post-DD transposition*

Case Name	Year	Type of action	Competition law provisions	Outcome for the claimant
UAB Envija v T.P.D.J. and M.J.**	2017-2020	Follow-on	Domestic Art 101 TFEU	Rejected
UAB Vlantana v Daimler AG	2018-ongoing	Follow-on	Art 101 TFEU	ongoing
Employment Service under the Ministry of Social Security and Labour v UAB Authoplaza	2019-2021	Follow-on	Domestic Art 101 TFEU	Successful (the amount claim EUR 1115)

* disclaimer: there is a possibility that not all relevant cases were identified

** unorthodox case in terms of traditional private antitrust damages claims

7. Evaluation of the environment for private enforcement of competition law

Damages claims in Lithuania are still rather rare, despite having a sufficient legal framework for private antitrust enforcement. As noted by the previous section, so far there have been a limited amount of private antitrust enforcement cases, even fewer of them were successful. Claimants are faced with various challenges. First of all, the high legal standard for proving the causal relationship between anticompetitive actions and the damage incurred can be highlighted as one of the obstacles to private enforcement in Lithuania, as illustrated, for instance, by the LUAB 'Klevo lapas' v. AB 'ORLEN Lietuva' case. Secondly, proving the occurrence and quantification of damage has also proven challenging, with the Lithuanian courts unwilling to award damages to their full

extent (i.e. *UAB 'Šiaulių tara' v. SPAB 'Stumbras'* case). Thirdly, the complexity of competition cases and proving an 'infringement' itself in stand-alone claims cause additional hurdles (i.e. UAB KROVINIŲ TERMINALAS v AB Klaipėdos nafta and AB Orlen Lietuva). One must also note the most cited *BAB flyLAL-Lithuanian Airlines v Air Baltic Corporation A/S and Starptautiskā lidosta Rīga VAS* case, which can be argued that it was partially the follow-on decision, based on the Latvian Competition Council's infringement decision in 2006 where it concluded that the system of reductions applied by Riga Airport, providing discounts of up to 80 per cent to several undertakings, including, Air Baltic, for aircraft take-off, landing and security services breached Article 102(c) TFEU (though with no fine imposed on Riga Airport due the binding Latvian law at the time). This case, which lasted over 13 years and involved two preliminary reference rulings[303] ended in no damages being awarded. Fourthly, high litigation costs associated to the proceedings are also to blame. The long length of litigation, as illustrated by the cases above, fees of legal representation, expenses for experts, translations, stamp duty and evidence collection build high litigation costs. There are no court experts specialising in competition economics,[304] which exemplify additional costs due to a need to appoint foreign experts.[305] Therefore, due to the significant costs, only large claims are worth pursuing in practice. Finally, 'success builds on success,' as the parties evaluate the potential outcome of the action, such as the probability of recovery of damages, which, *inter alia*, embraces considerations whether similar claims were successful.[306]

8. Suggestions for further development

One may also argue that the injured parties in Lithuania are not active, as they are reluctant to seek redress due to the low expectation to be successful.

303 Judgment of 23 October 2014, *flyLAL-Lithuanian Airlines*, C-302/13, EU:C:2014:2319; and Judgment of 5 July 2018, *flyLAL-Lithuanian Airlines*, C-27/2017, ECLI:EU:C:2018:533.

304 See the official website of the Ministry of Justice of the Republic of Lithuania providing the list of court experts. Available at: https://tm.lrv.lt/media/viesa/saugykla/2024/3/Mf03kcuPiMA.pdf.

305 PAUKŠTĖ, Rita. Lithuania · (In)Effective Private Antitrust Enforcement in Lithuania? *European Competition and Regulatory Law Review*. 2024, vol. 8, no. 2, pp. 111–117. DOI: 10.21552/core/2024/2/10

306 *Ibid.*

Predominantly, damages action claims in Lithuania are brought by competitors, mainly medium/large-sized businesses. Therefore, there is a need to promote litigation funding to facilitate access to justice. There are no particular rules concerning third-party litigation funding in Lithuania. While this is not explicitly prohibited, so far, third-party funding does not exist in practice in Lithuania.

Furthermore, there have not been a single case involving consumers. Currently, there are no strong Consumer Associations to initiate class action in Lithuania. There was one attempt to do this, but it was challenging to find many consumers with small claims. Therefore, it did not develop into a successful claim. Lithuania has an opt-in system. If Lithuania were to introduce more flexibility, for instance, like in the UK, allowing either opt-in or opt-out option, then it could potentially improve the existing situation.

9. Summary

This study concludes that the number of private damages claims cases in Lithuania is rather low. The situation has not improved after the transposition of the DD. The limited number of antitrust damages cases prevent any substantial conclusions being drawn. Unlike public enforcement, which principally dominates in Lithuania, private enforcement is largely underdeveloped.

The rare use of courts can be attributed to a number of factors, including difficulties in proving the causal link, calculating damages as well as expensive and prolonged litigation. For instance, the litigation of the LUAB 'Klevo lapas' v AB 'ORLEN Lietuva' and *BAB flyLAL-Lithuanian Airlines v Air Baltic Corporation A/S and Starptautiskā lidosta Rīga VAS* cases lasted 10 years and 13 years, respectively, and were ultimately rejected. In addition, there are barely any 'successful' damages claims. Even in the 'successful' cases, only 17% of the claimed amount awarded as illustrated by the UAB Šiaulių tara v. SPAB Stumbras case (save settlements). So far, there have not been any successful stand-alone cases.

Potentially, third-party funding and class action claims (especially with a help of the Lithuanian Consumers Alliance) can improve the current situation in Lithuania.

CHAPTER 4

Private enforcement of competition law in Latvia

by

Jūlija Jerņeva*

1. Introduction

This chapter presents an empirically grounded analysis of private enforcement of competition law in Latvia. This chapter empirically analyses private enforcement of competition law in Latvia, focusing on case outcomes, litigant strategies, and court interpretation.

The empirical analysis reveals several structural characteristics of the Latvian system, which are explored in depth in later sections. First, Latvian courts adjudicate almost exclusively pre-DD infringements under a post-DD procedural regime, generating recurring intertemporal and methodological tensions. Second, the claimant profile is institutionally narrow and is dominated by public bodies. Finally, the absence of collective mechanisms or developed assignment practice restricts private enforcement to a limited set of actors.

Throughout, the chapter aims to demonstrate how judicial practice, rather than statutory design alone, determines the real contours of private enforcement in Latvia.

2. Legislative Framework

Since 2021, the Economic Court (*Ekonomisko lietu tiesa*) hears competition damages cases at first instance, replacing district (*rajona*) courts. Appeals against judgments of the Economic Court lie to the Riga Regional Court (*Rīgas apgabaltiesa*) acting as the appellate instance for economic matters. A further

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cassation review by the Supreme Court Senate (*Senāts*) is available only where the Senate grants leave to hear the case, in accordance with the statutory filtering mechanism for cassation appeals.

Latvian civil courts have the authority to establish an infringement of Arts. 11 or 13 of Competition Law (LvCL)[308] even in the absence of a decision of the Latvian Competition Council (LvNCA). This competence is regularly exercised in cases where the LvNCA has not opened proceedings or has discontinued them.

2.1 Pre-DD legislation

Before the transposition of the DD, Latvia had a narrower, less structured private enforcement framework. Substantive private enforcement was regulated directly in the Competition Law, most notably through the original wording of Art.21 of LvCL, which from the adoption of the law recognised a right to claim damages for infringements of Arts.11 and 13 (prohibited agreements and abuse of dominance). This provision constituted the statutory basis for antitrust damages actions and confirmed that civil liability, including compensation for losses and lost profits, was available irrespective of whether the LvNCA had imposed an administrative fine. In parallel, the general rules of the Civil Law (LvCC) on unlawful damage[309] applied as a default framework for liability, causation and the determination of loss, while the Civil Procedure Law (LvCPC) [310] governed procedural matters, including evidence, burden of proof and limitation.

Limitation periods, prior to the transposition of the DD, were governed by the general rules of the LvCC[311]. Tort claims are subject to a ten-year limitation period running from the moment the damage was caused, without any knowledge requirement, without suspension during administrative investigations, and without rules addressing concealed infringements. A recurring feature of pre-DD litigations concerns attempts by defendants to apply shorter three-year

[308] Competition Law, 2001, Latvian Gazette No. 151, as amended.
[309] Civil Law, 1937, Government Gazette No. 41, as amended, Part 3.
[310] Civil Procedure Law, 1998, Latvian Gazette No. 326/330, as amended.
[311] Civil Law, 1937, Government Gazette No. 41, as amended,

limitation periods that are applicable to commercial transactions. Courts have consistently rejected these arguments.[312]

The pre-DD regime lacked specialised procedures, requiring courts to use general civil-law models.

For pre-DD infringements, joint liability is governed by the general tort rules of the LvCC, rather than by the LvCL. The LvCC establishes the possibility of multiple tortfeasors being jointly liable but does not presume joint liability merely because several undertakings acted in an anticompetitive manner. Instead, liability depends on the demonstration of each defendant's contribution to the tort. For instance, in one case, as a follow-up to an infringement decision by the LvNCA, a local municipality brought damages claims.[313] The claimant initiated separate actions against each member of the cartel. Although adjudicated under post-DD procedural rules, the courts applied pre-DD substantive law and therefore relied on LvCC principles. The courts accepted this procedural strategy and assessed the liability of each defendant independently, requiring proof of (i) the defendant's participation in the infringement and (ii) the causal relevance of that participation to the claimant's procurement (or otherwise the cartelisation of the agreement in question). No presumption of joint liability was applied for the pre-DD events. These judgments demonstrate a consistent pre-DD doctrine: joint liability must be proven, not presumed.

The DD states that it is up to each Member State to determine the mechanism for establishing joint liability. The LvNCA also emphasises that not all infringers are likely to be equally responsible for competition law infringements (from a material, temporal, and territorial point of view).[314] However, Latvian law does not guide how to assess the "degree of liability of a specific infringer". Nor

312 LV: Riga Regional Court, Judgment of 1 June 2023, No. CA-0577-23; LV: Economic Court, Judgment of 12 October 2022, No. C-0125-22; LV: Riga Regional Court, Judgment of 26 April 2023, No. CA-0991-23; LV: Economic Court, Judgment of 2 December 2022, No. C-0150-22; LV: Riga Regional Court, Judgment of 21 March 2024, No. CA-0409-24; LV: Economic Court, Judgment of 14 August 2023 in case No. C-0035-23; LV: Economic Court, Judgment of 11 October 2023, No. C5012823; LV: Economic Court, Judgment of 7 July 2023, No. C-0085-23; LV: Economic Court, Judgment of 21 August 2023, No. C-0050-23.

313 LV: Economic Court, Judgment of 16 January 2023, No. C75012722; LV: Riga Regional Court, Judgment of 19 October 2023, No. CA-1177-23; LV: Economic Court, Judgment of 12 October 2022, No. C-0125-22; LV: Riga Regional Court, Judgment of 1 June 2023, No. CA-0577-23.

314 See the NCA's methodological material on damages actions here: https://www.kp.gov.lv/lv/zaudejumu-atlidziba.

are there any considerations regarding the criteria proposed in the Directive – turnover, market share or role in the cartel. Such explanations are also not found in the explanatory memorandum to the amendments to the LvCL.[315]

Since 2008, the LvCL has entrusted the courts with the power to estimate the amount of damages where exact quantification is impossible or excessively difficult.

In 2016, Latvia had introduced the presumption of a 10% cartel overcharge (the future Art. 21(3) of LvCL) already in June 2016, i.e., before the formal transposition and anticipating the structure of Art. 17(2) DD. This created a partial overlap between pre-DD and DD-inspired elements. Latvian courts treat this presumption (including for the actions brought between June 2016 and the actual transposition of the DD) as a substantive rule, applying in Latvia the same non-retroactivity principle in accordance with the case-law of the CJEU on the interpretation of Art. 22 DD.[316] The rule will thus only apply to cases, dealing with violations committed after June 2016.

Overall, the pre-DD framework was marked by the co-existence of a substantive statutory right to damages under the LvCL and a purely general-law procedural environment. This combination ensured the availability of actions but did not provide the structured facilitation mechanisms later required by the DD. The deficiencies of this earlier framework—such as the absence of disclosure, the lack of clear interaction between administrative and civil findings, and the absence of defined standards for quantification and passing-on–explain many of the divergences and doctrinal difficulties observed in the case-law discussed in the preceding sections.

A particularly telling illustration of the structural deficiencies of the pre-DD regime is provided by the first *PKL Flote vs Brīvostas pārvalde* case. The LvNCA adopted its infringement decision on 24 March 2009, and the claimant brought the civil action already in 2009. What followed was a prolonged procedural odyssey. The case moved between several levels of the judiciary for years without any court agreeing to examine the substance of the damages claim, each instance returning the matter on procedural grounds or declining jurisdiction.

315 IVANOVS, Reinis. Konkurences tiesību pārkāpēju savstarpējās tiesiskās attiecības. *Jurista Vārds*. 2023, no. 43 (1309), pp. 27–31.

316 LV: Economic Court, Judgment of 28 November 2024, No. C-0136-24, para. 6.2; LV: Riga District Court, Judgment of 28 July 2023, No. C29251821, para. 8.5.

Because the legislation then in force provided no competition-specific procedural framework, the claimant had to first struggle to prove they had standing despite relying on an infringement decision by the LvNCA.[317] The extraordinary procedural inertia in *PKL Flote* demonstrates how, before the 2016 reform of LvCL, the statutory private damages right existed in theory but was practically inaccessible, and civil courts lacked the tools and legal certainty necessary to adjudicate competition damages claims effectively. By the final judgment[318] the claimant was awarded the to-date record high damages in the amount of over a million euros.

2.2 Transposition of the DD

The Latvian approach to the transposition of the DD is characterised by both formal precision and some distinctive national choices. Latvia implemented the DD through amendments to two principal legislative instruments: the LvCL and the LvCPC. These amendments, which entered into force on 1 November 2017, are expressly recognised in Latvian judicial practice as the point at which the DD's requirements became effective.

Latvia divided substantive DD rules into the LvCL and procedural rules into the LvCPC. This dual legislative technique preserved the conceptual integrity of LvCL as a substantive statute while modernising procedural rules to accommodate the DD's requirements regarding evidence, proportionality, and the protection of leniency materials.

Despite the formal accuracy of the transposition, Latvia implemented the DD in November 2017,[319] almost a year after the deadline set by the DD (27 December 2016). However, no Latvian private enforcement case to date has involved an infringement that occurred during the gap period between the DD's entry into force and Latvia's transposition. All infringements litigated to date

317 NEIMANIS, Jānis. Konkurences likuma pārkāpuma pierādīšana zaudējumu atlīdzības prasījumā. *Jurista Vārds*. 2014, no. 9 (811).

318 LV: Riga Regional Court Judgment of 16 May 2017, No. CA-0172-17.

319 Amendments to the LvCPC implementing the requirements of the DD were adopted on 19 October 2017 and entered into force on 1 November 2017. Amendments to the LvCL implementing the requirements of the DD were adopted on 5 October 2017 and entered into force on 1 November 2017.

predate 2016, often substantially. As a result, the doctrinal tensions arising from the delayed transposition remain largely theoretical in Latvian jurisprudence.

The scope of the Latvian transposition closely follows the restrictive harmonisation model of the DD. The material scope is confined to infringements of Arts. 101 and 102 TFEU and their national equivalents, without extension to mergers, state aid, unfair competition,[320] prohibition of distortion of competition by public bodies,[321] or other regulatory fields.

With few exceptions only, the transposition reproduces the DD's provisions almost verbatim.

Following the 2017 amendments, Latvia transposed the DD's requirements by introducing a knowledge-based trigger and suspension mechanism into the LvCL. Importantly, the Latvian legislator did not introduce a distinct limitation period and the general ten-year limitation period under the LvCL continues to apply, while Art. 21.[4] LvCL specifies that the limitation period may only begin once the claimant knew, or ought to have known, of (i) the infringement, (ii) the harm, and (iii) the identity of the infringer.[322] In line with Art. 10 DD, the limitation period is also suspended for the entire duration of proceedings before the LvNCA, resuming only when the LvNCA decision becomes final.

A distinctive aspect of Latvian law is the introduction of a dual presumption in Section 21(3) of the LvCL. In addition to the rebuttable presumption that cartels cause harm (as required by Art.17(2) DD), Latvian law presumes that the overcharge equals 10% of the price. This 10% benchmark, which has no basis in the DD, reflects a deliberate national policy choice and signals a move beyond minimum harmonisation. Notably, the extension of this presumption to abuse of dominance cases was considered but ultimately rejected.

In summary, the Latvian legislative framework for private enforcement of competition law is marked by formal alignment with the DD, a clear

[320] LV: Supreme Court Senate, Judgment of 28 December 2022, No. C29548817. SKC-46/2022, ECLI:LV:AT:2022:1228.C29548817.19.S.

[321] The introduction of **Art.14.[1] of the LvCL** (in force from 1 January 2020) created a distinct mechanism addressing **competition distortions by public institutions and publicly controlled undertakings**, thereby codifying the principle of the principle of neutrality. This provision concerns public law conduct and establishes an administrative regime enforced exclusively by the LvNCA. The courts have determined that the private competition enforcement regime does not apply in this case. See LV: Economic Court, Judgment of 19 May 2022, No. C75009121.

[322] KREICŠTEINA, Paula. Tiesa ievieš skaidrību attiecībā uz noilgumu konkurences tiesību lietās par zaudējumu atlīdzināšanu. *Jurista Vārds*. 2024, no. 43 (1361), pp. 8–11.

substantive–procedural division, and certain national innovations, such as the 10% overcharge presumption. The practical implications of these choices are explored in subsequent sections of this chapter.

2.3 Post-DD adjustments

The most significant post-DD development occurred with the 2024 amendments, which extended the entire DD-based private enforcement framework to infringements of the Digital Markets Act[323].

3. Types of private enforcement measures

Private enforcement of competition law in Latvia encompasses a range of civil law remedies, although damages actions remain the most developed and relevant mechanism. Latvian law theoretically provides claimants with access to declaratory relief, contractual invalidity, unjust enrichment, and interim measures, in addition to damages for infringements of Arts.11 and 13 of LvCL and their EU equivalents.

Declaratory actions are also possible, where clarification of a legal relationship is necessary to protect a civil right.

Latvian competition and general contract laws[324] recognise the invalidity of agreements concluded in breach of mandatory rules, including anti-competitive agreements.

Interim measures are permitted under Latvian procedural law[325] to prevent continued harm or preserve rights during litigation. In principle, such measures could be used to prevent ongoing anti-competitive conduct or secure evidence relevant to damages claim. However, no injunction has been granted in Latvian competition litigation to date, likely due to the predominance of historic cartel conduct rather than ongoing behavioural abuses.

323 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) *(OJ L 265, 12.10.2022, s. 1 – 66).*

324 Civil Law, 1937, Government Gazette No. 41, as amended, Part 4.

325 LvCPC.

4. Case law relevant for private enforcement of competition law

There is a body of judgments outside the competition-law domain that articulate principles of evidence, causation and judicial fact-finding that have direct significance for antitrust damages actions.

The obligation to compensate for losses arises if three conditions are met simultaneously: an unjustifiable infringement of rights, the existence of losses/harm, and a causal link between the losses and the unauthorised action.[326] [327] If even one of these conditions is not met, the obligation to compensate for damage does not arise.[328]

Unlike in some jurisdictions worldwide, in Latvia the existence of a causal link cannot be presumed.[329] As rightly pointed out in the literature, one of the central and sometimes even decisive issues in determining causality is the fulfilment of the burden of proof.[330] Latvian courts often err, limiting themselves to concluding that a causal link exists or does not, and failing to provide justification for their conclusion on the existence or absence of a causal link in a specific case.[331]

The role of the victim's negligence in determining liability for the damage caused is quite accurately described in the doctrinal document – Principles of European Tort Law 8:101. The first part of this article stipulates that liability may be excluded or reduced to an extent considered fair, taking into account the victim's negligence that contributed to the damage (contributory fault).[332]

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326 TORGĀNS, Kalvis. *Saistību tiesības. I daļa. Mācību grāmata*. Riga: Tiesu namu aģentūra, 2006, p. 209.

327 LV: Riga Regional Court, Judgment of 24 July 2020, No. C29548817; LV: Riga Regional Court, Judgment of 24 April 2024, No. C75012823.

328 LV: Economic Court, Judgment of 5 March 2024, No. C75018923.

329 MANTROVS, Vadims. Cēloniskā sakara problēmjautājumi civiltiesību kontekstā. *Jurista Vārds*. 2016, no. 16 (919), pp. 20–28.

330 VAN DAM, Cees. *European Tort Law*. OUP Oxford, 2013, p. 312.; PALANDT, Otto, Peter BASSENGE and et. al. *Bürgerliches Gesetzbuch*. München: Beck, 2001, pp. 266–267.; MAGNUS, Ulrich. Germany: Causation in German Tort Law. In: SPIER, Jaap, ed. *Unification of Tort Law : Causation*. The Hague: Kluwer Law International, 2000, p. 20.

331 MANTROVS, Vadims. *Cēloniskā sakara problēmjautājumi civiltiesību kontekstā*.

332 EUROPEAN GROUP ON TORT LAW. *Principles of European Tort Law* [online]. Available at: http://egtl.org/docs/PETL.pdf

Thus, the victim's negligence or, more precisely, the victim's conduct in general (including, of course, intent), depending on the circumstances of the case, must be taken into account both in assessing the causal link establishing liability and in assessing the causal link establishing the extent of liability.[333]

In accordance with the adversarial principle established in civil proceedings, each party must prove the facts on which it bases its claims or objections, and the court adjudicates the dispute based on the evidence submitted by the parties.[334] Therefore, a party asserting a fact must substantiate it with admissible and credible evidence, and the failure to discharge this burden results in the claim's dismissal.

With regard to lost profits, Art.1787 of the LvCC establishes a higher standard of proof, namely, when calculating lost profits, there must be no doubt, or at least it must be proven to a degree of legal certainty, that such loss arose from the action or inaction that caused the damage.[335]

5. Private enforcement cases

5.1 Procedural patterns

DD disclosure mechanisms are rarely used; LvCPC Arts.250.66–250.67 govern evidence disclosure. The transposition is formally precise: courts may, upon a reasoned application, order disclosure of relevant evidence in the possession of the opposing party or, subject to consultation, in the possession of the LvNCA. When assessing an application for disclosure, Latvian courts first examine whether the applicant has identified the evidence sought with sufficient detail and demonstrated its relevance and necessity for proving a concrete factual element of the claim or defence. Only once these two cumulative prerequisites are met does the court proceed to evaluate proportionality, burden and confidentiality safeguards under LvCPC . In practice, failure to meet the

333 RASNAČS, Lauris. Cēloņsakarības noteikšana lietās par konkurences tiesību pārkāpumu rezultātā nodarītu zaudējumu atlīdzību. *Jurista Vārds*. 2022, no. 43/44 (1257/1258), pp. 60–70.

334 LV: Riga City Latgale Suburb Court, Judgment of 15 November 2019, No. C29319218; LV: Economic Court, Judgment of 9 January 2023, No. C75014622.

335 LV: Riga City Latgale Suburb Court, Judgment of 15 November 2019, No. C29319218.

specificity or relevance requirement is the principal reason why disclosure is refused.[336]

In the context of disclosure, consideration should also be given to recital 47 of the DD, which refers to information asymmetry in competition law infringements, including cartel agreements, in cases of damages. This information asymmetry means that the infringer, who would be the defendant in the case, is often better informed about the circumstances relevant to the infringement and has a wider range of evidence at his disposal,or at least is better informed about the existence of such evidence. Due to these circumstances, a claimant seeking damages from a cartel member may have unequal opportunities to prove his claim compared to the cartel member's opportunities to defend himself against it.[337] Latvia has the legal tools to implement a disclosure regime aligned with European standards, yet its practical application remains underdeveloped. First, courts have only ordered disclosure in two cases.[338] *Renault* is another case in which disclosure was requested, but the request was refused at first instance and, as later accepted by the court of appeals, the refusal was procedurally mishandled.[339] Second, although LvCPL 250.66–250.67 transpose the DD's disclosure regime comprehensively, Latvian courts continue to view disclosure in a restrictive manner, requiring claimants to identify evidence with a degree of specificity that is often unrealistic in competition cases. Third, courts increasingly treat the non-use of disclosure as evidence that proof could have been obtained by the claimant, thereby affecting both causation and quantification analyses.[340] This approach accords with traditional Latvian procedural doctrine but sits uneasily

[336] Jerneva, Julija and Druviete, Inese, Implementation of the EU Damages Directive in Central and Eastern European Countries. Latvian Report (June 27, 2023). Available at SSRN: https://ssrn.com/abstract=, pp. 8-9.

[337] RASNAČS, Lauris. *Cēloņsakarības noteikšana lietās par konkurences tiesību pārkāpumu rezultātā nodarītu zaudējumu atlīdzību*, pp. 60–70.

[338] LV: Economic Court, Judgment of 28 November 2024, No. C-0136-24; LV: Riga City Latgale Suburb Court, Judgment of 15 November 2019, No. C29319218.

[339] LV: Riga Regional Court, Judgment of 4 October 2023, No. CA-0592-23; LV: Economic Court, Judgment of 14 October 2022, No. C-0010-22.

[340] In *Dinotrans vs Volvo* case the court held that the claimant's failure to utilise the disclosure mechanism precluded any conclusion that difficulties in proving harm were objectively insurmountable, which is a necessary condition for judicial estimation under Art.21(1) of the Competition Law. As the court put it, a claimant who neither provides evidence nor seeks its disclosure cannot later invoke evidentiary insufficiency as a reason to shift the burden onto judicial estimation. See LV: Riga Regional Court, Judgment of 9 May 2024, No. CA-0391-24.

with the DD's objectives, which were designed precisely to address information asymmetry.

Passing-on occupies a structurally important but underdeveloped position in Latvian private enforcement. Latvia transposed Arts. 12–16 DD into Art. 21 of LvCL and Chapter 30.6 of the LvCPC. The resulting framework is formally complete, but case-law is not developed on the subject. Two follow-up cases from the European Commission's decision in the *Trucks cartel* case demonstrate a rare insight into the attempt to rely on the passing-on defence. In both cases, the defendants raised the passing-on defence and in both cases failed to meet their evidentiary burden. At the same time, in neither of these cases did the courts address the requisite standard or burden of proof issues.[341] The emerging picture is thus one where the doctrinal tools exist, but their practical application remains embryonic.

5.2 Probatory value of NCA decisions

Latvia implemented Art.9 DD and determined that a final LvNCA decision is binding on civil courts only as to the existence, legal classification, and temporal scope of the infringement. Civil courts must still determine whether the specific procurement or contractual transaction underlying the damages claim was affected by that infringement.

Defendants have relied on this distinction in several cases, arguing that the LvNCA decision did not establish violation in relation to the contract (tender) in question or that the contract between the parties does not fall within the relevant market analysed by the LvNCA.

In some of the cases, the LvNCA decision establishing violation based on the object's doctrine was at least in one case deemed insufficient to prove the existence of tort and causal link to the claimant's loss.[342]

Other type of objection is characteristic to bid-rigging cases, where the key question is whether the claimant's tender formed part of a single and continuous

[341] LV: Riga District Court, Judgment of 28 July 2023, No. C29251821; LV: Riga Regional Court, Judgment of 9 May 2024, No. C29251821; LV: Economic Court, Judgment of 14 October 2022, No. C-0010-22; LV: Riga Regional Court, Judgment of 4 October 2023, No. CA-0592-23.

[342] LV: Economic Court, Judgment of 11 October 2023, No. C75012823, para. 8.2.4.; LV: Riga Regional Court, Judgment of 24 April 2024, No. C75012823, para. 6.2; LV: Economic Court, Judgment of 14 August 2023, No. C75013722.

infringement, but where the LvNCA does not identify all cartelised tenders individually. In several firstinstance judgments, it was accepted almost automatically that because the infringement was single and continuous, any procurement during the period was cartelised.[343] This approach shows insufficient understanding of the different tasks pursued and tests used in the administrative process (establishing a violation of competition law) and the civil process (establishing if the violation caused harm to the claimant). In other cases, the courts are more careful not to punish the defendants for the non-cartelised behaviour.[344] The latter approach prevails, but inconsistencies of the case-law are still present.

A separate set of arguments concerns mismatches between the relevant market, within which the LvNCA establishes the violation and the relevant market within which the claimant and the defendant conclude a contract. In one of the cases, the court held that the LvNCA decision could not be extended to other markets without proof.[345]

The courts' approach in all these cases is not consistent, though mostly courts correctly conclude that not every violation of competition law automatically concerns every transaction entered by the cartel members. Judgments that accept liability without such analysis, or that rely solely on the continuous nature of the infringement, fall short of the required analytical standard. Proper application of the law obliges courts to ascertain that the LvNCA's findings are relevant in the case before other elements of damages test are analysed.

5.3 Quantification of damages

Victims should be able to claim compensation not only for the actual loss suffered as a result of the infringement (*damnum emergens*), but also for the profit they were deprived of (*lucrum cessans*), as well as interest.[346]

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343 LV: Economic Court, Judgment of 20 December 2022, No. C75012022; LV: Economic Court, Judgment of 29 December 2023, No. C75015223.

344 For instance, see LV: Economic Court, Judgment of 23 February 2024, No. C75017723; LV: Riga Regional Court, Judgment of 24 April 2024, No. C75012823; LV: Economic Court, Judgment of 20 December 2022, No. C75012022.

345 LV: Economic Court, Judgment of 28 November 2024, No. C75013624.

346 RUSAKOVS, Jurijs Georgs. Zaudējumu atlīdzināšanas prasības par konkurences tiesību pārkāpumiem (I). *Jurista Vārds*. 2025, no. 37 (1407), pp. 26–32.

Quantification of harm in Latvia is inconsistent and still developing. The legal framework itself is relatively straightforward. Art.21(1) of LvCL requires the claimant to establish the amount of the loss suffered, while authorising courts to determine that amount where precise calculation is impossible or disproportionately difficult.

Overall, several approaches to quantification of damages can be identified in Latvian case-law.

The full gross income of the defendant recovery approach is seen only in the litigation between PKL Flote and the Riga Freeport Authority. This model was consistently applied across two separate lawsuits (cases C04293109 and C29319218) concerning anticompetitive conduct in the Riga Port tugboat market by the Riga Freeport Authority. The LvNCA established an abuse of dominant position, but the court established an additional violation by the defendant, a public body, engaged in commercial activities where market inefficiencies were not established. Thus, the Riga Free Port violated the principle of neutrality.[347] Given that the defendant's commercial activity itself was found to be unlawful, the claimant was deemed to be the sole lawful participant on the market, and that part of the claimant's market share (the difference between 100% and the actual market share of the claimant) was illegally taken over by the defendant. The court concluded that in these circumstances the claimant was entitled to the infringer's gross revenue stream. This case is highly fact-specific and, based on more recent case law, was decided incorrectly. Namely, subsequent cases show that the courts lack jurisdiction to adjudicate violations of the principle of neutrality.[348]

The second, counterfactual, approach requires the court to compare the claimant's actual position with the position it would have occupied in a world without the infringement. In legal terms, an administrative finding of an infringement establishes only the unlawful conduct, and it does not establish the 'butfor' price or the actual monetary loss. Economically, the court must reconstruct the competitive benchmark (what price would have emerged in the tender, or what payment would have been made for the service, under conditions of undistorted competition) and measure the difference between that benchmark

347 DZĒRVINIECE, Dita. Tiesas vēstījums par publisku personu radītiem konkurences kropļojumiem. *Jurista Vārds*. 2018, no. 50 (1056), pp. 14–15.

348 See LV: Economic Court, Judgment of 19 May 2022, No. C75009121.

and the price actually paid. This logic is expressly endorsed in Latvian case-law. The case-law explains that the claimant must show how the price would have formed in the tender had the restriction of competition not existed, thereby confirming that the infringement decision alone does not reveal the butfor price.[349] Taken together, existing case-law anchors a legally and economically coherent counterfactual standard. Namely, liability for damages is dependent not merely on the existence of an infringement but also on the demonstrated difference between the actual outcome and the outcome that would have prevailed absent the unlawful conduct. However, to date, there is still only an extremely limited body of caselaw that applies this counterfactual methodology in practice.

Third, a more streamlined damages quantification approach is seen in cases where damages are not presumed (or assumed) but are based on specific costs incurred if those costs are incurred as a result of the defendant's illegal conduct. Most, but not all,[350] of such cases relate to mandatory financial correction of amounts received from EU funds. Such corrections are imposed by the Central Finance and Contracting Agency, and the standard approach is to treat these corrections as a proven actual financial loss (*damnum emergens*).[351] However, caution is warranted, since the Central Finance and Contracting Agency appears, in practice, to impose corrections even where doubts remain as to whether the relevant tender was in fact cartelised, and private defendants have no standing to appeal the Agency's decision. This asymmetry raises legitimate concerns about whether all amounts paid or payable to the Agency can be treated as conclusively established financial losses in civil proceedings.

In one of the pre-DD cases the claimant had justified the damages in its statement of claim as lost profits, the amount of which it had also attempted to prove. The Supreme Court indicates that in such a case the amount of damages could no longer be determined by the court on the basis of the judicial

[349] LV: Economic Court, Judgment of 16 January 2023, No. C75012722; LV: Riga Regional Court, Judgment of 19 October 2023, No. C75012722; LV: Economic Court, Judgment of 12 October 2022, No. C75012522; LV: Riga Regional Court, Judgment of 1 June 2023, No. C75012522.

[350] For instance, see LV: Riga City Latgale Suburb Court, Judgment of 15 November 2019, No. C29319218.

[351] LV: Economic Court, Judgment of 16 January 2023, No. C75012722; LV: Riga Regional Court, Judgment of 19 October 2023, No. C75012722; LV: Economic Court, Judgment of 12 October 2022, No. C75012522; LV: Riga Regional Court, Judgment of 1 June 2023, No. C75012522.

estimation.[352] Therefore, if the claimant defines a specific amount of damages, it cannot subsequently refer to the court's right to determine the amount at its discretion. However, Latvian legal literature critically evaluates this court practice – forcing the plaintiff to decide at the time of filing the claim whether to request the recovery of a specific amount or to ask the court to determine the amount of damages.[353] The fourth standard is the judicial estimation approach. For preDD infringements, judicial estimation was permissible but was not legally required, and courts retained discretion as to whether to estimate harm once the existence of damage had been established. For postDD infringements, this discretion will no longer exist. Art.17(1) DD, as transposed through Art.21(1) of LvCL, obliges courts to estimate the amount of harm whenever the claimant has demonstrated the occurrence of damage and precise quantification is impossible or excessively difficult. Thus, while judicial estimation is conceptually available in all cases, its legal nature shifts.

There are no available post-DD damages cases discussing the judicial estimation; thus, it remains to be seen how the Latvian law presumption of the 10% overcharge in cartel cases will be applied and how it will influence the process of the judicial estimation. For the time being, however, the majority of pending and incoming cases qualify as pre-DD cases, thus a separate discussion on pre-DD quantification tests is warranted.

For all pre-DD infringements, the court's authority to estimate damages is triggered only if the claimant has exerted all reasonable efforts to prove the precise amount, but this proves impossible or excessively difficult. The LvCL's presumptions of harm and overcharge are substantive rules and were ruled inapplicable retroactively to these cases, a finding reinforced by the CJEU in C267/20, *Volvo and DAF Trucks*. Therefore, the court's authority to estimate damages is triggered only if the claimant has exerted all reasonable efforts to prove the precise amount of loss. This legal structure reflects a dual obligation, i.e. the claimant must demonstrate the economic disadvantage resulting from the infringement, and the court must, when appropriate, complete the quantification task through judicial estimation. Latvian courts thus operate within

[352] LV: Supreme Court Senate, Judgment of 30 September 2016, No. SKC-297/2016.

[353] PĀVILA, Debora. Prasības par konkurences tiesību pārkāpumiem. *Jurista Vārds*. 2020, no. 48 (1158), pp. 46–49.

a hybrid model that combines classic tort law principles with a competition-specific authorisation to bridge evidentiary gaps.

At the same time, empirical analysis of the Latvian case-law shows the existence of divergent and inconsistent case law.

As previously mentioned, the presumption of harm, as well as the 10% overcharge presumption in case of cartels, is only applicable to the post-DD cases, and this is settled case-law. The existence of the claimant's obligation to demonstrate, to the extent possible, the economic disadvantage suffered is also settled and is not questioned. Inconsistencies arise when judges decide on (1) whether the claimant has exerted all reasonable efforts to prove the precise amount of loss and (2) which benchmarks can be used in pre-DD cases when the court is exercising judicial discretion in quantifying the amount of damages.

In many cases, where the claimant fails to even attempt to prove the damages (and does not request disclosure of evidence), the claims are dismissed as manifestly ill-founded.[354] In this category of cases, the courts rightly acknowledged the high level of difficulty in quantifying the damages, but rejected the claims due to failure to prove either the existence of damages or quantum thereof.

However, there exists another category of cases, where courts show maximum relaxation of the burden of proof and discharge the claimants from the obligation to submit (any specific or any at all) evidence.[355] When awarding damages, in most of such cases the *de facto* awarded amount is equal to 10%.[356]

Although the prevailing outcome in estimation cases is the nowfamiliar 10% figure, the reasoning supporting this outcome varies widely: from detailed engagement with comparative studies to brief references to generic literature

[354] LV: Economic Court, Judgment of 2 December 2022, No. C-0150-22; LV: Economic Court, Judgment of 30 November 2022, No. C75014522; LV: Economic Court, Judgment of 7 July 2023, No. C-0085-23; LV: Economic Court, Judgment of 5 March 2024, No. C-0060-24; LV: Riga Regional Court, Judgment of 21 March 2024, No. CA-0409-24; LV: Economic Court, Judgment of 11 October 2023, No. C75012823.

[355] LV: Riga Regional Court, Judgment of 5 June 2024, No. CA-0419-24; LV: Riga Regional Court, Judgment of 26 April 2023, No. CA-0991-23; LV: Economic Court, Judgment of 29 December 2023, No. C75015223; LV: Riga Regional Court, Judgment of 19 November 2024, No. C75015223; LV: Riga Regional Court, Judgment of 4 October 2023, No. CA-0592-23.

[356] LV: Riga Regional Court, Judgment of 5 June 2024, No. CA-0419-24; LV: Riga Regional Court, Judgment of 26 April 2023, No. CA-0991-23; LV: Economic Court, Judgment of 29 December 2023, No. C75015223; LV: Riga Regional Court, Judgment of 19 November 2024, No. C75015223; LV: Riga Regional Court, Judgment of 4 October 2023, No. CA-0592-23; LV: Riga Regional Court, Judgment of 5 January 2024, No. CA-0336-24.

without meaningful contextualisation. The lack of explicit differentiation among sources, sectors and types of conduct diminishes analytical persuasiveness and leaves the system vulnerable to criticism for standardised overreliance on a single percentage.

In many of the case, when quantifying damages, the courts reproduce an identical passage stating that even where the infringement predates the DD-based amendments, international overcharge studies[357] may "serve as a comparison." In substance, this standardised line of argumentation asserts that international empirical studies show typical cartel overcharges significantly above 10%, yet the Latvian legislator deliberately opted for a more conservative 10% (post-DD) benchmark. Thus, the courts conclude they may apply a 10% judicial estimation even where neither the DD nor the LvCL *ratione temporis*. Although framed as an evidence-based exercise, this boilerplate reasoning is methodologically unsound because it juxtaposes broad, heterogeneous overcharge studies with Latvian procurement disputes without demonstrating their relevance and then defaults to a uniform 10% estimate without articulating why this percentage follows from either the cited research or the factual circumstances of the case. The approach thus collapses the legally required, case-specific assessment into an unexamined formula, depriving the estimation exercise of internal logic and severing the link between the statutory test and the justification offered by the court.

Interestingly, in one of the cases, the courts awarded the 10% quantum while simultaneously dismissing the defendant's economic expert submission, which argued the maximum overpayment was significantly lower than 10%. The court dismissed this expert evidence based on general principles and upheld the 10% estimation with no hesitation.[358]

A more coherent and economically grounded application of Art.21(1) of LvCL would require courts to articulate clearly the relevant counterfactual and to justify the selected estimation method in relation to the specific case context, thus distinguishing between the evidentiary threshold for establishing the existence of harm and the subsequent analytical task of determining its amount. Without such clarification, Latvian quantification practice risks developing into

[357] CONNOR, John M. Price-Fixing Overcharges: Legal and Economic Evidence. *SSRN Electronic Journal*. 2005. DOI: 10.2139/ssrn.787924

[358] LV: Economic Court, Judgment of 29 December 2023, No. C75015223; LV: Riga Regional Court, Judgment of 19 November 2024, No. C75015223.

a quasipresumptive system, notwithstanding that neither the Competition Law nor the DD permits such an outcome for the infringements examined in the current caselaw.

6. Evaluation of the environment for private enforcement of competition law

Latvia has over forty private enforcement judgments. Notably, the temporal distribution of these cases is uneven. Almost all infringements occurred before the transposition of the DD, while the judgments themselves span from 2016 to 2025. Thus, Latvian courts mostly adjudicate pre-DD infringements under a post-DD procedural framework, creating distinctive interpretative tensions.

The Latvian system of private enforcement of competition law presents a nuanced picture. While the legal framework now aligns with EU law and includes specialised rules on limitation, passing-on, disclosure, and judicial estimation, practical enforcement remains limited and inconsistent. Most cases are dismissed at first instance, usually for failure to prove harm or causation. Damages awards are rare, modest, and often estimated at 10%. Proceedings are lengthy, and appeals are common, but overall claimant success rates are low.

A defining feature of Latvian private enforcement is the dominance of public-sector claimants, which is partly due to official pressure on public institutions to pursue damages. The activity of the public entities is partially due to the fact that the office of the Prosecutor General, at one point, started sending out reminders to the head officials of municipal and state institutions and enterprises, reminding that failure to claim damages in cartel cases may give rise to the investigation of possible waste of public funds, for which criminal liability may arise.

Few private undertakings bring claims, and consumer actions are absent. No collective mechanisms exist, and assignment of claims, while legally permissible,[359] remains underused. The LvCPC permits multiple claimants to

[359] *Renault Trucks SAS* (case C75003121), where the original buyer assigned the damages claim against Renault. The judgment confirms that assigned competition claims are admissible and that the assignee acquires full standing to pursue the action. Although the court did not deve-

bring a single action. However, such participation as co-claimants differs from the concept of a class action, in which one or more representatives act on behalf of a large, often unnamed group of persons.[360] The lack of procedural vehicles capable of consolidating dispersed harm restricts access to justice for small victims.

The lack of collective mechanisms and the underuse of claim assignment restrict access to justice for small victims. Despite a coherent legal structure, the real-world impact of private enforcement in Latvia remains modest and cautious, with limited deterrent effect and little benefit for private parties.

7. The Future of Private Enforcement in Latvia

The Latvian system of private enforcement has reached a stage where the foundational legal architecture is complete, yet practical functioning remains uneven and constrained by structural barriers. As Latvia approaches a decade since transposing the DD, several developments could enhance both the effectiveness and coherence of private enforcement while remaining aligned with EU law and domestic procedural traditions.

A persistent challenge is the information asymmetry between claimants and defendants. Although the LvCPC provides a disclosure framework, its practical use remains limited, and courts often apply it narrowly. A more proactive judicial approach, grounded in the proportionality criteria already embedded in national law, could increase evidentiary completeness and encourage more potential claimants to pursue actions.

Expanding the role of assignment and aggregation of claims presents another avenue for development.

lop a detailed doctrinal analysis of assignment or its potential implications for aggregation, it accepted the transfer without imposing additional evidentiary or procedural burdens.

360 In those cases, co-plaintiffs participate in the proceedings, each retaining their procedural independence. See LV: Supreme Court, Judgment of 13 November 2025, No. C77895222, **SKC-542/2025,** ECLI:LV:AT:2025:1113.C77895222.16.L; LV: Supreme Court, Judgment of 6 February 2020, No. C04426011, **SKC-428/2020,** ECLI:LV:AT:2020:0206.C69360318.9.S; LV: Supreme Court, Judgment 11 February 2021, No. C30496418, **SKC-40/2021,** ECLI:LV:AT:2021:0317.12814009511.6.L.

The LvNCA developed useful methodological material for calculating losses and recovering damages arising from violations of competition law.[361] In developing the methodological materials, various European Commission guidelines, CJEU and national court judgments, as well as studies and other legal doctrine resources, were researched and analysed.[362] Interestingly, since 2024, the LvNCA has been assigned a new function – to provide methodological support to public contracting authorities in identifying, assessing and calculating losses resulting from violations of competition law. The LvNCA will advise public contracting authorities on loss assessment calculations and the choice of calculation methods, as well as provide support in calculating the losses incurred by the public contracting authority for the purpose of filing a claim in court.

8. Summary

The transposition of the DD has fundamentally reshaped the Latvian system of private enforcement, introducing a coherent legislative framework where previously only fragmented elements of civil and competition law existed.

Yet, the practical significance of the DD in Latvia cannot be understood without analysing judicial practice. Case law has been decisive in defining the operational meaning of the legislative framework, especially in areas where statutory language mirrors the DD verbatim but leaves room for interpretative discretion. Latvian case law demonstrates divergent judicial approaches to causation, estimation, and the assessment of evidence. The legal framework alone does not guarantee consistency, and the development of a coherent national jurisprudence remains essential.

Overall, the Latvian system illustrates that the DD is both a legislative and a judicial project. The DD introduced the architecture, but national case law provides the interpretative substance that determines its effectiveness. Continued judicial engagement will remain central to the evolution of private enforcement in Latvia.

361 KONKURENCES PADOME. *Zaudējumu aprēķināšana un zaudējumu par konkurences tiesību pārkāpumu piedziņa. Metodiskais materiāls* [online]. Riga, 2021. Available at: https://www.kp.gov.lv/lv/media/12375/download?attachment.

362 DZELVE, Matīss. Konkurences padomes aktualitātes zaudējumu atlīdzināšanā. *Jurista Vārds* [online]. 2022, no. 43/44 (1257/1258) [accessed 27.11.2025]. Available at: https://juristavards.lv/zurnals/282183-konkurences-padomes-aktualitates-zaudejumu-atlidzinasana/

CHAPTER 5

Private enforcement of competition law in Poland: Where we are and how to accelerate the use of private litigation

by

Anna Piszcz* and Dominik Wolski**

1. Introduction+

This chapter narrates the development of private enforcement of competition law in Poland in two phases, the pre-DD legislation years when no specific law governing private antitrust enforcement was in force and the post-DD period from 2017 onwards, upon implementation of the DD to national legal system. Discussion focuses on three central elements. At first, this chapter refers to some general issues which are useful to comprehend this phenomenon in Poland. After that, the focus is on selected substantive law issues, namely limitation period, joint and several liability, quantification of harm and passing-on of overcharge. Third, we examine selected procedural law issues, such as standing, disclosure of evidence and effect of national decisions. We then go on to discuss a selection of cases, that do not differ substantially from those we may see in other EU member states (e.g. truck cartel, interchange fee, etc.). However, the scarce case law makes it difficult to reach a concluded view on the relatively underdeveloped private enforcement of competition law in Poland.

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+ Sections 1, 2.1, 2.3, 3 and 4 were written by Anna Piszcz, Sections 2.2, 5 and 6 were written by Dominik Wolski, whilst Sections 7, 8 and 9 are common parts.

2. Legislative framework

2.1 General issues

2.1.1 Pre-DD legislation

The history of public enforcement of Polish competition law (understood in the narrow sense, i.e. excluding unfair competition rules) is quite complex.[366] It began before World War II, and – interrupted afterwards – was formally continued by the 1987 Act on Counteracting Monopolistic Practices in the National Economy. However, only the transition to market economy in 1989 implied the creation of a competition law system. The 1987 Act was replaced by the 1990 Act on Counteracting Monopolistic Practices, providing in particular for the prohibitions of anticompetitive agreements and of the abuse of a dominant position. The perspective of Poland's accession to the European Union (EU) led to replacing the 1990 Act with the 2000 Act on Competition and Consumer Protection. In 2007, a new Polish Act on Competition and Consumer Protection (PlACCP) was adopted. In short, in Art. 6 and 9, it provides for the prohibitions of anticompetitive practices modelled on – respectively – Art. 101 and 102 TFEU.

Under the pre-DD Polish legislation, there were neither special substantive rules nor specific procedural mechanisms applicable to private enforcement of the above-mentioned prohibitions of anticompetitive practices. Various publications are available that examined the pre-DD Polish legislation in the study area, constantly arguing for the need for modernisation of the existing system,[367] whereas – on the other hand – it was also believed that "the overall success of private enforcement of antitrust law in Poland is far more dependent on public perception than on a change in the law.[368]The key element of the legal framework

366 BŁACHUCKI, Mateusz. *Polish Competition Law-Commentary, Case Law and Texts*. Office of Competition and Consumer Protection, 2013, pp. 8–22.

367 In English in particular see PODRECKI, Paweł. Civil Law Actions in the Context of Competition Restricting Practices under Polish Law. *Yearbook of Antitrust and Regulatory Studies*. 2009, vol. 2, no. 2.; PISZCZ, Anna. Still-unpopular Sanctions: Developments in Private Antitrust Enforcement in Poland After the 2008 White Paper. *Yearbook of Antitrust and Regulatory Studies*. 2012, vol. 5, no. 7.; GAC, Maciej. Individuals and the Enforcement of Competition Law-Recent Development of the Private Enforcement Doctrine in Polish and European Antitrust Law. *Yearbook of Antitrust and Regulatory Studies*. 2015, vol. 8, no. 11.

368 JURKOWSKA, Agata. Antitrust Private Enforcement-Case of Poland. *Yearbook of Antitrust and Regulatory Studies*. 2008, vol. 1, no. 1, p. 78.: "The current legal framework of civil law and

was the Civil Code (PlCC) (see 2.2.1 below).[369] Also the 1993 Act on Combating Unfair Competition (PlACUC),[370] providing for more types of available claims, could be applied to private enforcement of the prohibitions of anticompetitive practices due to the broad concept ("general clause") of unfair competition act (Art. 3 PlACUC). On the other hand, it was extremely doubtful whether the 2007 Act on Counteracting Unfair Market Practices could be applied to competition law infringements.[371] [372] There was no guidance on this issue from judiciary due to the lack of lawsuits based on this Act.

In general, procedural aspects of private enforcement of competition law were governed by the Civil Procedure Code (PlCPC).[373]

Under the pre-DD Polish legislation, there were no courts designated to deal specifically with private enforcement of competition law. The allocation of the judicial power between district and regional courts was determined by the monetary value of the claim. Moreover, in 2007 the amendment of the PlCPC came into effect providing that only regional courts were competent to hear cases based on the PlACUC provisions.

2.1.2 Transposition of the DD

After the adoption of the Damages Directive (DD), it was obvious that maintaining the *status quo* was not an option and therefore the Ministry of Justice worked to on the DD implementation. Whereas the deadline for the transposition was 27 December 2016, the Polish draft Act on Claims for Damages for Infringements of Competition Law (PlACD) was published and submitted for public consultation only in November 2016.[374] It was sent to the Parliament in

civil procedures, supported by the existing case law largely attributable to the judgments of the Polish Supreme Court, seems to be sufficient from a legal point of view. An explicit mention of the right to antitrust damage actions and clear instructions concerning the execution of this right would be likely to accelerate a 'psychological' shift towards private enforcement of antitrust law".

369 Civil Code, as amended, Journal of Laws 1964, No. 16, item 93.

370 Act on Combating Unfair Competition, as amended, Journal of Laws 1993, No. 47, item 211.

371 Act on Counteracting Unfair Market Practices, Journal of Laws 2007, No. 171, item 1206.

372 JURKOWSKA-GOMUŁKA, Agata. Private Enforcement of Competition Law in Polish Courts: The Story of an (Almost) Lost Hope for Development. *Yearbook of Antitrust and Regulatory Studies*. 2013, vol. 2013, no. 8, p. 121.

373 Civil Procedure Code, as amended, Journal of Laws 1964, No. 43, item 296.

374 For more see PISZCZ, Anna and Dominik WOLSKI. Poland. In: PISCZ, Anna, ed. *Imple-*

March 2017, adopted on 21 April 2017 and published in Journal of Laws on 12 June 2017.[375] The PlACD came into force on 27 June 2017.

The PlACD sets out the rules governing claims and actions for damages under national law for competition law infringements – both rules required by the DD and some additional ones. It also amended provisions of the PlACCP and PlACUC, as well as some general provisions of the PlCC relating to the limitation period for tort-based compensation claims. Quite expectedly, the PlACD did not limit the scope of the transposed solutions exclusively to infringements with an impact on trade between Member States. On the other hand, the PlACD went beyond the DD scope with regard to neither the types of claims covered (claims for damages) nor the types of infringements covered (anticompetitive agreements, decisions by associations of undertakings or concerted practices and abuses of a dominant position). "Spontaneous" harmonisation with a significantly broader scope than that provided for in the DD did not occur in Poland.

Article 11 PlACD vested regional courts with exclusive authority to hear actions for antitrust damages in 1st instance (authority of a kind that they already possessd in relation to all unfair competition claims and all collective redress actions).[376]

2.2 Substantive law issues

2.2.1 Pre-DD legislation

As said, in the pre-DD period there was no specific law addressing civil liability for infringement of competition law, antitrust damages claims included. Of the three types of civil liability provided for in the PlCC, contractual liability (Art. 471) and unjust enrichment (Art. 405) might be theoretically used, but in case of contractual liability, infringement of competition law results in nullity

mentation of the EU Damages Directive in Central and Eastern European Countries. Warszawa: University of Warsaw Faculty of Management Press, 2017.

375 Act on Claims for Damages for Infringements of Competition Law, Journal of Laws 2017, item 1132.

376 WOLSKI, Dominik. Can an ideal court model in private antitrust enforcement be established? *Yearbook of Antitrust and Regulatory Studies*. 2018, vol. 11, no. 18, pp. 136–137. DOI: 10.7172/1689-9024.YARS.2018.11.18.5

of contract, and consequently no contractual liability may arise. In turn, unjust enrichment comes into play when legal act (e.g. contract) as the ground of value transfer, violates competition law and consequently is null and void. However, it does not constitute type of damages claims, but simple obligation of the party to return every benefit that was obtained based on the legal act that is no longer valid. For the above reasons only fault-based tort liability provided for in Art. 415 PlCC, in conjunction with the PlACCP, might be considered as legal ground for antitrust damages claims in pre-DD period in Poland.[377] Other options discussed in legal literature, including the PlACUC, should be seen as desperate quest for any symptom of private antitrust enforcement rather.[378]

The first aspect of antitrust damages claims mentioned above is limitation period. At that time, limitation periods applicable to antitrust damages claims did not differ from those that governed tort liability. This meant according to the basic principle set forth in then-Art. 4421 § 1 PlCC, that damages claims were time barred after three years from the day when the injured party has become aware of the harm and of the person obliged to remedy the harm (*a tempore scientia*). However, in any case this period could not be longer than ten years from the day of the event causing the harm (*a tempore facti*). No different in case of joint and several liability for the infringement of competition law, where Art. 441 PlCC applied in its full scope to any type of tort, including violation of the PlACCP. With that said, if several persons were liable for harm caused by tort (here, infringement of competition law), the liability of those persons was joint and several (Art. 441 § 1). Consequently, if harm resulted from an action or omission of several parties infringing competition law, the party that remedies the harm may expect from other infringers to be reimbursed a relevant part, depending on the circumstances, and especially on the fault of a given party and on the extent of contribution to the harm arising (see Art. 441 § 2). However, if someone remedies harm being liable, but not at fault, that party had a recourse claim against the perpetrator who caused harm being at fault (Art. 441 § 3). As said, the above rules applied to tort liability for the infringement of competition law in pre-DD period. Furthermore, tort liability set forth in Art. 415 PlCC is

[377] WOLSKI, Dominik. The principle of liability in private antitrust enforcement in selected european states in light of the implementation of the damages directive into the polish legal system. *Yearbook of Antitrust and Regulatory Studies*. 2016, vol. 9, no. 14, p. 78. DOI: 10.7172/1689-9024.YARS.2016.9.14.3

[378] JURKOWSKA, Agata. *Antitrust Private Enforcement-Case of Poland*, pp. 65–66.

based on three premisses: civil wrong (illegal act), harm and causal link between the former and the latter (no change from the pre-DD period). For the plaintiff to successfully pursue legal action in the court, it was necessary to meet cumulatively all the above conditions. Importantly, harm means not only its occurrence, but also its quantum. The burden of proof in respect to both, harm and quantum rests on the plaintiff, as it was in pre-DD era. For this reason, to seek compensation from the wrongdoer, the plaintiff had to prove, using complex economic models[379] and rules of civil proceedings (PlCPC), the extent she was harmed due to the defendant's anticompetitive conduct.

The last aspect of antitrust damages claims discussed in this chapter is currently very well-known concept of passing-on of overcharges. No wonder, in the pre-DD period no specific rule governing passing-on existed, in particular in the form as we know it today. Therefore, if any harm was passed on to another party by the injured-party, dawn- or upstream, the only rules that could apply to such situation would be the rules of civil liability outlined above, including burden of proof of any harm suffered by the plaintiff. If the harm was successfully proven, the plaintiff would have to pay compensation. But if for whatever reason the plaintiff failed in proving harm, this meant lack of defendant's liability. Consequently, if any concept of passing-on could be used by the defendant, it was possible only based on civil liability principles and no specific rules addressing this phenomenon existed in the pre-DD period.

2.2.2 Transposition of the DD

After the transposition of the DD, all the above four elements of antitrust damages claims have been addressed by the new legislation. At first, Art. 10(1) DD that mentions not only limitation period, but it also contains rules governing its commencement, duration, and circumstances of its suspension or interruption. Therefore, implementation process required some adjustments of the pre-existing rules.[380] Article 9(1) PlACD, implementing rules of limitation period included in the DD, extends the general limitation period set forth in Art. 4421 § 1 PlCC from three to five years in relation to competition-based damages

[379] DAVIS, Peter J. and Eliana GARCÉS. *Quantitative techniques for competition and antitrust analysis*. Princeton University Press, 2010, p. 347 et seq.

[380] STAWICKI, Aleksander and Bartosz TURNO. Przedawnienie roszczeń. *Dochodzenie przed sądem polskim roszczeń odszkodowawczych z tytułu reguł konkurencji*. 2016, p. 140 et seq. DOI: 10.7172/978-83-65402-13-4.2016.wwz.4.

claims (*a tempore scientia*).[381] Furthermore, the limitation period does not begin to run during the infringement of competition law. Notwithstanding the above, according to Art. 4421 § 1 PlCC after the amendments, limitation period applicable to antitrust damages claims shall not exceed 10 years from the time when the infringement of competition law ended (*a tempore facti*). It is worth mentioning, that the DD does not include any rules regarding the limitation period *a tempore facti*, but the drafters of the PlACD decided to maintain this concept, with some necessary adjustments required by the DD. It corresponds to Art. 10 DD,[382] however it does not solve problems in identifying the moment when a competition law infringement actually ends.[383] Furthermore, according to the new wording of Art. 4421 § 1 PlCC, that applies to antitrust damages claims too, a tort-based claim will be time-barred after three years (five years in competition-based damages claims) from the day when the injured party learned or with due care could have learned about the harm and about the person liable to redress it. Implementing Art. 10(4) DD, Art. 9(1) and (2) PlACD provide the suspension of the limitation period from the time of initiating: 1) antimonopoly proceedings by the Polish competition authority (PlNCA), or 2) proceedings by the European Commission or a competition authority of another Member State, against the competition law infringer, if the damages claim is based on the same infringement. The suspension ends one year after the final infringement decision was issued, or any other termination of the proceedings occurred.

With respect to the type of liability in antitrust damages claims, these claims fall under the scope of tort liability based on fault. Therefore, Art. 415 PlCC was identified as the main legal basis of private enforcement of competition law in Poland[384]. However, the drafters of the PlACD decided to create a separate basis for liability addressed directly to the above claims. This specific model of liability concerns in particular claims of indirect purchasers, partly based on presumption of fault. Nevertheless, in principle it is entrenched in the model

[381] According to Art. 4421 § 1 PlCC, the limitation period for other tort-based damages cases is three years.

[382] STAWICKI, Aleksander and Bartosz TURNO. *Przedawnienie roszczeń*, p. 151.

[383] WOLSKI, Dominik. Implementacja dyrektywy Parlamentu Europejskiego i Rady w sprawie niektórych przepisów regulujących dochodzenie roszczeń odszkodowawczych z tytułu naruszenia prawa konkurencji (2014/104/UE). *Prawo konkurencji. 25 lat*. 2015, p. 17.

[384] JURKOWSKA, Agata. *Antitrust Private Enforcement-Case of Poland*, p. 66.

of liability set forth in Art. 415 PlCC. It provides the rule, according to which a person that when being at fault has caused harm to another person, shall be obliged to redress it. In order to avoid any doubts relating to a claim of an indirect purchaser, Art. 3 PlACD stipulates clearly that the infringer is obliged to redress harm caused by the infringement of competition law to anybody, unless the infringer is not at fault. Furthermore, Art. 7 PlACD introduces a presumption of fault, that does not exist under Art. 415 PlCC. Consequently, the burden of proof of not being at fault rests on the wrongdoer. At the same token, Art. 7 PlACD contains presumption of harm caused by the infringement of competition law which goes further than that stipulated in Art. 17(2) of the Damages Directive, because it goes beyond damage resulting from cartel infringement. Both above presumptions are rebuttable according to Art. 234 PlCPC.

The joint behaviour of undertakings infringing competition law is mentioned in Art. 11(1) DD. Since the above rule established in Art. 441 § 1 PlCC fully applies to damages claims based on competition law infringements,[385] there was no need to implement Art. 11(1) DD.[386] In addition, Art. 5(1) and (2) PlACD provide a similar scheme of limitation in respect to SMEs. Also, article 5(3) PlACD establishes a specific limitation concerning claims directed to immunity recipients. As regards the liability of settling co-infringers, according to Art. 6(1) PlACD, if the injured party settles with one of the jointly and severally liable co-infringers, then the injured party can demand from other jointly and severally liable co-infringers to redress that party's harm, but reduced by the amount of the recourse claim which the settling co-infringer would have been obliged to pay according to Art. 441 § 2 PlCC. Furthermore, according to Art. 6(2) PlACD, to the extent to which the injured party cannot obtain the redress of harm from other (non-settling) co-infringers based on Art. 6(1) PlACD, the injured party can demand compensation from a settling co-infringer, unless the settlement provides otherwise.

Article 10 PlACD refers to the PlCC in any matters not covered by the PlACD, quantification of harm included. In this respect, the PlCC provides for

[385] PODRECKI, Paweł and Katarzyna WIESE. Solidarna odpowiedzialność podmiotów naruszających reguły konkurencji i jej ograniczenia. In: PISZCZ, Anna and Dominik WOLSKI, eds. *Dochodzenie przed sądem polskim roszczeń odszkodowawczych z tytułu naruszenia reguł konkurencji*. Warszawa: Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, 2016, p. 119.

[386] *Ibid*., p. 137.

the principle of full compensation, which also means, that the compensation paid to the injured party cannot exceed the harm which that party suffered.[387] This also means, that the infringer shall be liable for actual loss and lost profits. Furthermore, the overcharge was defined in Art. 2(11) PlACD. Additionally, in case of harm caused by tort according to Art. 481 PlCC, the infringer would be obliged to pay interest to the injured party. In addition, Art. 8 PlACD states that if the calculation of damages is based on prices from the date other than the date of calculating the damages, the injured party is also entitled to statutory interest for the period from the date on which the prices were the basis for determining compensation until the date the claim for compensation becomes due. Article 31(1) PlACD states that the court when quantifying harm caused by an infringement of competition law may follow the guidelines included in the *Communication on quantifying harm* issued by the European Commission (2013/C 167/07[388]) as well as those mentioned in Art. 16 DD. Furthermore, Art. 31(2) PlACD stipulates that at the request of the court, the Polish competition authority or the competition authority of another EU Member State may assist the court in quantifying the harm, if the evidence collected and information possessed by such authority allow it to do so.

Article 4(2) and (3) PlACD implement the rules with respect to the passing-on of overcharges. If the infringement of competition law resulted in an overcharge of direct purchasers, and an indirect purchaser bought products or services to which the infringement of competition law relates, or products or services derived from products or services to which the infringement relates, it is presumed that the overcharge has been passed on to the indirect purchaser. However, reference to the above presumption can be made only by an indirect purchaser who claims the redress of damages arising from the passing-on of the overcharge upon that indirect purchaser. The presumption can be rebutted according to Art. 234 PlCPC.

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387 BANASZCZYK, Zbigniew. In: BANASZCZYK, Zbigniew and Krzysztof PIETRZYKOWSKI. *Kodeks cywilny, Komentarz, Tom I*. Warszawa: C. H. Beck, 2008, pp. 998 and 1000–1001.

388 Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07).

2.3 Procedural issues

2.3.1 Pre-DD legislation

First, standing to sue is typically a procedural matter. Before the transposition of the DD, injured parties had standing to sue based on the PlCPC provisions. However, under the PlACUC injured entities other than undertakings, including individual consumers, lacked standing.[389] Claims for injunctions (cessation claims, claim to remove the consequences of an infringement, claims to make a statement) and claims to pay an adequate sum of money to benefit a specific social purpose related to the support of Polish culture or protection of national heritage (if it was a culpable act) could (and still can) be pursued not only by undertakings, but also by a national or regional organisation having objectives consisting in the protection of the undertakings' interests.[390] Standing to bring such claims conferred upon organisations or authorities representing consumer interests was gradually restricted over the years until it was finally abolished in 2007.[391]

Second, in 2010, the 2009 Act on the Pursuit of Claims in Group Proceedings[392] came into force.[393] Hypothetically, collective redress mechanisms (opt-in system) became applicable to competition law private claims, but in practice this innovation did not shape more fertile ground for the development of private antitrust enforcement in Poland. When it comes to enforcement practice, there were no antitrust group proceedings at all.

Third, the pre-DD legislation involved neither specific rules on disclosure of evidence nor provisions on effect of public enforcement decisions upon private enforcement proceedings. On the last question, however, dissenting views were taken in the case-law.[394] Eventually, in a resolution of 2008, the Supreme Court

[389] Art. 18(1) PlACUC. In English available at: https://www.wipo.int/wipolex/en/legislation/details/3510 (version 2004).

[390] See Art. 19(1)(2) and Art. 19(2) PlACUC.

[391] See the developments of Art. 19(1) PlACUC.

[392] Act on the Pursuit of Claims in Group Proceedings, Journal of Laws 2010, No. 7, item 44.

[393] PAIS, Sofia Oliveira and Anna PISZCZ. Package on Actions for Damages Based on Breaches of EU Competition Rules: Can One Size Fit All? *Yearbook of Antitrust and Regulatory Studies*. 2014, vol. 7, no. 10, pp. 209–234.

[394] For more in English see e.g. PISZCZ, Anna. Practical Private Enforcement: Perspectives from Poland. In: BERGSTROEM, Maria, Marios C. IACOVIDES and Magnus STRAND, eds. *Har-*

argued in favour of the binding effect of final decisions adopted by the Polish competition authority.[395]

Last, with the principle of amicable resolution of disputes, wherever settlement is admissible, courts were (and still are) obliged to endeavour to settle the case amicably at any stage, among others by encouraging parties to use mediation (Art. 10 PlCPC). Mediation was included in the CPC in 2005. However, the legal framework simply did not include specific rules of consensual dispute resolution (CDR) applicable to private antitrust enforcement.

2.3.2 Transposition of the DD

First, even though the DD does not require Member States to provide business organisations and consumer organisations with standing in the course of private antitrust damages claims, the PlACD directly addresses this question. Whereas the DD only mentions "someone acting on behalf of one or more alleged injured parties" in Art. 2(4) defining an action for damages, Art. 14 PlACD clearly gives standing to both business and consumer non-governmental organisations (NGOs) to initiate representative actions for antitrust damages, as well as to participate in proceedings already pending before the court. To this end, the objective (or rather one of the objectives) pursued by a business NGO should be to protect the market against infringements of competition law (Art. 14(1)). In case of a consumer NGO, its objective must be the protection of consumers. Quite obviously, in order to act before the court, the NGO needs to receive the injured party's approval. These minimum (not excessive) requirements applying to NGOs seeking to represent injured parties should be welcomed. However, those laid down by the PlACD essentially do not seem designed so as to prevent improper litigation.[396]

Second, the legislative works were not extended beyond the scope of the DD (see Recital (13) sentence 2 of the Preamble) to include provisions on collective redress mechanisms. The opportunity to improve them for the purpose

monising EU competition litigation : the new Directive and beyond. Oxford: Bloomsbury Publishing, 2016, pp. 206–208.

395 PL: Supreme Court, Resolution of 23 July 2008, No. III CZP 52/08.

396 PISZCZ, Anna and Dominik WOLSKI. *Poland*, pp. 224–225.

of private antitrust enforcement on the occasion of the transposition of the DD was lost, since group proceedings received no legal drafters' attention.[397]

Third, Art. 17-29 PlACD implemented the provisions of the DD on disclosure of evidence from the defendant, the plaintiff, a third party or a competition authority. The importance of these articles derives from the significance of evidences for effective enforcement as well as their sensitivity, in particular when they are included in files held by a competition authority. These articles include many details, either quite literally copied from the DD, or added based on the procedural autonomy principle (see Art. 24-25 PlACD). However, the limits of this chapter allow merely for a concise outline, concentrating on the two essential elements of the introduced legal framework. These are the protection of documents related to public enforcement of competition law (Art. 18 and 29 PlACD) and the combination of sanctions applicable in relation with procedures of disclosure of evidence. Articles 18(1) and 29(1) PlACD absolutely prohibit disclosure of leniency statements/settlement submissions and their use as evidence in damages proceedings, while documents enumerated in Art. 18(2) PlACD (after Art. 6(5) DD) must not be disclosed and used as evidence before the public enforcement proceedings are completed. It should be added that Polish competition law is characterised by specific scopes of leniency and settlements different from the EU models. Therefore, in order to secure the compliance with the DD, the legislature must have introduced to the Polish antitrust vocabulary the new terms for leniency statements and settlement submissions (defined in Art. 2(7) and (9) PlACD) different from those used by the PlACCP (but compliant with the DD), in particular narrowed the scope of leniency programme to secret cartels for the purposes of the PlACD application. In the case of sanctions applicable in relation with procedures of disclosure of evidence, a range of measures is generally allowed to the court in compliance with Art. 8 DD. The PlACD includes provisions sanctioning both of the opposing situations, namely when a party files the motion to disclose evidence in bad faith (*mala fide*), breaches the rules on access to evidence set forth by the court according to Art. 23 PlACD, or uses disclosed evidence for a different purpose than the pending proceedings (Art. 28 PlACD providing for the possibility to presume the relevant issue to be proven and/or to order the payment of costs),

[397] PISZCZ, Anna. *Compensatory Collective Redress: Will It Be Part of Private Enforcement of Competition Law in CEE Countries?*, p. 226.

as well as when the person obliged to disclose evidence refuses to follow the order (Art. 27 PlACD providing for the possibility to draw adverse inferences and/or to impose the fine of up to PLN 20,000, i.e. approx. EUR 4,700). Moreover, Art. 26 PlACD states that the final order on evidence disclosure creates an enforcement title against the person obliged to do so. Certainly, this solution goes beyond the literal interpretation of the terminology employed within Art. 8 DD ("penalties"); however, it should be considered compliant with the DD because of a margin of discretion provided for by the minimum harmonisation approach.[398]

Fourth, Art. 30 PlACD implemented Art. 9 DD. In short, a Polish court is bound by a final decision of the Polish competition authority in proceedings regarding claims for damages for infringements of competition law (the non-cross-border effect of decisions). As for a cross-border effect of national decisions (Art. 9(2) DD), the drafters made the choice not to regulate it in the PlACD. In their opinion, Article 231 PlCPC is applicable to foreign decisions. According to this provision, courts may consider facts essential for the resolution of the case as established based on other established facts. Such evidence by inference from other established facts is called a "factual presumption" by the PlCPC. It was believed by the drafters to equal to *prima facie* evidence within the meaning of Art. 9(2).[399]

Last, it is to be made clear that in spite of the importance of CDR and the existing variety of its means, only one amendment was considered necessary by the Polish drafters. It regarded the suspensive effect of CDR in terms of court proceedings where the parties thereto are involved in CDR concerning the claim covered by those proceedings. After Art. 18(2) DD, Art. 15 PlACD set two years as the maximum length of the suspension period of proceedings, a safeguard devised by the DD authors. As for the remaining provisions of the DD on CDR, the Polish drafters decided those provisions do not require transposition to Polish law. This decision is doubtful, when it comes to Art. 18(1) DD interpreted by them narrowly.[400] As a result, the process leading to the conclusion of out-of-court settlements (other than those concluded before the mediator or

398 For more in Polish, see e.g., KOHUTEK, Konrad. *Szkoda antymonopolowa. Zasady odpowiedzialności oraz dochodzenia roszczeń odszkodowawczych*. Warszawa: Wolters Kluwer Polska, 2018, pp. 208–209.

399 PISZCZ, Anna and Dominik WOLSKI. *Poland*, p. 228.

400 PISZCZ, Anna. Well Begun is Half Done: Amendments to the Polish Legal Framework for

arbitrator) does not stop the limitation period, even though literature says with certainty that CDR should be understood broadly, to also cover negotiations between the parties and/or their lawyers.[401]

3. Post-DD adjustments

From 2017, a number of changes to the statutes mentioned above have been made, but the legal framework for private antitrust enforcement, including the PlACD, has not essentially changed. On 24 September 2021, the legal status of infringements of Art. 6 and 9 PlACCP and Art. 101 and 102 TFEU as unfair competition acts has been determined. Since then, they are expressly listed among other unfair competition acts (Art. 15c PlACUC). Therefore, the victim of a competition law infringement can pursue claims under the PlACUC (see section 4 below), and at the same time, does not have to prove that the infringement meets conditions of the general clause of an unfair competition act (Art. 3 PlACUC).

Slightly earlier, on 1 July 2020, provisions on proceedings in intellectual property cases were added to the PlCPC (Art. 479^{89}-479^{129}). They consider cases concerning the prevention and combating of unfair competition to be intellectual property cases. The Minister of Justice decided that but a few appellate and regional courts are competent to hear intellectual property cases.[402] Of 47 regional courts established in Poland, only five (courts in Gdańsk, Katowice, Lublin, Poznań, Warszawa) figure on the lists of courts competent to hear intellectual property cases. Of 11 courts of appeals in Poland, only two courts of appeals (Poznań, Warszawa) have appellate jurisdiction from those five regional courts.

Consensual Dispute Resolution Needed After Antitrust Damages Directive (2014/104/EU). *Białostockie Studia Prawnicze*. 2017, vol. 22, no. 4, pp. 255–256. DOI: 10.15290/bsp.2017.22.04.19.

401 WIJCKMANS, Frank et al. *The EU Private damages directive : practical insights : minutes of the Closed workshop 2015*. Intersentia, 2016, p. 76.

402 Regulations of the Minister of Justice of 29.06.2020, Journal of Laws, item 1151 and 1152.

4. Types of private enforcement measures

Competition law damages can be pursued only based on the PlACD (embodying the DD principles); the PlACUC or PlCC cannot be their legal basis.[403] When the Polish legislature was implementing the DD, it did not seem willing to introduce a wider scope of the application of its rules than their application to claims for damages regulated by the PlACD.

Claims other than claims for damages are available based on Art. 18(1) PlACUC, namely claims for injunctions, i.e. cessation claims, claim to remove the consequences of an infringement, claims to make a statement (p. 1-3), unjust enrichment (undue performance) claims pursuant to general (PlCC) rules (p. 5), claims to pay an adequate sum of money to benefit a specific social purpose related to the support of Polish culture or protection of national heritage, if it was a culpable act (p. 6). Claims for injunctions (cessation claims, claim to remove the consequences of an infringement, claims to make a statement) and claims to pay an adequate sum of money to benefit a specific social purpose related to the support of Polish culture or protection of national heritage (if it was a culpable act) can be pursued not only by undertakings, but also by a national or regional organisation having objectives consisting in the protection of the undertakings' interests.[404]

Hypothetically, also an action for declaratory relief may be brought (for the declaration of invalidity, that is, the declaration that a practice is void) based on Art. 6(2) or 9(3) PlACCP and Art. 189 PlCPC.[405]

5. Case law relevant for private enforcement of competition law

The development of case-law in antitrust private enforcement does not follow evolution of Polish legislation that was discussed above. Although the DD was implemented in Poland on time, apparently providing solid legal ground

[403] Art. 18(1a) PlACUC.

[404] See Art. 19(1)(2) PlACUC.

[405] PODRECKI, Paweł. *Civil Law Actions in the Context of Competition Restricting Practices under Polish Law*, pp. 92–93.

for antitrust damages claims in both aspects, procedural and substantive, it did not trigger rapid development of case law. It does not mean that any case of private antitrust enforcement did not appear in Polish courts, however, it is visible that Poland did not evolve in the direction of the most popular destinations for antitrust damages claims, such as the Netherlands or the UK, not to mention Spain, where the courts are the most active in the EU in antitrust damages claims relating to truck cartel.[406] [407]In Poland, in spite of remarkable rise of economy for at least two last decades, the courts did not become a hub for private enforcement cases based on competition law infringements. Moreover, there are cases of Polish origins, that are being brought by claimants not to Polish courts, but outside Poland, including courts in the above-mentioned states. Basically, there are two reasons of scarce number of private enforcement cases in Poland. Firstly, although the economy is growing, Polish competition authority is not much oriented toward hard-core infringements of competition law.[408] Its activity in this respect, though noticeable, is rather modest. It results in diminishing number of cases giving rise to antitrust damages claims. Secondly, the expertise and effectiveness of Polish courts in economy and market-related cases may still be a subject of complaints. Proceedings are time- and cost-consuming, and judges, although improving their ability to tackle more complex cases, including experts' opinions and economic analysis, still need more said economic and market expertise.

As regards the main issues being a subject of courts' consideration in the above rather scarce number of cases, there are not much different from those under analysis of courts in the other Member States and the CJEU. One of the examples relating to substantive law may be limitation period applicable to antitrust damages claims and its interpretation, in particular in terms of its

406 EC Decision of 19 July 2016, no. C(2016) 4673, AT.39824.

407 See MARCOS, Francisco. The Spanish Supreme Court Sentences the Trucks Cartel. In: *Kluwer Competition Law Blog* [online]. 06. 2023 [accessed 05.11.2025]. Available at: https://legalblogs.wolterskluwer.com/competition-blog/the-spanish-supreme-court-sentences-the-trucks--cartel/.

408 One of the recent, rather rare cartel decisions of OCCP concerns KIA case (Decisions no. DOK-3/2024, DOK-4/2024, DOK-5/2024), although the qualification of this case as cartel is controversial, due to rather vertical, not horizontal scheme of the infringement (KIA and its distributors). The President of OCCP imposed a fine of PLN 405 m on KIA Poland and 11 car dealers (distributors) working for KIA. See OCCP, Zmowa przy sprzedaży samochodów KIA – decyzja Prezesa UOKiK, [Online] Available at: https://uokik.gov.pl/zmowa-przy-sprzedazy--samochodow-kia-decyzja-prezesa-uokik.

commencement date,[409] parent company liability or, as regards procedural aspects, disclosure of evidence analysed in one of the CJEU cases.[410] Overall, the number of cases in Polish courts is rather limited. Also, access to cases' files is limited too, due to the lack of official, mandatory register of cases, that could be publicly available. Therefore, a number of issues arising out of case-law that could be discussed here is limited too.

6. Private enforcement cases

As said, due to the lack of official track record of court cases, in particular those falling under the scope of private antitrust enforcement, exact number of antitrust damages claims in Poland is unknown. No official statistics are available. Therefore, cases discussed in this paragraph as well as their characteristics are based on anecdotal evidence, in particular information available in news or newsletters published by law firms, as well as small number of cases that were found randomly in official platform of courts' judgements ran by the Polish Ministry of Justice. Soon after the implementation of the DD, as a very well known legal ground of antitrust damages claims became anticompetitive conduct of banks included in the decision of Polish CA, reaching back as early as 2006.[411] The above practice was a collusion that occurred among banks setting so-called interchange fee at given level, that was higher than the interchange fee that would have been taken place, if anticompetitive conduct in question had not happened. This was also the first moment when some of the important elements of private enforcement legal framework were applied in practice and confronted with reality in Polish courts. One of those issues verified in judicial practice was limitation period applicable to private enforcement claims. In this respect, some of the interchange fee cases that were brought to courts were eventually dismissed, because – according to the courts – antitrust damages claims were time barred, at least in part. [412]

[409] Judgment of 4 September 2025, Case C21/24, *CP v Nissan Iberia SA*, ECLI:EU:C:2025:659.

[410] Judgment of 10 November 2022, Case C163/21, *PACCAR and Others*, ECLI:EU:C:2022:863.

[411] Decision of the President of OCCP of 29 December 2006, DDF3-580/1/01/DL/EK.

[412] See for example: PL: Regional Court in Warsaw, Judgment of 28 April 2022, No. XXVI GC

Another type of antitrust damages claims that could be tested in Polish courts refers to truck cartel case. The issue at stake in one of the cases that reached out even Polish Supreme Court, was the forum in the context of art. 7(2) of the Brussels I bis Regulation. [413] The Supreme Court analysed the forum for the above case – whether in Poland or not – in relation to the place where harm occurred. According to the plaintiffs, the place when the trucks were being sold at the price affected by cartel, might be considered as the place where the harm occurred. The Supreme Court decided to revert the case to the Court of Appeals for reconsideration in the above context.[414]

One of the most interesting private enforcement cases in Poland, and importantly, successful to the significant extent, was *Magna Polonia* case. The court battle took 10 years, but eventually parties decided to settle the case out of court, when the proceedings were pending in the Court of Appeals.[415] In the case initially brought to the Regional Court in Warsaw, Magna Polonia SA (the plaintiff) sought compensation from Emitel SA (the defendant) for infringement of fair competition rules. The compensation at stake amounted to PLN 167,7 m plus interest, that gives PLN 263 m as the total amount of the claim. It was eventually confirmed to significant extent by the parties in the above out of court settlement of 16 June 2023. Importantly, the case was initiated as stand-alone case, before the implementation of the DD. Although the plaintiff based the complaint on the infringement of unfair competition rules, the case was qualified as private antitrust enforcement. It was also the biggest amount ever awarded to the plaintiff in Polish judicial practice at the time of the Regional Court ruling.[416]As said, before the Court of Appeals final judgement, the parties settled the case out of court, awarding the plaintiff still

754/20; Regional Court in Warsaw, Judgment of 30 March 2023, No. XX GC 342/20 and Regional Cout in Warsaw, Judgment of 27 January 2023, No. XVI GC 455/18.

413 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, pp. 1–32).

414 PL: Supreme Court, Order of 15 October 2021, No. V CSKP 124/21.

415 DZIADKOWIAK, Marcin. Magna Polonia wygrała z Emitelem. Do spółki trafi blisko 100 mln zł. In: *Bankier.pl* [online]. 06. 2023 [accessed 05.11.2025]. Available at: https://www.bankier.pl/wiadomosc/Magna-Polonia-wygrala-z-Emitelem-Do-spolki-trafi-blisko-100-mln-zl-8562598.html.

416 BUCZKIEWICZ, Katarzyna. Ćwierć miliarda złotych za naruszenie reguł konkurencji. In: *Prawo.pl* [online]. 14. 7. 2021 [accessed 01.11.2025]. Available at: https://www.prawo.pl/biznes/naruszenie-regul-konkurencji-cwierc-miliarda-zlotych,509426.html.

unprecedented amount of PLN 192,5 m compensation. Therefore, regardless of the above doubts concerning legal framework of the case, namely if it was "pure" private enforcement of competition law or law combating unfair competition, it was the first success story in Polish legal practice, that might be qualified as competition damages claim. Interestingly, the case was initiated and conducted thanks to external funding.[417]

The last example of antitrust damages claims discussed in this chapter, as opposed to the one mentioned above, was not as successful as expected by the plaintiff. In this case, referring to then-not final decision of PlNCA concerning cartel in the market of chemical products for mining industry,[418] limitation period was the main reason of the plaintiff's defeat in the court. According to the Regional Court in Gliwice (Poland), the plaintiff learned about the harm and a person that caused this harm before the above decision of PlNCA from the letters that the plaintiff was receiving from PlNCA in the course of antimonopoly proceedings. Importantly, those are the conditions of commencing limitation period in tort cases according to Polish civil law, that were discussed in section 2.2.2 above. As a result, commencement of limitation period should be counted from that moment, and at the time of initiation of said court proceedings by the plaintiff, the claim was already time barred. For this reason, antitrust damages claim brought to the court by one of the mining companies that suffered harm due to the above cartel was dismissed by the court.[419]

7. Evaluation of the environment for private enforcement of competition law

The real "workhorses" of the private antitrust enforcement in Europe seem the UK, the Netherlands, Spain, Germany, and certainly not Poland. In some

[417] KOHUTEK, Konrad. Factors Driving the Growth in the Private Enforcement of Competition Law in Europe. *Journal of European Consumer and Market Law*. 2024, vol. 13, no. 3, p. 317. DOI: 10.2139/ssrn.4986292

[418] Decision of the President of the OCCP as of 12 December 2013 r., no. RKT-46/2013.

[419] LINKLATERS. Ważny wyrok dotyczący roszczeń za szkodę wyrządzoną działaniami sprzecznymi z prawem konkurencji. In: *Linklaters* [online]. 13. 6. 2021 [accessed 09.11.2025]. Available at: https://www.linklaters.com/en/knowledge/publications/alerts-newsletters-and-guides/2021/july/13/alert.

authors' opinion that we share, "[d]espite the continued development of Polish jurisprudence in the field of private competition actions, there are not many final judgments, which is probably, among other factors, due to the nature, complexity, and the long duration of an average damage action case as well as the relatively limited activity of the PlNCA, which results in a small number of follow-on cases".[420] In general, at present, it is still very difficult to win a private antitrust enforcement case in Poland. However, it should be kept in mind that the courts still are deciding cases today that originated in 2010s.

As regards to substantive law, antitrust damages claims were admissible even before the implementation of the DD. Therefore, implementation of the latter, although important, did not substantially change legal environment of private antitrust enforcement. Since the DD was implemented in its full scope and timely, substantive law does not constitute a factor, that could prevail on the above scarce popularity of antitrust damages claims in Poland, comparing to other Member States. There is also nothing – except radical solutions such as for example the US treble damages system that has never been seriously considered in the EU – that could substantially help in boosting private enforcement in Poland. The duality of legal regimes for remedies (PlACD vs PlACUC), with the advent of the duality of competent courts in 2020 (47 regional courts hypothetically competent to hear damages actions and only five regional courts for "intellectual property" cases)[421] has given a new dimension to obstacles to private antitrust enforcement in Poland. In fact, it does not allow a plaintiff to combine claims pursued based on the PlACD with those pursued on the basis of the PlACUC. In short, not only there are not too many incentives for private antitrust enforcement cases (limited number of cartel decisions that could be used in follow-on actions), but claims cannot even be combined in those overall long-lasting and complex proceedings.

[420] HANSBERRY-BIEGUŃSKA, Dorothy et al. Poland - Law and Practice. In: *Hansberry Tomkiel Sp. k.* [online]. 18. 11. 2024 [accessed 09.11.2025]. Available at: https://hansberrytomkiel.com/en/poland-law-and-practice/

[421] See sections 3 and 4 above.

8. Suggestions for further development

Considering the current state of play of private antitrust enforcement in Poland, and particularly its main reasons, it is very difficult to draw prospects for the future. It is because behind a small popularity of private enforcement are mostly systemic reasons, such as still not enough ability of the courts to tackle antitrust damages claims on the one hand, and on the other, scarce activity of the PlNCA in hard core antitrust cases. As obvious, systemic, long-lasting problems are usually the biggest challenges and the most difficult ones to be solved. Additionally, the problem at least in part may stem from litigation culture, that is not as developed as in other states. However, Spanish example may prove otherwise. Generally speaking, on the part of substantive law only radical changes, such as multiplication of damages could help, but it is the solution that is very unlikely to be considered in the foreseeable future. As regards the judicial system and the courts competent in antitrust damages claims, a shift from generalist judges to specialized ones could help. Thus, only courts for "intellectual property" cases should be empowered to hear and decide damages actions. This is in our opinion highly recommended, although as we may see in other Member States, also non-specialized courts can tackle antitrust damages claims with expertise and timing efficiency.[422]

Nevertheless, if the most popular private antitrust claims across the EU are follow-on cases, nothing can help, if the activity of the PlNCA is concentrated on many areas (consumers, late payments, bargaining power), with only scarce number of hard-core antitrust cases based on Art. 101 or 102 TFEU and corresponding national competition law. On the other hand, we may observe increasing activity of law firms if any new case with potential for antitrust damages claims appears.[423] Perhaps this will eventually lead to increase of popularity of private enforcement in Poland, although for the time being there are not many symptoms of that increase.

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[422] See also WOLSKI, Dominik. *Can an ideal court model in private antitrust enforcement be established?*.

[423] See for example so called Salmon case: EUROPEAN COMMISSION. Objections to six companies in farmed Atlantic salmon cartel. In: *European Commission* [online]. 25. 1. 2024 [accessed 09.11.2025]. Available at: https://ec.europa.eu/commission/presscorner/detail/ga/ip_24_405.

9. Summary

Although antitrust damages claims were hypothetically possible before the implementation of the DD, this directive undoubtedly has begun the new journey of private enforcement in Poland. With regard to substantive law, a few elements are worth noting at this occasion. The liability type remains unchanged as fault-based, albeit with some adjustments required by the DD. These adjustments are in particular, liability towards anyone who suffered damage (including indirectly injured party) and presumption of harm caused by an infringement of competition law. Limitation periods have been adjusted to the requirements of the DD, especially in relation to their length (five years), the moment when the limitation period begins to run, and the circumstances under which it is suspended. Rules governing joint and several liability in private enforcement of competition law based on the Civil Code have not been substantively changed. Also, significant amendments were not necessary in relation to the quantification of harm. Lastly, the PlACD includes provisions on the passing-on of overcharges.

Consequently, the PlACD properly implemented substantive law following the DD. In general, the same can be said about procedural aspects of private enforcement of competition law. However, private antitrust enforcement cases are complex, long-lasting and difficult to win. Also, the duality of competent courts introduced in 2020 within the autonomy of Poland as the EU Member State may have, in fact, chilling effect on private antitrust enforcement in Poland.

In our view, in spite of all the above amendments to Polish laws, both substantive and procedural, current development of case-law in Poland does not prove to be impressive. In general, very scarce number of cases appeared, and very little ended successfully for the plaintiffs seeking compensation arising out of the infringement of competition law.

In other words, the potential for private enforcement of competition in Poland, hypothetically increased by the PlACD rules implementing DD, may be in practice diminished because of some problems of the procedures and the organisation of the judiciary.

CHAPTER 6

Private enforcement of competition law in Romania

Troubleshooting compatibility with the Romanian legal frame

by

Adriana Almășan* and Horia Banciu**

1. Introduction

In Romania, the private enforcement of competition law is considered a complement to the (i) administrative enforcement, and to the (ii) criminal enforcement. While criminal liability is regulated in the national legal system, in practice it does not represent a pillar in enforcement. The main channel of application in this field is the public enforcement conducted by the Romanian Competition Council (the RoNCA).

The Romanian competent courts for this type of enforcement in first instance are the civil sections of tribunals, the next higher court above the first instance lower courts, their solutions being challengeable by appeal at the civil sections of courts of appeal. The appeals may be subject to final appeal on limited grounds at the High Court of Cassation and Justice, the highest national court.[426]

The private enforcement process is applicable to all competition law areas. In the Romanian legal system, competition law may be used as a sword in civil cases, antitrust regulation having the possibility of being the basis of private claims. In civil lawsuits, the judges may apply the national legal provisions prohibiting anticompetitive agreements, abuse of dominant position, the article 101 TFEU,

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426 GRONDEN, J. W. van de and Catalin Stefan RUSU. *Competition law in the EU : principles, substance, enforcement*. Edward Elgar Publishing, 2024, p. 275.

as well as the article 102 TFEU, pursuant to the claims invoking application of competition law or even *ex officio*.

The most representative area of private enforcement in Romania is the action for civil damages resulted from anticompetitive behaviour. The substantial aspects of the action for damages are regulated by the dedicated law on competition damages and the general Civil Code (RoCC[427]) tort provisions; the procedural aspects of the actions for damages are regulated by the Civil Procedural Code (RoCPC[428]).

Collective redress is enabled in the Romanian legal system only at the level of theoretical possibility, provided in the RoCPC.[429] However, the civil procedure requirements in case of multiple claimants renders prohibitive the application for class action. The law on action for damages implemented the directive without inserting corresponding provisions pertaining to class action and law regulating class action in consumer protection matters are inapplicable, by analogy.

Another field of application stems from the nullity of all the legal deeds infringing the antitrust legislation and the subsequent legal consequences in the RoCC being incident as well. The same legal regime, of imperative nature, applies to the non-sanctioned State aid measures as well as to the unauthorized merger operations. The virtual nullity of the last two hypotheses arises from the public order requirements which oversee the prohibition provision.

At the same time, illegal State aid measures may be judicially controlled in civil law matters, the provisions of article 107 para (1) TFEU pertaining to the public order. If either party in a civil case-law argues the application of State aid prohibition, the judge in the case is compelled to examine the applicability, being also able to invoke the interdiction *ex officio*.

Alternative dispute resolution instruments may also apply competition antitrust rules, however this is a rather remote possibility in practice, as these are not specific for competition matters in the Romanian legal system. Mediation is entirely unknown to competition law. Arbitration is unlikely for the resolution of disputes arising from the competition law, even though antitrust and State aid rules pertain to the public order in the national legal system, and the theoretical

427 Law No. 287/2009 Civil Code, as amended, Official Monitor No. 505.

428 Law No. 134/2010 Civil Procedure Code, Official Monitor No. 247.

429 ALMĂȘAN, Adriana. Dreptul la acțiune în obligațiile plurale. *Revista Romana de Drept Privat (Universul Juridic)*. 2018, no. 4.

possibility of enforcement exists. In most situations, the action for damages is lodged with the judicial courts, being very unlikely to be amicably settled. The arbitrators are compelled to consider the competition law infringements claimed by the parties in arbitration. Nothing prevents the arbitration courts to invoke *ex officio* the imperative competition provisions, such as antitrust, in the arbitral proceedings. There is a limited incidence in arbitration cases, as the active use is only theoretically applicable, the claims being required to be grounded on an arbitration clause, hence remaining inapplicable in tort cases. The Romanian legal practice is not abundant in arbitration for contractual disputes, remaining strongly resistant to referring to arbitration for damage claims. Alternative dispute resolution is allowed in the procedure of accepting remedies for antitrust or merger cases, however there is no practice involving arbitration or mediation. Negotiation is used for settlement of damages disputes, and in the implementation of commitment procedures, in merger control.

Despite the ample possibilities of use, various challenges stemming from the particularities of civil procedural law resulted in scarce to insignificant application of private enforcement of competition law in the judicial courts. Challenges that are more significant pertain to alternative dispute resolution application and even though the legislation enables application, the practitioners are reluctant to seek incidence of competition rules. Procedural requirements, such as the judicial tax that is required – except for the moral damages stemming from the illicit deed – and obstacles, such as the inapplicability of collective redress in competition matters – confirm the trend of basically non-existent and inconsistent application. This lack of application is also a result of the inconsistent application of law in the judicial review of administrative decisions issued by the RoNCA.

The unfair trading practices are regulated from the perspective of (i) administrative law and (ii) criminal law, on a case-by-case basis, depending on the gravity of the deed, as well as (iii) civil law. Nonetheless, the predominant application is represented by the action for damages, where claimants seek relief for the effects of unfair trading practices. As the civil law ambit far exceeds the incidence of either criminal or administrative law, unfair competition remaining in all the cases also a civil law infringement enabling tort law application.

The application is performed by the civil law courts, in a similar fashion to the one pertaining to civil damages arisen from antitrust behaviour. The action

for damages in matters of unfair trading practices is not regulated by a distinct law, but by the general rules provided in the RoCC and in the RoCPC.

The extended area of application in civil law matters grants the private law application as the main type of enforcement, civil law being applicable in all the situations where damages result from unfair competition.

The RoCC also provides the possibility of obtaining moral damages regardless of the source of the claim, on the condition that a breach of non-pecuniary rights has been observed. A distinct provision on awarding moral damages was included in the initial form of the Law on unfair trading practices no. 11/1991, this being the first Romanian law that expressly regulated moral damages[430]. The provision was naturally absorbed by the newer, improved wording of the Civil Code in 2011.

2. Legislative framework

2.1 Manner of transposition the DD

Private enforcement of competition law in Romania originates from the Civil Code, corroborated with Competition Law no. 21/1996[431] ('RoCL), which gives the right to victims of breaches of competition law to be compensated for the damages they have suffered. This type of action, rarely used, is based on common law tort liability, regulated by the RoCC, and may be used in addition to regular claims of different natures.

New rules were enacted in 2010[432] meant to simplify the process, by also including violations of Article 101 and 102 among the reasons for obtaining damages, passing-on of overcharges, lack of liability of immunity applicants and court access to the Romanian Competition Council's ('RoNCA') files. A two-year statute of limitations was set, as well as the possibility of the competition

[430] ALMĂȘAN, Adriana and Mircea DUB. Mult zgomot pentru nimic. Repararea daunelor morale cauzate de fapte de concurență neloială. *Revista Română de Drept Privat* [online]. 2020, no. 3. Available at: https://rrdp.universuljuridic.ro/index.php/journal/article/view/148.

[431] Law No. 21/1996 Competition Law, as amended, Official Monitor No. 153.

[432] Emergency Government Ordinance No. 75/2010 concerning amending and supplementing Competition Law no. 21/1996, Official Monitor No. 459, Article I, p. 54.

authority to forward observations to courts when anticompetitive agreements and abuse of dominant positions were concerned. In 2011, another amendment of RoCL[433] opened the possibility for certain associations to file these types of claims on behalf of consumers, though this possibility has not been yet used by such actors, to our best knowledge.

Three years after the DD entered into force at EU level, the first attempt at implementation was represented by Emergency Government Ordinance („EGO") no. 39/2017[434], which made it subject to scrutiny from the Parliament, called to approve the EGO with any amendments it may deem necessary as already pointed out[435]. Another three years later, in July 2020, the Romanian Constitutional Court deemed the EGO unconstitutional[436] on procedural grounds. The Government did not request the opinion of the Economic and Social Council – a consultative body of the Parliament and the Government of Romania – before adopting the EGO. Later that year, in October, a new EGO no. 170/2020[437] was enacted, which corrected the procedural flaw, and which finally managed to transpose the DD. Later, in 2022, respectively, the EGO no. 39/2017 was examined and repealed by the Parliament[438], which maintained all the legal effects produced by the EGO from its enactment until 23 July 2020 and in 2024, EGO no. 170/2020 was approved[439], ending any debates as to the manner of

433 Law No. 149/2011 for approving Emergency Government Ordinance No. 75/2010 concerning amending and supplementing Competition Law no. 21/1996, Official Monitor No. 490, Article I. p. 41 and 42.

434 Emergency Government Ordinance No. 39/2017 concerning actions for damages in cases of violation of competition law provisions, as well as for the amending and supplementing Competition Law No. 21/1996, Official Monitor No. 422.

435 MIRCEA, Valentin. Romania. In: PISZCZ, Anna, ed. *Implementation of the EU Damages Directive in Central and Eastern European countries* [online]. Warsaw: University of Warsaw. Faculty of Management Press, 2017, p. 237. Available at: https://cars.wz.uw.edu.pl/images/publikacje/podreczniki/137/CARS_24_Piszcz_Implementation.pdf

436 RO: Constitutional Court, Decision of 3 June 2020, No. 239, Published in the Official Gazette of Romania, Part I, No 649 of 23 July 2020.

437 Emergency Government Ordinance No. 170/2020 concerning actions for damages in cases of violation of competition law provisions, as well as for the amending and supplementing Competition Law No. 21/1996, Official Monitor No. 952.

438 Law No. 78/2022 for repealing the Emergency Government Ordinance No. 39/2017 concerning damages actions in cases of violation of competition law provisions, as well as for amending and supplementing Competition Law No. 21/1996, Official Monitor No. 356.

439 Law No. 320/2024 for approving the Emergency Government Ordinance No. 170/2020 concerning damages actions in cases of violation of competition law provisions, as well as for amending and supplementing Competition Law No. 21/1996, Official Monitor No. 1308.

transposition. Both attempts at implementation repealed the provisions regarding passing-on of overcharges, immunity, court access to RCC files, should a decision of the competition authority be in force, and the limitation period. RoCL still retained the general provision on the rights of the injured parties to obtain compensation, the legitimacy of certain associations to file such claims, as well as the possibility of the RoNCA to have the role of *amicus curiae* in these cases, with respect to the application of Article 101 and 102 TFEU and their national law correspondents.As a result of the failed initial implementation, there are two sets of rules applicable to the substantive issues regarding private enforcement in the past ten years, one regarding actions filed before EGO no. 39/2017 and from 23 July 2020 to 16 October 2020, based on regular tort law, and one after this EGO, excluding the period mentioned above. Regarding the procedural issues, the last EGO unified the procedural rules for any such claims of the kind introduced past 26 December 2014.

2.2 Scope of the transposition

Due to the fact that both EGO no. 39/2017 and EGO no. 170/2020 reproduced almost verbatim the DD, the scope of the transpositions is limited to the one pointed out in the directive itself. The EGOs give the right to the injured party to claim full compensation of a harm suffered as a consequence of infringements of national competition law.

These are defined further in Article 1(2) as including breaches of only Article 101 or 102 TFEU, cases when these provisions are applied in parallel to national competition law, as well as cases where national competition law exclusively applies.

Since its 2010 modification, RoCL states, that any breaches of the 'present law' as well as Article 101 and 102 of TFEU give the injured party a separate right to full compensation, irrespective of any penalties applied (by the RoNCA) according to the 'present law'. Given the ambit of RoCL, which includes anticompetitive agreements, abuse of dominant position and mergers, it seems that every antitrust violation could still be subject to action under RoCL, given that the article has not been repealed by the implementation attempts.

At the same time, the implementation does appear to broaden the scope of the actions for damages, since it covers any breach of 'national competition

law', not only of RoCL. This would mean that breaches of Unfair Competition Law[440] and State Aid Law, which are part of the public order requirements governing all competition matters. As a Member State that includes EU Law in its legal order, including Articles 107 and 108 TFEU, Romania views State Aid as 'national competition law', that could also be subject to claims filed under EGO no. 39/2017 and EGO no. 170/2020. It is unclear whether this was the intended effect of the transposition, but with the EGOs being *lex specialis* in this case, there seems to be harmonization of all the private enforcement claims essentially under the rules stated by the Damages Directive.

2.3 Competent courts

Before the first attempt at implementing the DD, the competent court for an action in recovery of damages based on competition law was determined according to general civil procedure rules to be the first instance lower courts („*judecătorie*") or the tribunal, the next higher court, depending on the value of the claim. Should the claim be lower than RON 200,000 (~EUR 40,000) the first instance lower court would be competent, and should the claim be higher than that amount, the regional tribunals, will judge the case.

After the implementation of the DD, the competent court to judge all actions for damages grounded on the EGOs became the Bucharest Tribunal. This competence rule is an exception the general civil procedure rules, which state that tort claims have to be brought to the jurisdictions territorially linked by either the damages incurred or the place where the infringement took place, as well as the general rule of filing a claim where the defendant has his residence.

There are no specialized competition courts or panels at no level in Romania, and the actions for damages fall under regular civil law panels within the Bucharest, in the Commercial Claims Section of the Court. The decision to territorially allocate all first instance claims in Bucharest was criticized before the first attempt at implementation for affecting the ability of small victims outside the capital to file such claims against competition law[441]. The potential experience of the judges in the capital, relative to other Tribunals in the country could have been a deciding factor in the adopted solution.

[440] Law. No. 11/1991 on unfair trading practices, Official Monitor No. 24.

[441] MIRCEA, Valentin. *Romania*, pp. 238–239.

The Bucharest Tribunal's decision, given by a single judge can be appealed with the Bucharest Court of Appeals, whose judgement will come from a two-judge panel more loosely specialized in commercial disputes. The Court of Appeals judgement may also be subject to another final appeal before the High Court of Cassation and Justice in a three-judge panel, however this final appeal is limited to procedural issues of the previous judgement.

2.4 Substantive law issues

2.4.1 Limitation periods

Under the RoCC[442], the general tort liability limitation period is three years from the moment that the victim knows or is reasonably expected to know both the damage and the person liable for it. The 2010 amendment to RoCL introduced a shortened term of two years, in case the action for damages was a follow-on action and failed to harmonize with the rest of the legislation. RoCL also provided for as a different starting point for the period, calculated from the moment that the RoNCA's decision that found an infringement can no longer be subject to regular, ordinary appellate remedies.

This shortened term of two years remained the applicable rule in the matter while the DD was not implemented. Both the EGOs that attempted to transpose the DD set the limitation period to the minimum indicated by the Damages Directive, which is five years, without any specific rule on the moment it begins. The provision follows the negative wording of the rules in the DD, which was pointed out as inappropriate and unusual for national legislation, because its purpose is not harmonization.[443]

However, since the EGO is clearly a derogation from regular tort law, it may be inferred that the limitation period starts according to general substantial and procedural rules. As a result, the period begins from the moment that all the conditions set out in the directive are met, namely the injured party (i) has knowledge or (ii) should have reasonably had knowledge of the fact that there

442 Law No. 287/2009 Civil Code, as amended, Official Monitor No. 505.

443 BLAŽO, Ondrej. Slovakia. In: PISZCZ, Anna, ed. *Implementation of the EU Damages Directive in Central and Eastern European countries* [online]. Warsaw: University of Warsaw. Faculty of Management Press, 2017, pp. 251–252. Available at: https://cars.wz.uw.edu.pl/images/publikacje/podreczniki/137/CARS_24_Piszcz_Implementation.pdf

was a violation of competition law, that damages were incurred, as well as the identity of the person who breached competition law, provided the infringement of competition law has ended.

Alternative dispute resolution does preclude the limitation period from starting and it suspends it if in action, only to the benefit of the parties involved in this, and not to everyone.

In perfect line with the DD, again, if „an authority regarding competition", is investigating the breach, the limitation period should not start or be suspended. One cannot overlook the fact that the definition of the authority is not even in line with the wording provided in the second article of the EGO. In any case, the suspension will end a year after all proceedings finalise, and if a decision to acknowledge the breach was reached, after this decision is no longer subject to appeal.

Bundling together the requirements provided by the DD article related to joint or several liability, the EGO also rules on the effects. Should a SME or a beneficiary of leniency be liable together with another defendant, and damages be impossible to obtain from the other parties involved due to bankruptcy, the limitation period for such claims is reduced to the standard three years, starting from the moment that the bankruptcy decision is no longer subject to appeal.

2.4.2 Joint and several liability

In an obviously superfluous provision and merely restating the general rules of the RoCC on joint liability, the article concerning joint liability makes undertakings that are liable for a breach of competition law together entirely liable for the entire amount of the damages. The EGO goes on by copying the provisions of the DD regarding limiting liability only to direct or indirect buyers for SMEs, as defined by Commission Recommendation 2003/361/CE of 6 May 2003 (SME Recommendation)[444], should their market share on the relevant market be lower than 5% and regular joint liability enforcement would lead to loss of economic viability and total loss of the value of the assets.

[444] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) (*OJ L 124, 20.5.2003, s. 36 – 41).*

At the same time, borrowing from the treatment of immunity recipients, the exception is followed by a return to the rule of full compensation, by reiterating that an SME may be liable to any injured party, only if the full compensation is not able to be obtained from the other undertakings involved in the same infringement.

No further help is provided to the courts with the purpose of striking the balance between the principle of full compensation for damages and the derogation regarding SMEs. At present, the immunity recipients receive the same treatments as in the DD, with the added mention that before implementation, they were excluded from joint liability in cases where the violation of competition law concerned anti-competitive agreements.

2.4.3 Quantification of harm

EGO regulates the quantification of damages in a way that makes it excessively difficult for the claimant, not adding any particularity to the bland, general provisions of the RoCC, by copying the first sentence of Article 17 (1) of the DD and empowering the courts to „quantify the harm in the case before them". While the translation is literal and it maintains the same meaning as the DD, it is unclear whether or not what this rule entails.

Whereas the rules concerning burden and standard of proof are the ones in the RoCPC, this is only about a principled approach, closely related to the right of access to a court already enshrined and protected by Article 6 ECHR. The transposition does not help in any significant way to solve issue, by only copying the provisions of the DD.

Among the particularities, there is a presumption of harm until proven otherwise, in case of cartels, alongside a separate, similar, presumption that the damages are amounting to a rise in prices of 20%. At the same time, there is another relative presumption of damages in case of abuse of dominant position, this time without any other attempt at quantifying the harm in a percentage. Should the court request it, the RoNCA may also take the role of *amicus curiae* in establishing the amount of the damages that the injured person is entitled to, „if the competition authority considers this assistance to be appropriate". This last sentence is a result of a mistranslation, since strict interpretation of this provision may mean that the Commission or other NCAs may have a say in whether or not assistance provided by the RoNCA would be appropriate in

a litigation before Romanian Courts, which would not only be improbable, but very impractical. In any case, procedural imperatives mean that only the courts have the prerogative of evaluating the damages.

2.4.4 Passing-on of overcharges

Like many before, the passing-on of overcharges is copied from the DD into the EGO without any meaningful change and addition to it. It must be pointed out that the „procedural rules" which the DD requires in order to ensure that compensation does not exceed the overcharge is simply transformed into a material rule by Article 12(2), with no procedural mechanisms whatsoever. The previous rule regarding passing-on of overcharges stated that a harm cannot be observed in case of reselling a good or service that was obtained at an excessive price.

2.5 Procedural law issues

2.5.1 Standing

As a matter of principle, claims have to be lodged to the competent courts by the victims of anticompetitive behaviour. Ever since the amendment of the RoCL in 2011, the claim may also be filed by registered consumer protection associations, as well as professional and employers' associations, on behalf of their members that are affected by an anticompetitive practice. This provision remains unchanged, even if the EGO that implemented the DD and repealed most of the rules about private enforcement, it spared this provision. These claims are exempted from judicial tax. To our best knowledge, there currently is no such claim filed by any association.

2.5.2 Disclosure of evidence

According to general evidence disclosure rules in the RoCPC, the court may order administering any evidence it may deem necessary to solve the claim, even if the parties object[445]. Specifically concerning written evidence (instruments), the law states that any instrument, held by the defendant could be ordered to be presented by the court, should the instrument be common to the

[445] Article 22 para (2), corroborated with article 256 para (5) RoCPC.

parties, the defendant referred to it, or the law compels the defendant to present the instrument. The only limitations concern strictly personal aspects of dignity and respecting the right to privacy, the legal duty to secrecy, and the fact that submitting such a document may lead to a criminal investigation of the party or its close relatives, as an expression of the privilege against self-incrimination. In these cases, the judge will examine the content of the document to determine whether such an exception is applicable or not.

When the document is held by a third party, the plaintiff merely has to show that the document is necessary for solving the claim, subject to the same exceptions. If the defendant refuses to provide the document, the court may consider the plaintiff's claims regarding said document to be true, in addition to the fines it may impose for non-compliance with orders of the court.

On this background, since the EGO simply translated the dispositions of the DD, the rules appear less favourable than the RoCPC, because now the claimant has to have 'presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages', as opposed to simply showing the connection to the present case. The general rights of the court to order anybody to present a relevant document is limited in this case, which leads to a lower level of protection of the injured party.

Another interesting aspect concerns the effective measures of protection introduced by the EGO, such as redacting documents, non-public hearings, limiting access to the authorized persons to access evidence to lawyers, representatives and experts (which was already the case) and others. At the same time, owing to poor translation, the exception to legal professional privilege of Article 5(6) was extended to all cases of professional privilege such as doctors, bankers or psychologists, with it being unclear if there is any reasoning behind this.

The fines imposed for infringements related to disclosure are between 0.1% – 1% of turnover for legal persons and maximum EUR 1,000 for natural persons, a very high and very low threshold, respectively, regarding the effect these provisions might have. At the same time, there are no specific non-pecuniary measures taken by the EGO to dissuade such practices.

2.5.3 Effect of national decisions

Because the EGO did not make use of the word 'review court' when translating the DD, this effectively instituted the rule of precedent in these matters,

since any definitive decision of Romanian courts may be used as 'irrefutable proof of evidence'. While this may not have been its intended effect, it was pointed out that this might actually be an improvement, successful plaintiffs paving the way for further injured persons to more easily obtain the damages.[446] It has to be pointed out that mistranslation leads to weird wording and imprecise legal terminology, because while the translation of 'irrefutably' does make sense in the context, the specific legal notion of something being impossible to challenge would either be an 'absolute presumption', or something related to 'positive' *res iudicata*.

2.5.4 Collective redress

The possibility of filing a class-action lawsuit is not expressly found within the Romanian legal order, so this type of claim is not governed by any special rules.

Firstly, Article 37 of the RoCPC, creates a generic platform for filing class-actions providing the conditions are met. However, in the absence of dedicated legislation for collective redress, the respective procedure for actions for damages resulting from competition infringements is yet to be determined.

Secondly, according to Article 59 of the RoCPC, if the subject of the lawsuit is a common right or obligation, or if the rights or obligation have the same cause or a strong connection, multiple persons may bring together a lawsuit.

Thirdly, the RoCPC states that the court may decide to enjoin multiple claims by different claimants, should there be a strong link between the subject of the lawsuit, the cause and the parties, but it can also disjoin them, should it consider necessary to examine each individual case.

Fourthly, persons interested in the outcome of the lawsuit may intervene and support one party's claims or defences, if the court grants such an intervention.

Lastly, the RoCPC allows claimants to stand trial in their own name, or to be represented. Any claim made on behalf of multiple persons by an association or by an empowered body, acting as a representative, has to be set forth in the law. This is essentially the authorization for the 2011 modification of the law regarding collective redress.

[446] MIRCEA, Valentin. Romania, p. 244.

At the same time, Law no. 414/2023 which came to implement the Representative Actions Directive,[447] has a limited scope of application, only being related to consumers and cannot be extended for the purpose of regulating class-action lawsuits filed by undertakings with the scope of protecting competition. has a limited scope of application, only being related to consumers and cannot be extended for the purpose of regulating class-action lawsuits filed by undertakings with the scope of protecting competition. has a limited scope of application, only being related to consumers and cannot be extended for the purpose of regulating class-action lawsuits filed by undertakings with the scope of protecting competition. has a limited scope of application, only being related to consumers and cannot be extended for the purpose of regulating class-action lawsuits filed by undertakings with the scope of protecting competition.

2.6 Consensual dispute resolution in antitrust enforcement

2.6.1 Pre-DD (and mid-DD) legislation

In all matters related to litigation in Romania, consensual dispute resolution could come as a result of negotiation, mediation or arbitration, the latter being the most important and with the most consequences and procedural rules of the three. Once a suit is filed, parties can, an in the case of private antitrust enforcement, they often will, negotiate and sign a contract out of court and present it to the judge to end their claims against one another.

Mediation is another way of quashing the dispute. However, the implementation of the Mediation Directive[448] was not well received by the public and, due to the fact that the selection process for becoming a mediator is not rigorous, combined with the fact that the procedure is complex and not very effective, claimants rarely opt to use this medium of solving the dispute. This happens despite the fact that the RoCPC specifically provides that the judge may suggest such a remedy to parties involved in all civil matters.

[447] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (OJ L 409, 4.12.2020, pp. 1–27).

[448] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ L 136, 24.5.2008, pp. 3–8).

Arbitration is certainly the most effective and the most interesting way of solving the antitrust dispute, commercial agreements may include arbitration clauses, which gives exclusive competence to the arbitral tribunal.

In practice, it is more likely that the passive use of antitrust legal provisions, whenever the defendant argues that the claims are grounded on invalid contractual provisions, such as anticompetitive agreements or contractual clauses that qualify for abuse of dominant position. In arbitration cases, as the defendant indicates contractual provisions, the arbitration tribunal is mandated to examine all aspects of the contract, as the arbitration clauses tend to cover in a non-selective manner the disputes stemming from the contract. Therefore, arbitration is suitable for damages resulting from the performance of a contract that infringes antitrust rules.

Another factor contributing to the lack of application in arbitration stems from the fact that there is no cooperation mechanism available to the arbitration courts in Romania. Like other Member States, in the Romanian legal system there is no application of Article 267 TFEU in arbitration, preliminary questions being solely raised in front of judicial courts.

2.6.2 Transposition of the DD

The Damages Directive has been transposed into the Romanian legal system without an adaptation to the gaps in the general civil law provisions, leaving outside, for instance, the regulation of civil class and corresponding instruments for arbitration cases where antitrust is discussed, such being the case of cooperation, and without enabling private law implements in the public enforcement. The application of consensual dispute resolution is enabled by the application of other rules, including the RoCC, RoCPC, and the RoCL, EGO no. 170/2020 not including specific rules.

Consequently, the negotiation of matters pertaining to competition law is limited to settlement agreements, concluded during or prior to the trial in court, in some antitrust and merger control procedures, during the investigations, in the application of leniency or of settlement.

Mediation is chiefly used by means of equivalent in the merger control, or antitrust commitment procedures, the legal frame for mediation not including competition in its ambit of application.

Some competition law matters have a very limited incidendice in arbitration. Arbitration is suitable mostly for antitrust dispute resolution cases, being unlikely from the active perspective, as a sword, considering that tort law usually stays out of applicability due to the requirement that claims are to be solved by arbitration provided a valid arbitration clause should enable it. On the contrary, antitrust legal provisions are expected to be invoked by the defendant in arbitration cases, as a shield, as contractual clauses infringing the public law are null and void. In principle, arbitration may be used in merger control as well, nevertheless, in the absence of a legal provision directing the parties towards arbitration, the applicability remains theoretical.

Arbitrators are required to enforce not only the prohibition of antitrust, but also State aid rules, as they pertain to the public order, by ruling annulment of contracts that infringe the mandatory provisions and the subsequent effects of such annulment.

3. Post-DD adjustments

The simplistic transposition of the Damages Directive rendered inefficient the application of the national law and a scarcity of case-law. Despite the lack of particularities and detailing, the transposition law was not sheltered from challenges. The Romanian Constitutional Court declared unconstitutional by Decision 239/2020 EGO No. 39/2017 transposing the Directive 2014/104/EU. Consequently, the Ordinance has been rejected by the Romanian Parliament, by Law No. 78/2022. Even though the grounds found by the Constitutional Court for the unconstitutionality pertained to procedural aspects, and not to the substantial rules provided in the Ordinance or to how it transposed the DD,[449] the gap in application for almost two years contributed to the reluctancy in application. As the chief grounds for action for damages from competition infringements are represented by the civil and procedural general provisions, in principle, nothing prevents application even in the absence of the transposition

[449] ALMĂȘAN, Adriana and Ștefan BOGREA. Romania Report. In: RODGER, Barry J. et al., eds. *Judicial Review of Competition Law Enforcement in the EU Member States and the UK*. Kluwer Law International in Alphen aan den Rijn, The Netherlands: Wolters Kluwer, 2024, p. 712.

of the Directive. Nonetheless, no legislative adjustment has been made yet to respond to the weak reaction of the practitioners to the transposition law.

4. Types of private enforcement measures

Private enforcement of competition law could come as both actions for damages, as well as the invalidity of contracts,[450] both being covered under the RoCL and as a result of the transposition. The provision of Article 101(2) of the TFEU which voids any agreement or decision prohibited by the Article is expanded upon in the RoCL, in Article 52(1) to also cover Article 102 and its national law counterpart, any engagements, conventions and contractual clauses related to an anticompetitive practice, as well as any merger rules violations.

The automatic invalidity, stipulated 'as a result of the law' of any acts connected to anticompetitive agreements mirrors the Article 101(2) rule, which means the sole condition is that an anticompetitive practice is definitively established. This could mean that a court held such a conclusion during a stand-alone action (which never happened) or as a result of not appealing or the rejection of the appeal against an RoNCA decision that finds an anticompetitive practice is there. The EU establishment of such practices by the Commission or by the ECJ is obviously include.

If such a practice is established, there is no need for another court order to pronounce the invalidity of a specific contract or clause, and interested parties may simply ignore them, as if there were non-existent. The contracts or clauses are obviously non-enforceable, and there is no time limit to claim the effects of the invalidity, which would be subject to the *restitutio in integrum* principle. Agreements concluded based upon invalid acts are also void as a result of the *resolution iure dantis, resolvitur ius accipiens*.

[450] Private law sanctions in Romanian legislation are efficiently described in VERESS, Emöd. The Legal Consequences of Breaching Competition Rules in Romania. In: NAGY, Csongor István, ed. *The procedural aspects of the application of competition law: European frameworks – central European perspectives*. Groningen: Europa Law Publishing, 2016, pp. 341–347.

5. Case law relevant for private enforcement of competition law

Standard of proof in action for competition damages heavy relies on the findings in the administrative procedure, the decision issued by the RoNCA resolving the evidentiary needs pertaining to the illicit deed, the existence of damage and other elements required for the liability. This is main reason the follow-on action is sought instead of the stand-alone action, the national judges dismissing the actions for damages where the investigation is still in course, by deeming the claims prematurely filed. The more sensitive issue of the damage valuation is, in principle, resolved by market and accounting expert reports. The absence of any case-law on competition class action renders useless any discussion pertaining to the common issues, including transfer of prices, opt-in or opt-out advantages and preferences in practice etc. Another challenge to the occurrence in practice of competition case-law is the improper training of judges that are competent to judge this sort of cases. Very few of the faculties of law in Romania teach competition law, and only with the younger generation of judges improvements have been noticed in the solutions rendered by the judges in civil law courts (competent in private enforcement), despite the fact that competition law is taught for almost a decade in some faculties of law.

6. Private enforcement cases

The development of proper jurisprudence in Romania was severely hampered by the implementation process, as well as the implementation itself, which does not encourage already reluctant individuals to seek relief in court from a competition infringement, due to the low chance of success.

Each of the transposition attempts were sparsely[451] used as grounds for brave claimants to obtain reparation for the damages incurred, and they warrant

[451] There is no data or report published by the Government or the RCC on the exact number of cases that involved application of the EGOs that implemented the directive. The information we are basing our analysis on is extracted from a publicly available database which should have all decisions and documents of Romanian Courts, which goes back to the time before the first

separate analysis. Due to the fact that there is no centralized case-law evidence in Romania,[452] and only a few incomplete databases are available, the findings in this chapter are based on the accuracy and the completeness of these means.

Pertaining to EGO no. 39/2017, we have identified seven cases in which the transposition of the DD was referenced and in five of the cases, the defendants were members of the infamous truck cartel, a staple of private enforcement across the EU. Analysing the judgements, the picture is very bleak, because five of the seven claims were rejected by lower courts as inadmissible[453], because the EGO was deemed unconstitutional, therefore a transposition of the DD did not take place. On appeal, only two of the courts held that regular tort liability may apply, as a subsidiary remedy, even if the implementation was unconstitutional, and only one[454] of them held that as a result of the EGO no. 170/2020's provisions, EGO no. 39/2017's rules remain applicable until it was pronounced to be unconstitutional, as the law stipulated. The last two of the claims were decided on limitation periods with the first court, one of them being settled in court[455], and the other one still pending on appeal[456].

EGO was implemented (rejust.ro). It is impossible to assess how many cases were settled out of court or in arbitration, and it is likewise impossible to guarantee that the information provided is complete, because while the database is generally very reliable, any number of technical or human errors may lead to a document not being uploaded in the database.

452 ALMĂȘAN, Adriana and Ștefan BOGREA. *Romania Report*, pp. 719–721.

453 1. RO: Bucharest Tribunal, Decision of 27 November 2020, No. 2411/2020, EGO no. 39/2017 was not applicable, as a result of incompatibility with the Constitution, upheld on appeal by RO: Bucharest Court of Appeals, Decision of 14 June 2021, No. 1064/2021;

2. RO: Bucharest Tribunal, Decision of 13 April 2021, No. 961/2021, EGO no. 39/2017 was not applicable, as a result of incompatibility with the Constitution, upheld on appeal by RO: Bucharest Court of Appeals, Decision of 31 March 2023, No. 551/2023, rejected because it was filed by a person without legal standing.

3. RO: Bucharest Court of Appeals, Decision of 17 November 2023, No. 1786/2023, EGO no. 39/2017 was not applicable, as a result of incompatibility with the Constitution.

4. RO: Bucharest Tribunal, Decision of 4 March 2022, No. 410/2022, EGO no. 39/2017 was not applicable, as a result of incompatibility with the Constitution.

454 RO: Bucharest Tribunal, Decision of 28 April 2021, No. 1171/2021, EGO no. 39/2017 was not applicable, as a result of incompatibility with the Constitution., reverted on appeal by RO: Bucharest Court of Appeals, Decision of 28 April 2022, No. 694/2022.

455 RO: Bucharest Court of Appeals, Decision of 22 December 2021, No. 2097/2021 – sending it back to the first instance court. RO: Bucharest Tribunal, Decision of 11 December 2024, No. 3385/2024 – public settlement.

456 RO: Bucharest Tribunal, Decision of 10 July 2019, No. 2060/2019, EGO no. 39/2017 limitation

With respect to the application of EGO no. 170/2020, even if almost five years have passed since its application, giving ample time for courts to decide the case, there are only three cases[457] of actions for damages available for public review, one of them still pending before the Bucharest Tribunal. One of the cases decided concerned a stand-alone action in a public procurement procedure, ultimately being rejected for not being a procedure-specific claim[458]. At present, there is no successful private enforcement action anywhere in the courts in Romania.

7. Evaluation of the environment for private enforcement of competition law

The case-law outcome unpredictability in competition matters remains one of the issues preventing the large-scale private enforcement. Antitrust private enforcement has not yet received a boost from the regulation and the amendment of the national law transposing the Damages Directive and the collective redress is yet to be regulated in the field of competition damages.

Even though the history of application of unfair trading practices law is considerably longer and the jurisprudence reveals some case-law even in the last decade of the past century, it is still very limited in scope and predictability. Obtaining damages pertaining to harmful competition behaviour has never been encouraged by the judicial awards. To our knowledge, there is no arbitral enforcement of competition law, this conclusion being however under a strong reservation resulting from the private nature of arbitration case-law, that does not in publication of arbitral awards. The only means for the arbitration practice to be known is further to the judicial review of the arbitration solutions. Mediation is also inexistent at practical level, the mediation mandatory implement in

inapplicable, as a result of incompatibility with the Constitution. The appeal was suspended until the conclusion of another claim.

457 RO: Bucharest Court of Appeals, Decision of 30 April 2025, No. 720/2025; RO: Bucharest Tribunal, Decision of 7 March 2024, No. 425/2024; the one still pending has not reached a decision yet.

458 RO: Bucharest Tribunal, Decision of 7 March 2024, No. 425/2024.

the Romanian legislation not covering competition matters, including merger control.

8. Suggestions for further development

We submit that, in the absence of significant legislative improvements, in regard not only to the action for damages legislation, but also regarding the collective redress, the dissuasive effect of filing such an action in court, and the reluctance for the judges have an active perspective on it would still linger. This is not an unusual reaction to new and very specific legislation. Not long ago, the Commission gave a huge boost to the private enforcement, by acting as claimant further to *Elevators and Escalators.*[459]

Without implying that the NCA should act in a similar manner, it should be noticed that some non-judiciary measures, such as adequate training of competent judges, public (including media) endeavours in promoting the advantages of private enforcement and the power of encouraging examples in practice may have the effect in increasing awareness and enhancing both the quality and the quantity of cases.

9. Summary

As it stands, the private enforcement complements the administrative and criminal law competition enforcement, enabling ample possibilities for implementation: the action for damages, the possibility to use competition law as a shield in court whenever an infringement of antitrust law occurs, as well as in State Aid matters and merger control violations. In addition to the judicial courts, arbitration courts may as well apply antitrust provisions and, in principle, mediation may be used as a tool for resolving disputes arising from competition infringements, including merger control.

In reality, the private enforcement of competition law in Romania has a very slow development, and it was neither stimulated by legislation, nor by the courts

[459] The Commission Decision of 21 February 2007 relating to a proceeding under Article 81 of the Treaty establishing the European Community (Case COMP/E-1/38.823 — Elevators and Escalators) (Case AT.38823).

or by the NCA. The legislation is limited to copying verbatim the EU acquis and the implementation of the DD was the latest in the entire EU, being impracticable due to the scarcity of specific provisions and lack of procedural aids. The courts do not incentivise the practice due to the unpredictability of the awards; therefore the victims are very reluctant to file such claims that require significant costs with the legal assistance, despite the relatively small judicial tax.

Arbitration is even more unlikely to be used for solving these disputes, as it requires a specific clause for rendering the arbitral tribunal competent. As a consequence, in arbitration, using competition law as a sword is virtually impossible, as the action for damages is based on tort law. Mediation is almost non-existent in regular civil procedure, so it has no application in these matters. Unfair trading practices are also governed by tort law, and complements the rules on unfair competition law. The practice, however, is very scarce, due to the lack of consistency in its application.

CHAPTER 7

Private enforcement of competition law in Slovenia: A finely carved wooden sword

by

Ana Vlahek*

1. Introduction

Special provisions on private enforcement of antitrust in the Republic of Slovenia were first introduced into the Act on Prevention of Restriction of Competition (hereinafter: ZPOmK-1)[461] in 2008 and were subsequently expanded in 2017 with the transposition of the Damages Directive (hereinafter: DD).[462] By contrast, the fields of merger control and state aid remain outside the scope of any specific legislative framework for private enforcement: civil sanctions for infringements in these areas have not been specifically regulated, and private enforcement in these fields remains largely hypothetical within the Slovenian legal environment. This article therefore focuses on antitrust private enforcement, which has been harmonized at the EU level and has already been tested, albeit modestly, in Slovenian practice. The paper first traces and critically assesses the evolution of the Slovenian legislative framework for antitrust damages actions, before turning to the experience and challenges of its practical application.

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461 Act on Prevention of Restriction of Competition, Official Gazette of the RS No. 36/08 *(ZPOmK-1)*. This act has been replaced in 2022 with a new Act on Prevention of Restriction of Competition, Official Gazette of the RS No. 130/22 with later amendments, *(ZPOmK-2)*, that is currently in force.

462 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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, Text with EEA relevance, OJ L 349, 5.12.2014, pp. 1–19.

2. Legislative framework for private enforcement of antitrust

2.1 Pre-DD legislation

The first two Slovenian competition acts of 1993 and 1999 did not provide for any competition law specific instruments to alleviate private enforcement of competition law in Slovenia. They merely stated that anyone sustaining a loss because of antitrust infringement could seek damages in accordance with the general rules of obligations.

The competition act of 2008 was adopted when Slovenia was already a Member State of the EU. It regulated anew some of the core aspects of antitrust damages claims. When drafting these new provisions, the Slovenian legislator had been inspired by the existing CJEU's case law as well as the Commission's activities aiming at fostering private enforcement of antitrust in the EU. Although at that time no binding secondary EU legislation on antitrust damages existed, the drafters had already modelled the Slovenian regime upon the planned future European regulation, such as the European Commission's White Paper of April 2008 on damages actions for infringement of EU antitrust rules.[463] The rules were as follows:[464]:

- anyone who intentionally or negligently infringed European or/and Slovenian antitrust,[465] was liable for damages resulting from such infringement,
- a final Slovenian competition authority or European Commission's decision finding an infringement of Slovenian or/and European antitrust had binding effect with an option of the courts to activate before the CJEU, if relevant, the preliminary ruling proceedings,
- limitation was suspended during administrative proceedings before the authority or the Commission until the finality of those proceedings,

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463 COM(2008) 165 final.

464 For further details see: GRILC, Peter, ed. ZPOmK-1 s komentarjem. Ljubljana: GV Založba, 2009, pp. 483-540.

465 Only infringements of Arts. 101 and 102 and the Slovenian corresponding provisions were mentioned here whereas as of 2008 with the new competition act, infringements of antitrust provisions laid down in other Member States' laws also explicitly fall under the term »competition law infringement«.

- Slovenian courts had to inform the authority of every action requesting damages for infringements of Slovenian or/and European antitrust as well as of every decision taken in the case,
- if the Commission or the Slovenian competition authority submitted their *amicus curiae* brief under Article 15/3 of Regulation 1/2003, the courts had to forward the brief to the parties and (in case of the Commission's brief) the authority; the act stated that such briefs are not binding and that they could be submitted any time before the decision is delivered,
- in case a Slovenian court asks the Commission for its opinion under Article 15(1) of Regulation 1/2003, it must inform the parties about it and send a copy of the opinion to the parties and the competition authority,
- communication between the courts and the Commission could be direct or via the competition authority.

With respect to issues of antitrust damages actions that were not covered by EU law or the Slovenian competition act, general provisions of Slovenian civil law and procedure applied. Regarding infringements of Slovenian antitrust, formally only Slovenian law applied, although EU law concepts have been of importance to purely national cases as well, since Slovenian competition law was largely transcribed from European competition law.[466] This was confirmed, e.g., in the *Euromedia MB v. Pošta Slovenije* case presented *infra* in Section 4.3. where the Higher Court in Ljubljana explained as follows:

"The appellant naturally has the right to present its own legal opinion. However, insofar as it refers to the decisions of foreign courts, those are based on the laws of their respective states and are not a decisive criterion for the decision of a court in the Republic of Slovenia, with the exception of the judgments of the CJEU. Courts in the Republic of Slovenia adjudicate on the basis of Slovenian law and EU law. Accordingly, the appellate court will generally not provide a specific explanation as to why its decision differs from what the presumed decision of some foreign court might be. It will, however, take into account the case law of the CJEU. This is case law that applies very similar provisions of EU law, which indeed served as a model for the adoption of the relevant Slovenian legislation."

[466] See: FATUR, Andrej, Klemen PODOBNIK and Ana VLAHEK. *Competition Law in Slovenia*. Wolters Kluwer, 2020, p. 110.

Regarding nullity and its enforcement which has not been covered in any detail by pre-DD EU law or the DD, the general rules of Slovenian law still apply today.

2.2 Transposition of the DD

Slovenia implemented the DD in 2017 by adopting the law amending the ZPOmK-1 of 2008.[467] The amendments entered into force on 20 May 2017 and apply for actions requesting damages for infringements of EU and/or Slovenian antitrust considering the rules on their temporal application as required by the DD. The transposition was full in terms of not leaving any questions addressed by the DD outside the scope of the transposition. On the contrary, some additional rules relevant for effective private enforcement of antitrust were added in the amended ZPOmK-1 chapter on antitrust damages actions. Additionally, novel Collective Actions Act of 2017 (hereinafter: ZKolT)[468] added infringements of European and/or Slovenian antitrust in its scope of application. The DD implementing rules were not extended to apply to other competition law infringements outside those of infringements of antitrust nor have the competition acts included any rules on other mechanisms for antitrust enforcement other than damages claims. All aspects of antitrust damages that are not covered by EU law are to be resolved under national legislation on damages and civil procedure, i. e. the Code of Obligations (hereinafter: OZ)[469], the Act on Civil Procedure (hereinafter: ZPP)[470] as well as the ZKolT under the proviso that the principles of effectiveness and equivalence as set out in the relevant case law of the CJEU are respected, which is also required by the DD.

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467 Act on Amending and Supplementing the Prevention of Restriction of Competition Act, Official Gazette of the RS No. 23/17 *(ZPOmK-1G)*.

468 Collective Actions Act, Sl. Zakon o kolektivnih tožbah, Official Gazette of the RS No. 55/17 with later amendments (*ZKolT*).

469 Code of Obligations, Official gazette of the RS No. 83/01 Sl. Obligacijski zakonik, Official Gazette of the RS, No. 83/01 and later amendments (OZ). For details on this regulation, see: JUHART, Miha et al., eds. *Obligacijski zakonik: s komentarjem*. Ljubljana: GV Založba, 2009, pp. 665–683, 795–819, 683–742; AHTIK, Meta and Ana VLAHEK. *Določanje odškodnin v primeru kršitev antitrusta*. Ljubljana: GV Založba, 2011.

470 Act on Civil Procedure, Official Gazette of the RS No. 26/99 with later amendments *(ZPP)*.

2.3 Post-DD adjustments

The ZPOmK-1 of 2008, into which the 2017 amendments were inserted because of transposition of the DD, was replaced in 2022 with a new competition act (ZPOmK-2). The new act copied from its predecessor the existing chapter on antitrust damages in its entirety. So far, no adjustments in this chapter have been made.

3. Types of antitrust private enforcement measures

3.1 Damages actions

3.1.1 Competent courts

In Slovenia there is no specialized competition court, nor are the courts and their judges in any way specialized for private enforcement of antitrust. Only specialized divisions for civil and specialized divisions for commercial cases are organized within larger district courts, the Higher Courts and the Supreme Court of the RS (hereinafter: Supreme Court), covering a plethora of different civil and commercial disputes. Maximum specialization of judges, highly proficient in competition law and general civil law would surely best guarantee effective private enforcement of antitrust. There are, however, not that many damages cases related to competition law pending before the Slovenian courts. A specialized competition court that would assess both the Competition Agency's decisions and damages actions, composed of administrative, commercial and criminal law judges would be the optimal solution but is probably not realistic due to the structure of the judicial system in Slovenia.[471]

In Slovenia, jurisdiction in first instance damages cases is – as the law stands now – divided between local and district courts based on different criteria. The general rule is that local courts have jurisdiction in disputes concerning pecuniary claims where the value of the subject matter does not exceed EUR 20,000, while district courts hear cases where the disputed value exceeds this threshold.

[471] See: VLAHEK, Ana. Slovenia Report. In: RODGER, Barry J.; BROOK, Or. eds. *Judicial Review of Competition Law Enforcement in the EU Member States and the UK*. Kluwer Law International B.V., 2024, pp. 832–833.

However, in certain matters, jurisdiction is divided regardless of the disputed value. For example, district courts have exclusive jurisdiction in the majority of commercial disputes, in disputes relating to bankruptcy proceedings, as well as in disputes relating to 'protection of competition'.[472] In disputes relating to 'protection of competition' the special rules of the ZPP on commercial disputes apply irrespective of whether a dispute in question could be characterized as a commercial dispute under the ZPP or not as such rules are due to its contents perceived as commercial.[473] Disputes relating to 'protection of competition' also do not fall under the special regime for small claims disputes. First instance cases, including antitrust private enforcement cases, are typically held before a single judge. Prior to one of the ZPP amendments, cases regarding "protection of competition" were, among some others, handled by a panel of judges. The legislator then decided to favour individual assessment of cases as panel assessment aimed at guaranteeing better quality of the judgments supposedly did not produce the wanted results and amounted to additional backlogs.[474] In terms of guaranteeing the quality of judicial assessment in these rather complex cases, it would be reasonable to reintroduce the panel assessment. In September 2017 a novel provision was incorporated into the ZPP enabling a judge having jurisdiction to assess a first instance commercial dispute to exceptionally ask the president of the respective Higher Court to transfer the case to a three-member judicial panel if the case raises complex legal or factual questions. A similar option is given to first instance judges by the ZKolT in collective actions proceedings. The practice shows that the judges generally rarely opt for this.[475]

There are no special rules on international or local jurisdiction in place in antitrust damages cases. There is, however, a special rule set out in the competition act since 2017 for cases where multiple damages actions were filed with different Slovenian courts for the enforcement of claims arising from the same

[472] VLAHEK, Ana. Challenges of Private Enforcement of Antitrust in Slovenia. In: KOVAČ, Mitja and Ann-Sophie and VANDENBERGHE, eds. *Economic evidence in EU competition law.* 18. Cambridge: Intersentia, 2016, pp. 376–377.

[473] See: FATUR, Andrej, Klemen PODOBNIK and Ana VLAHEK. *Competition Law in Slovenia*, pp. 102-106; EKART, Andrej et al. *Zakon o pravdnem postopku: z novelo ZPP-E.* GV Založba, 2017, p. 740

[474] EKART, Andrej et al. *Zakon o pravdnem postopku*, pp. 167–168.

[475] For further details, see the relevant provisions of the ZPP and the Courts Act, as amended, Official Gazette of the RS No. 19/94 with later amendments *(ZS)*.

antitrust infringement, and in which the same person is the opposing party of various plaintiffs or various defendants. In such cases, the Supreme Court may, upon the proposal of the competent court or a party, order the joinder of cases for joint consideration if this expedites the proceedings or reduces costs. The court seized of the matter may in such cases issue a joint judgment in all joined proceedings. The ZKolT sets out specific rules on jurisdiction in proceedings with collective damages actions and collective settlements: only the district courts of Ljubljana, Maribor, Celje and Koper have jurisdiction at first instance. No special rules on international jurisdiction or the joinder of collective actions are laid down in the ZKolT.[476]

3.1.2 Standing

In practice, competitors rather than consumers tend to bring individual antitrust damages actions in Slovenia. A number of these cases are examined *infra* in the chapter on private enforcement.In cases of antitrust infringements, collective actions as well as collective settlements are also available as of 21 April 2018[477] when the ZKolT started to apply.[478]

From the outset, the field of antitrust was intended to fall within the scope of application of the ZKolT.[479] Collective actions and collective settlements are available for the protection of interests of all types of victims of antitrust breaches, and are not limited to any special groups of victims.[480] Before the enactment of the ZKolT, collective redress was generally limited to injunctive and declaratory

476 GALIČ, Aleš and Ana VLAHEK. Slovenia. In: BARTKUS, Mary et al. eds. *Collective Litigation in Europe: Law and Practice*. Huntington, NY: Juris Publishing, 2025, pp. 631–633.

477 For further details on legal standing in general and in antitrust private enforcement cases under Slovenian law before the enactment of the Collective Actions Act of 2017, see before mentioned: VLAHEK, Ana. *Challenges of Private Enforcement of Antitrust in Slovenia*, pp. 379–380.

478 See Art. 2 of the CAA defining the scope of the act. The CAA provides for collective settlements and collective injunctive and compensatory actions in the following areas: consumer law, labor law, financial instruments market law, antitrust, environmental accidents, and (only in the form of injunctive relief) within anti-discrimination law. For further details, see GALIČ, Aleš and Ana VLAHEK. Challenges in Drafting and Applying the New Slovenian Collective Actions Act. In: UZELAC, Alan and Stefaan VOET, eds. *Class Actions in Europe: Holy Grail or a Wrong Trail?* Cham: Springer Nature, 2021, pp. 226–227.

479 VLAHEK, Ana. The Great Saga of Collective Redress in EU Competition Law: All Cry and No Wool? *World Competition*. 2024, vol. 47, no. 1, p. 17. DOI: https://doi.org/10.54648/woco2024004

480 *Ibid*., p. 12.

relief, such as that for the protection of the consumers' interests.[481] These types of actions were not particularly relevant for collective private enforcement of competition law.[482] Despite the lack of collective damages mechanisms in Slovenian law at the time, Slovenian consumers have taken part in at least two group competition law related out-of-court activities aiming at forcing the infringers to refund the overcharges paid on the basis of their restrictive practices. In the case of the so-called electricity cartel that was already found in breach of European and Slovenian antitrust by the Slovenian competition agency, refund of the overcharges was requested out-of-court by Association for the Refund of Electricity Overcharges, while in the case of a telecommunications undertaking, refund of the sums paid by its customers because of alleged unlawful tying/bundling of two telecommunications services was requested out-of-court by the Slovenian Consumer Association (some individual consumers decided to file their own individual actions with the court) after the authority's infringement decision was confirmed by the Administrative Court (after the undertaking made use of an extraordinary remedy with the Supreme Court, the case was returned back to the competition authority that decided to terminate the proceedings meaning that the infringement was eventually not found).[483] Individual class members do not have standing, common law-style class actions are thus not available in Slovenia.[484] The following persons may, as the law stands now, file a collective compensatory action or submit a collective compensatory settlement before a court in Slovenia:

– non-profit private law entities who can show a direct link between their main objectives and the rights that are alleged to have been violated and in relation to which the action is being filed; these entities need not be officially designated in advance (i.e. listed by Slovenian authorities), and may either exist independently of a specific instance of mass harm (e.g., consumer associations established years earlier to safeguard consumer interests), or may be established specifically in response to a particular case of mass harm

[481] Consumer Protection Act, as amended, Official Gazette of the RS No. 20/98 with later amendments *(ZVPot)*.

[482] VLAHEK, Ana. *The Great Saga of Collective Redress in EU Competition Law: All Cry and No Wool?*, p. 4.

[483] For further details, see: VLAHEK, Ana. *Challenges of Private Enforcement of Antitrust in Slovenia*, pp. 381–383.; VLAHEK, Ana. *Slovenia Report*, p. 830.

[484] See: GALIČ, Aleš and Ana VLAHEK. *Slovenia*, pp. 633–635.; GALIČ, Aleš and Ana VLAHEK. *Challenges in Drafting and Applying the New Slovenian Collective Actions Act*, p. 231.

for the purposes of protecting the interests of the class covered by the action in question,[485]
- the State Attorney's Office against the defendants who are not a State,
- organizations from other EU Member States that are listed as representative organizations for filing collective actions for the protection of consumers' interest in those Member States in line with the Representative Actions Directive.[486]

According to the ZKolT, a collective damages action in the field of antitrust may not be filed before any already initiated infringement proceedings before the competition authority or the review courts are brought to an end. If, however, the competition authority has initiated infringement proceedings only after the collective action was filed, the court must stay the collective proceedings until the proceedings assessing the antitrust infringement are finalized.[487] This means that collective antitrust damages actions may be stand-alone actions but turn into follow-on actions in the case of competition authority's initiation of infringement proceedings. No collective action or settlement has been thus far filed with the courts in Slovenia. Based on the information on the webpage of one of the recently established associations that started filing collective actions in Slovenia, it has for several years been anticipated that the first such action would be brought in the *Guess* case, following the European Commission's finding that the defendant had infringed Article 101 TFEU.[488]

3.1.3 Limitation periods

The effect of the initiation of administrative infringement proceedings on the limitation period for damages claims was addressed in the Slovenian competition act already before the enactment of the DD based on the CJEU's

485 A request for constitutional assessment of these rules was recently filed by a first instance court in one of the collective actions proceeedings.

486 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance), OJ L 409, 4.12.2020, pp. 1–27. For further details see VLAHEK, Ana, ed. *Uveljavljanje kolektivnega sodnega varstva v primerih množičnega oškodovanja potrošnikov in drugih skupin oškodovancev v Sloveniji*. Ljubljana: Inštitut za primerjalno pravo pri Pravni fakulteti v Ljubljani, 2022, pp. 192–196.; GALIČ, Aleš and Ana VLAHEK. *Slovenia*, p. 635.

487 On these proceedings, see: VLAHEK, Ana. *Slovenia Report*, pp. 795–804.

488 GALIČ, Aleš and Ana VLAHEK. *Slovenia*, p. 648.

case-law as well as the European Commission's ideas in its *travaux préparatoires* on antitrust damages actions. The ZPOmK-1 stated for the first time that the limitation period for damages claims was suspended until public enforcement of competition rules by the Slovenian competition authority or the Commission (and review courts) was pending. Temporal application of this rule was not addressed which resulted in uncertainties as to its application in cases where the limitation period started to run (but had not yet lapsed) already prior to entry into force of this new rule.[489] In the *Euromedia MB v. Pošta Slovenije* case presented infra in Section 4.3., the appellate court dealt with the question of whether interruption of the limitation period by the initiation of the administrative proceedings before the competition authority that was claimed by the plaintiff was available under the general rules of the OZ. It stated it was not and explained that the limitation period for some claims had run out. The provisions of the ZPOmK-1 on the limitation periods had to be amended for the purposes of transposing the DD into Slovenian law. A short subjective five-year limitation period as well as a long stop period of ten years are now set out. The short period cannot start to run before the infringement has ceased and the plaintiff knows or can reasonably be expected to know of the behaviour and the fact that it constitutes an infringement of competition law; the harm suffered because of that infringement; and the identity of the infringer. In any event, the five-year limitation period shall expire no later than ten years from the date on which the damage occurred. The limitation period (both the short and the long stop) are suspended from the day on which the competition authority acts for the purposes of investigation or proceedings in respect of an alleged infringement of antitrust, until one year after the decision on the infringement has become final or the proceedings have otherwise been terminated. Any time lapsed before the beginning of the suspension is counted as part of the limitation period.[490] Regarding questions on limitation periods left outside the DD

[489] VLAHEK, Ana. *Challenges of Private Enforcement of Antitrust in Slovenia*, pp. 397–398.; VLAHEK, Ana and Klemen PODOBNIK. Slovenia. In: PISZCZ, Anna, ed. *Implementation of the EU Damages Directive in Central and Eastern European Countries*. Warsaw: University of Warsaw, Faculty of Management Press, 2017, p. 276.

[490] For details, see: VLAHEK, Ana and Karmen LUTMAN. Ureditev zastaranja odškodninskih terjatev zaradi kršitev konkurenčnega prava v Direktivi 2014/104/EU in njena implementacija v pravne rede držav članic. *Pravnik*. 2017, vol. 72, no. 1.; VLAHEK, Ana and Klemen PODOBNIK. *Provisions of the Damages Directive on Limitation Periods and their Implementation in CEE Countries*.

and the Slovenian competition act, the general rules on limitation of claims set out in the OZ apply.

Before the adoption of the rules on the suspension of the limitation periods for filing damages actions during the proceedings pending before the Commission or the national competition authority and the review courts, the plaintiffs in Slovenia used to file damages actions mostly as stand-alone actions to avoid the running out of the limitation period for filing these claims that could occur due to the inefficiency of the Slovenian competition authority and the review courts.[491] Following the adoption of the DD, the expiry of limitation periods is no longer a major concern for plaintiffs, as these periods have been significantly extended.[492]

3.1.4 Effect of competition authority infringement decisions

In line with the rules of the DD, Slovenian courts are bound (unless they make use of the preliminary rulings procedure) by a final decision of the Slovenian competition authority establishing an antitrust infringement, or by a final decision rendered in judicial review proceedings against the authority's decision. The binding effect of the European Commission's decisions is regulated in Regulation 1/2003, not the DD and hence not in the Slovenian competition act. Where the infringement has been established by a final decision of the competition authority of another Member State, or by a final decision of a court of another Member State competent, on the basis of ordinary legal remedies, to review decisions of that competition authority, it is presumed that the infringers identified in the decision acted unlawfully (unless they make use of the preliminary rulings procedure), subject to proof to the contrary. This means that the Slovenian legislator opted for a rebuttable presumption in such cases. In contrast to Regulation 1/2003 dealing with Commission's pending cases, the Slovenian competition act is silent on how the courts are to act in cases where the national competition authority has initiated the proceedings that are still pending, nor how to act if the Commission's binding decision was appealed before the General Court in Luxembourg.

491 See: VLAHEK, Ana and Klemen PODOBNIK. *Provisions of the Damages Directive on Limitation Periods and their Implementation in CEE Countries*.

492 *Ibid*.

These rules represent an upgrade of the pre-DD rule of the ZPOmK-1 that set out a binding effect of final infringement decisions issued by the Slovenian competition authority (as well as final European Commission although the latter was the subject matter of Regulation 1/2003 that does not require the finality of the Commission's decision). Even before this special rule was inserted in the ZPOmK-1, Slovenian courts were bound by final administrative acts according to the general rules.[493] This was explicitly confirmed in the *Blitz Film & Video Distribution v. Kolosej kinematografi* case presented *infra* in Chapter 4.2. At first, antitrust damages actions in Slovenia were mostly stand-alone actions. As public enforcement of antitrust was typically inefficient and resulted in lengthy administrative and judicial review proceedings, the plaintiffs were often forced to file stand-alone damages actions to prevent their damages claims from becoming time barred. In such cases, the plaintiffs must allege all elements of tort liability, including proving the infringement. If the Slovenian competition authority issued a final and binding decision finding the infringement before or during the pending damages proceedings, the courts would be bound by such decision.[494]

3.1.5 Fault

The question of the infringer's fault was not addressed by the DD. This fostered different interpretations of this damages liability element, such as that it is for the Member States to regulate it; that it is not an element in antitrust damages liability; or that the infringer is irrefutably deemed liable for damages caused by the infringement.[495] The pre-DD ZPOmK-1 established explicitly tort liability for infringements of Slovenian or European antitrust: anyone intentionally or negligently infringing Article 6 or 9 of the ZPOmK-1 or Article 101 or 102 TFEU, was liable for the damage sustained by that. The redrafted provisions of the ZPOmK-1 that are now copied in the ZPOmK-2 are silent on the issue of fault. If the general rules of tort liability based on fault apply, then the plaintiff will have to show the following; that the defendant has infringed antitrust, that

493 GRILC, Peter, ed. *ZPOmK-1 s komentarjem*, pp. 504–510.; SEVER, Martina. Vezanost nacionalnega sodišča na odločbe Evropske komisije in Urada za varstvo konkurence. *Pravni letopis*. 2009, no. 1.

494 FATUR, Andrej, Klemen PODOBNIK and Ana VLAHEK. *Competition Law in Slovenia*, pp. 114-115.

495 *Ibid*., p. 125.

the plaintiff has sustained a loss, and that there is a causal link between the infringement and the loss, while the defendant's fault, i.e., that it committed a wrongful act intentionally or negligently, will generally be presumed according to the rules of the OZ. Slovenian legislation adopts the concept of fault liability with shifted burden of proof concerning fault meaning that the defendant must prove the absence of his or her fault, otherwise the fault is presumed. Other elements of liability as well as exculpatory reasons are, in general, to be proven by the plaintiff, apart from the causal link in cases of cartels where, as required by the DD, it is presumed that cartels cause harm, unless the infringer proves otherwise.[496]

3.1.6 Joint and several liability

Already before the transposition of the DD into the competition act, the general rule on joint and several liability for damages was set out in the OZ.[497] It corresponded to the basic rules set out in Article 11/1 of the DD, while the rest of the rules set out in Article 11 the DD had to be implemented into the competition act anew.[498] Research revealed no cases addressing this issue.

3.1.7 Quantification of harm

Before the implementation of the DD, the general rules of civil law and procedure on the burden and standard of proof as well as the quantification of harm applied also in antitrust cases.[499] A special rule set out in Article 216 of the ZPP stated (still does) that in case it is established that a party is entitled to damages, to a monetary amount, or to substitute goods, but the amount of money or the quantity of goods cannot be determined, or could only be determined with disproportionate difficulty, the court shall decide the matter on the basis of equitable assessment. The application of this article by the courts was, for example, in focus in the *Euromedia MB v. Pošta Slovenije* case presented infra in Section 4.4. In the *ABM v. Telekom Slovenije* case presented infra in Section 4.1.,

496 *Ibid*.

497 VLAHEK, Ana and Klemen PODOBNIK. *Slovenia*, pp. 297–280.

498 See: FATUR, Andrej, Klemen PODOBNIK and Ana VLAHEK. *Competition Law in Slovenia*, pp. 117-118.; For further details, see: VLAHEK, Ana. Novosti na področju odškodninskih tožb zaradi kršitev evropskega antitrusta. *Pravnik*. 2016, vol. 71, no. 7/8, pp. 576–580.

499 FATUR, Andrej, Klemen PODOBNIK and Ana VLAHEK. *Competition Law in Slovenia*, pp. 120-122.

the Slovenian courts stressed that in antitrust damages cases it is focal that the parties reveal to the court and prove all relevant facts on their business activities. This applies also to the defendant if certain facts favoring the plaintiff who cannot prove the damage are within the defendant's 'cognitive sphere'. Unless they do so, the court is faced with the so-called 'cognitive crisis'.[500] The method of quantification applied by the Higher Court in Ljubljana in this case, and subsequently upheld by the Supreme Court, was rather unexpected, as the court equated the infringer's profit with the profit the plaintiff would have earned in the but-for scenario.[501]

Quantification of damages was addressed also in the *Blitz Film & Video Distribution v. Kolosej kinematografi* case presented infra in Chapter 4.2. where the appellate court interestingly noted that the assessment (and adjudication) of damages in the field of competition law infringements, both in theory and in practice, goes beyond the framework laid down by classical civil law rules of the law of damages and does not merely involve establishing actual loss and lost profit in the sense of the provisions of the OZ, but also takes into account – and in European practice increasingly recognizes - the so-called punitive premium, which originates in Anglo-Saxon legal systems, where damages serve a strongly punitive and deterrent function in terms of both special and general prevention.

The but-for scenario and the calculation of lost profit was addressed also in a case presented infra in Section 3.2. dealing with exclusive distribution agreement where the Higher Court confirmed the reasoning of the first instance court as to the method for calculation of lost profit that was presented to the court by an expert opinion. It stressed that in claims for compensation of lost profit, neither substantive nor procedural rules prescribe a single mandatory method for calculating the amount of damage, and that the choice of an appropriate method therefore depends on the factual circumstances of the case and on the quality and availability of the data. It added that lost profit comprises the profit that could reasonably have been expected and is calculated based on projections. Accordingly, the expert must employ the method that produces the result most closely approximating the hypothetical scenario, with the quality of the underlying data playing a decisive role.

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500 VLAHEK, Ana. *Challenges of Private Enforcement of Antitrust in Slovenia*, p. 388.

501 SI: Higher Court in Ljubljana, Judgment and Decision of 28 May 2013, No. VSL Sodba in sklep I Cpg 125/2013, ECLI:SI:VSLJ:2013:I.CPG.125.2013 and SI: Supreme Court, Judgment of 23 May 2014, No. Sodba III Ips 98/2013, ECLI:SI:VSRS:2014:III.IPS.98.2013.

To fully transpose the DD, additional rules were inserted into the ZPOmK-1 that afterwards stated (the same provision is now in the ZPOmK-2) that when determining the amount of the damage based on equitable assessment under the ZPP, the court may also consider part of the profit gained by the infringer.[502] The court may request the competition authority of any Member State to submit, within thirty days of receipt of the request, an opinion on the determination of the amount of harm. If the authority considers such assistance appropriate, it must submit its opinion to the court; otherwise, it is deemed that it has considered its assistance inappropriate. Same rules apply in cases where courts from other Member States would ask the Slovenian authority for assistance. No instances of such cooperation have been identified in the course of this research.

3.1.8 Passing on the overcharges

Rules on passing on of the overcharges as set out in the DD had to be implemented anew into the Slovenian competition act. Although Slovenian general legislation already accorded to the basic rule that compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers, that the defendant may invoke the passing-on defense, etc., detailed substantive as well as procedural rules regarding passing-on of overcharges had to be inserted into the competition act in order to implement the DD accordingly in the antitrust-specific legislation.[503] Research revealed no cases addressing this issue.

3.1.9 Disclosure of evidence

Pre-DD, there were no rules laid down in the competition act on access to competition authority's leniency documents for the purposes of damages actions.[504] Now, the competition act contains detailed rules on disclosure as required by the DD. The litigation disclosure regime in the DD was predicted to have significant implications for the development of civil procedure law in Slovenia.[505] While transposing the DD into the ZPOmK-1, the legislator seized

[502] See also: MOŽINA, Damjan. Protipravno pridobljeni dobiček kot merilo odškodninskega in obogatitvenega zahtevka. *Podjetje in delo*. vol. 41, no. 3/4.

[503] See: VLAHEK, Ana and Klemen PODOBNIK. *Slovenia*, pp. 282–283.

[504] Ibid., pp. 285–287.

[505] GALIČ, Aleš. *Disclosure of Documents in Private Antitrust Enforcement Litigation*, p. 99; GALIČ,

the opportunity and drafted anew also the general provisions of the ZPP on disclosure of evidence.

3.1.10 The effects of consensual dispute resolution

The rules on the effects of consensual dispute resolution on the limitation periods and the pending damages actions proceedings that were already laid down in Slovenian legislation outside the competition act already covered some of the contents of Art. 18 of the DD. That is why only a short provision was inserted in the competition act anew stating that at the joint request of the parties, who agree to engage in consensual dispute resolution of a damages claim, the court may at any time stay the proceedings for the duration of that process, but for no longer than two years (this period is much longer that the one laid down in the general procedural rules). Since judicial assessment of cases in Slovenia is generally lengthy, the danger of an overly hasty judgment does not present itself in practice. On the other hand, specifying the rules on how consensual dispute resolution affects limitation periods is also of practical significance.

The pre-DD competition act also already paid due regard to the fact that the offender has repaid damages to the victims of the infringement.

Article 19 of the DD, by contrast, required action by the Slovenian legislator to ensure proper implementation, leading to the incorporation of its provisions into the competition act.[506]

3.1.11 Cooperation of the courts with competition authorities

The rules on the cooperation of Slovenian courts and the Slovenian competition authority as well as the European Commission were laid down in the ZPOmK-1 already before the DD and were only improved within the DD transposition and were later copied in the ZPOmK-1. They complement the rules of Regulation 1/2003 as to cooperation with the Commission, and supplement

Aleš. Disclosure of Documents in Civil Procedure: The Privilege Against Self-Incrimination or a Quest for Procedural Fairness and Substantive Justice. In: VAN RHEE, C. H. and Alan UZELAC, eds. *Evidence in Contemporary Civil Procedure: fundamental issues in a comparative perspective*. Intersentia / Metro, 2015. DOI: 10.1017/9781780685250.

506 For further details, see: FATUR, Andrej, Klemen PODOBNIK and Ana VLAHEK. *Competition Law in Slovenia*, pp. 122-125.

them as to the cooperation with the national competition authority.[507] The following rules are now set out in the ZPOmK-2:

- Slovenian courts must inform the Slovenian competition authority of every action requesting damages for infringements of Slovenian or/and European antitrust as well as of every decision taken in the case at the same time as it is served on the parties,
- the court may request the Slovenian competition authority to provide a written opinion on the application of Slovenian antitrust rules, with the permission of the court, the agency may also present its opinion orally at a hearing,
- if the Commission or the Slovenian competition authority submitted their written *amicus curiae* brief under Article 15/3 of Regulation 1/2003 on the application of European antitrust rules, the courts must forward a copy of the brief to the parties and (in case of the Commission's brief) the authority, or (in case of the authority's brief on the application of European antitrust rules) the Commission,
- in case a Slovenian court asks the Commission for its opinion under Article 15/1 of Regulation 1/2003, it must inform the parties about it and send a copy of the opinion to the parties and the competition authority,
- the Commission and the Slovenian competition authority may submit briefs at any time before the judgment is delivered.

Unfortunately, no information is available regarding the extent of such cooperation, either with the Commission or with the Slovenian competition authority. The Slovenian competition authority does not publish any specific information on it on its website, nor do the courts, the Commission's database on antitrust damages proceedings has also consistently been incomplete. Although the rules on cooperation have been in effect since 2004 (Regulation 1/2003) and 2008 (ZPOmK-1), it is fair to assume that such cooperation is rare, if it exists at all. In one of the more recent cases (appellate decision was issued in the beginning of 2017, i.e. before the competition act provided cooperation between the courts and the Slovenian competition authority in the form of a request for an opinion on the application of Slovenian antitrust rules) presented infra in Chapter 4.5., the plaintiff claiming abuse of a dominant position of the defendant asked the first instance court to request the Slovenian competition authority to assess the alleged infringement as the plaintiff could not have

[507] GRILC, Peter, ed. *ZPOmK-1 s komentarjem*, pp. 516–540.

done this on its own, and to stay the proceedings for that purpose. The Higher Court in Maribor stressed that the burden to allege and prove the infringement lies with the claimant. The court is only entitled and obliged to inform the competition authority of any action seeking damages for infringement of the antitrust rules. For the first-instance court to stay the proceedings, a procedure before the competition authority would have had to be already pending, which the claimant did not allege when submitting its motion for a stay, it merely asserted that such proceedings would be initiated in the future.[508]

3.2 Annulment actions

The consequence of nullity of agreements, trade association decisions and concerted practices that represent restraining business practices stems directly from the Slovenian competition act that copies in this part the wording of Article 101 TFEU. As is the case with Article 102 TFEU, the Slovenian provisions regulating abuse of a dominant position, too, do not provide for any sanction in case the abuse stems from an agreement, but the sanction of nullity would clearly apply also in such cases.[509] The details of the consequences and enforcement of null acts in Slovenian law are regulated in the OZ, the general principles of which are in principle in line with the CJEU's case law regarding antitrust related nullity, and can thus fully apply also in cases of antitrust infringements. According to the OZ:

- the court must take nullity into account *ex officio*, and any interested person may invoke it,
- the right to invoke nullity does not expire,
- decision on nullity has a declaratory character and *erga omnes* effects,
- null contracts do not become valid if the prohibition or other cause of nullity later ceases,
- if a contract is null, each contracting party must return everything to the other party what was received based on such contract, or otherwise,

[508] SI: Higher Court in Maribor, Judgment of 9 February, No. VSM Sodba I Cpg 507/2016, ECLI:SI:VSMB:2017:I.CPG.507.2016.

[509] For further details on this, see: KOMNINOS, Assimakis P. *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts*. Oxford and Portland, Oregon: Hart Publishing, 2008, pp. 158–160.

adequate monetary equivalent must be provided; if, however, a contract is null because its contents or purpose contravenes fundamental moral principles, the court may wholly or partly reject the claim of the party acting in bad faith for restitution taking into account the fairness of one or both parties as well as the significance of the interests at stake.[510]

The ZKolT does not provide for collective actions seeking only declaratory relief.[511]

Only scarce information on individual nullity actions or nullity shield-objections in this field is available due to incompleteness of the Supreme Court's judicial decisions database.[512] A case that is available in the database,[513] concerned a distribution agreement concluded between a supplier and a distributor of beverages for the territory of the Republic of Slovenia. Article 4 of the agreement contained an exclusivity clause (sole distribution), under which the supplier was prohibited from selling beverages directly within Slovenia and was further required to obtain prior written consent before supplying any other seller or distributor. In the dispute, the supplier argued that the distribution agreement was void due to the anticompetitive nature of Article 4. The court held that, should the anticompetitive effects of Article 4 be established, only that clause of the agreement would be void (partial nullity), rather than the agreement in its entirety.[514] However, because the supplier failed to sufficiently specify and substantiate the alleged negative effects of Article 4 on competition, the court declined to rule on the issue of partial nullity.

3.3 Interim measures

There are no specific provisions on interim measures in the field of private competition enforcement proceedings (a special rule of the ZPOmK-2 applies only to interim measures issued by the Slovenian competition agency),

510 FATUR, Andrej, Klemen PODOBNIK and Ana VLAHEK. *Competition Law in Slovenia*, pp. 106–107.

511 For further details, see: GALIČ, Aleš and Ana VLAHEK. *Slovenia*, pp. 629–630.

512 See *infra* Chapter 4.

513 SI: Higher Court in Ljubljana, Judgment of 28 June 2016, No. VSL Sodba I Cpg 1780/2015, ECLI:SI:VSLJ:2016:I.CPG.1780.2015.

514 It referred also to the CJEU case law in confirming the partial nullity, see Judgement of 11 September, *CEPSA*, C-279/06, ECLI:EU:C:2008:485.

therefore general rules on interim measures regulated in the Enforcement and Securing of Civil Claims Act[515] apply.[516]

A special provision regarding interim measures is laid down in the ZKolT for cases of collective injunctive actions that states that at the request of the plaintiff, the court shall, in accordance with the Enforcement and Securing of Civil Claims Act, issue an interim measure ordering the defendant to cease conduct that harms the collective interests of a larger number of persons. The court may also issue an interim measure if the defendant has not yet commenced the unlawful conduct but is on the verge of doing so.

3.4 Actions seeking injunctions

Actions seeking injunctions are also available in Slovenia either as individual actions or as collective actions. In the case *ABM v. Telekom Slovenije* presented *infra* in Chapter 4.1., for example, the plaintiff filed an action requesting the court to order the defendant to seize with the infringement and to prohibit it to continue with it in the future.

Collective injunctive actions are likewise available in cases of antitrust infringements. A prerequisite for filing a collective action for injunction is a written warning by the plaintiff to the defendant at least fifteen days prior to the planned filing of the action, informing it that a collective action will be filed if it does not cease with the unlawful conduct. The available remedies are as follows: the court determines the infringement, requires the defendant to cease the infringement, and forbids any such future activity. The court may also decide that the judgment must be published at the expense of the defendant if it deems that this would contribute to mitigating or eliminating the harmful effects of violations. For cases of infringements of consumer interests, the ZKolT additionally states that judgments prohibiting the use of general terms and conditions, or pre-drafted contractual provisions include also a prohibition against referring to such clauses regarding the already concluded contracts. A final judgment finding the infringement is binding upon other courts assessing individual

[515] SI: *Zakon o izvršbi in zavarovanju (ZIZ)*, Official Gazette of the RS, No. 51/98 and later amendments.

[516] VLAHEK, Ana. *Challenges of Private Enforcement of Antitrust in Slovenia*, p. 403. For further details, see: FATUR, Andrej, Klemen PODOBNIK and Ana VLAHEK. *Competition Law in Slovenia*, pp. 128–130.

consumer claims.[517] So far, no collective injunctive actions in the field of competition law have been filed.[518]

4. Private enforcement cases[519]

The exact extent of private enforcement of antitrust and other competition law rules is unfortunately not known. The Supreme Court publishes only selected important judicial decisions in the judicial decisions database. Within civil and commercial law, this includes the decisions of the Supreme Court as well as decisions of all four Slovenian appellate courts of general jurisdiction since the beginning of 1993. The database contains only a selection of second- and third-instance judgments, anonymized as to the parties, and these often lack substantive detail on the factual background and, in some instances, on the core issues themselves. Where a Higher Court returned the case to the court of first instance for a new trial, information as to the outcome before the first instance court, as well as to whether the parties made use of any further legal remedies, is also not publicly available. Similarly, it is not known whether a party filed an extraordinary legal remedy before the Supreme Court, unless the decision of the Supreme Court is later made publicly available.

In the past twenty years, antitrust damages actions and other forms of relief have been intensified in Slovenia but are still scarce even in the post-DD era. Research has revealed at least 15 damages actions proceedings taking place before the Slovenian courts where breach of antitrust was argued as a shield or (in the majority of the cases) as a sword. All actions were individial,not collective actions. Judicial proceedings seeking damages were in most of the cases initiated by competitors of undertakings that have allegedly abused their dominant position, while damages actions against infringers of Art. 101 TFEU and/or its Slovenian counterpart are not common. The latter might increase in the future with the application of the ZKolT. In antitrust damages cases, abuses of dominant position in the telecommunications sector are mostly addressed.

517 VLAHEK, Ana. *Challenges of Private Enforcement of Antitrust in Slovenia*, p. 403.

518 This is evident from the public Register of Collective Actions.

519 This chapter is based on: VLAHEK, Ana. *Challenges of Private Enforcement of Antitrust in Slovenia*, pp. 407–426.

Other actions refer to abuses in the postal services sector, cinematographic sector, maritime transport sector, and food sector. *Telekom Slovenije d.d.*, who was at the time the incumbent telecommunications service operator was the most targeted undertaking with other telecommunications operators filing damages actions against it claiming it had abused its dominant position by predatory pricing, margin squeeze, tying, etc.

Majority of these actions predate the DD. Some were filed even before the modern Slovenian competition act of 2008 (i.e. the ZPOmK-1) was adopted laying down the rules on suspension of limitation during the public enforcement proceedings to avoid the running out of the limitation period.

A lot of these proceedings ended either with a dismissal of the claims or a settlement, while damages were rarely awarded.

The antitrust damages cases examined are presented *infra*.[520] These cases certainly do not represent the entirety of antitrust damages actions, as the precise number remains unknown despite the obligation to notify the Commission and/or the national competition authority. It is also safe to presume that in a lot of cases outside this research the parties settled out of court or during the judicial proceedings. In some of the examined cases, the parties are identifiable, whereas in others they are not, making it difficult to link them to specific cases reported in the media. The presented research results are based on publicly available judgments, public statements made by the parties and media reports. All amounts are presented in euros although in some of the cases the amounts were set in Slovenian tolars.

4.1 Telecommunications sector

ABM v. Telekom Slovenije

Administrative infringement proceedings against *Telekom Slovenije* started in September 1999 on request by *ABM d.o.o.* who claimed, *inter alia*, that *Telekom Slovenije* abused its dominant position by refusing to include *ABM* CDs for Internet access in its 'ISDN 3000' packages without just cause giving preference to the CDs offered by SiOL d.o.o. being a subsidiary of *Telekom Slovenije*. After lengthy administrative and judicial review proceedings, the abusive practice of

[520] *Ibid.*, pp. 408–423. The core analysis of the cases is taken from this publication.

Telekom Slovenije was finally confirmed in 2007 by the Administrative Court of RS and in 2008 by the Supreme Court. Already in 2002, *ABM* filed an action requesting the defendant to seize with the infringement and prohibit it to continue with it in the future, include *ABM*'s product in its package, and to pay damages in the amount of EUR 4.2 million for the loss sustained due to defendant's alleged abusive behaviour. The damages were in the form of lost profit and the market value of lost subscribers at the time of filing the claim. In March 2012, the District Court in Ljubljana awarded *ABM* damages in the amount of EUR 2.3 million plus interest. In May 2013, the Higher Court in Ljubljana[521] lowered the amount to approx. EUR 62.000, while in May 2014, the Supreme Court ordered *Telekom Slovenije* to pay *ABM* approx. EUR 941.00 plus interest.[522] Claims for cessation and inclusion were dismissed as they were obsolete (the packages and products no longer existed at the time of adjudication). It is absolutely striking how long the public and private enforcement proceedings lasted.

In determining the amount of damages both the Higher Court and the Supreme Court equated the infringer's profit with the profit the plaintiff would have earned in the but for scenario. The Supreme Court summarized as follows:

"To determine the amount of lost profit, a comparison must be made between the injured party's actual position and the position it would have been in had the harmful act not occurred (Art. 189(3) of the former OZ or Art. 168(3) of the current OZ). For this purpose, a hypothetical scenario (the 'non-infringement' scenario) must be constructed. Since it is impossible to know how the market would have developed in the absence of the infringement of competition law, the hypothetical scenario necessarily rests on a set of assumptions. There are various approaches to constructing such a scenario, with the available data and procedural material in a given case playing a decisive role. In such circumstances, the precise amount of the damages can generally not be established in the manner ordinarily required under the law of damages, or only with disproportionate difficulty. Accordingly, the legislature has empowered the court to determine the amount on the basis of equitable assessment (Art. 216 of the ZPP). By virtue of Art. 216, the burden of proving the amount of harm is thus alleviated for plaintiffs in certain cases, including those

521 SI: Higher Court in Ljubljana, Judgment of 23 May 203, No. VSL Sodba I Cpg 125/2013, ECLI:SI:VSLJ:2013:I.CPG.125.2013.

522 SI: Supreme Court, Judgment of 23 May 2014, No. Sodba III Ips 98/2013, ECLI:SI:VSRS:2014:III.IPS.98.2013.

involving infringements of competition law. Where the amount of the damages is determined through equitable assessment, the award of damages constitutes an application of substantive law, whereas the facts underlying the use of equitable assessment remain matters of fact. In the present case, the comparison was made between the profitability of the injured undertaking and that of a comparable undertaking. Here, however, the only undertaking deemed comparable was one that had not suffered any harm as a result of the abuse—namely, the infringer itself, i.e., the defendant or its daughter company [whose product was included in the infringer's package in contrast to the plaintiff's product]« (explanation in brackets added by the author).

Western Wireless Int. v. Mobitel

In 2005, *Western Wireless Int. d.o.o.* requested damages from the then incumbent operator *Mobitel d.d.* and the Republic of Slovenia in the amount of almost EUR 204 million for the loss of its business due to regulatory and market barriers alleged to have prevented *Vega* (its trademark in Slovenia) from entering or competing on equal terms in the Slovenian telecommunications market. *Mobitel* sued in the same proceedings *Western Wireless Int.* for approx. EUR 440.000 requesting payment of the services it had rendered to *WWI*. The parties concluded an out-of-court settlement in April 2006, and the plaintiff subsequently withdrew the action. *Western Wireless Int*. withdrew from the Slovenian market and sold its base stations to competitors as well astransferred to them its subscribers.

T2 v. Telekom Slovenije

In 2007, *T2 d.o.o.* who is one of Slovenian Internet service providers filed a lawsuit with the District Court in Ljubljana against *Telekom Slovenije* claiming that it had abused its dominant position by discriminating between T2 and its downstream market competitor *SiOL d.o.o*. It sought pecuniary and non-pecuniary damages in the amount of approx. EUR 204 million (approx. EUR 130 million, plus approx. EUR 74 million of interest plus other charges). The judge rejected the claim. The Higher Court in Ljubljana rejected *T2*'s appeal and upheld the first instance court judgment in November 2013 stating that the plaintiff had not offered required assertions and evidence regarding its claim.[523]

[523] SI: Higher Court in Ljubljana, Judgment of 21 November 2013, No. VSL Sodba I Cpg 708/2013, ECLI:SI:VSLJ:2013:I.CPG.708.2013.1.

In January 2014, the plaintiff filed an extraordinary remedy of revision to the Supreme Court. According to the media, the Supreme Court granted *T-2*'s request for review of the Higher Court's decision and reversed in June 2017 the judgments of both the first- and second-instance courts. The case was returned to the court of first instance for a new trial. In September 2018, after eleven years of back-and-forth judicial proceedings, the parties reached a court settlement. The precise terms were not fully disclosed. Media reports suggested a settlement sum of around EUR 50 million.

Tušmobil v. Telekom Slovenije

A similar case was pending also between *Telekom Slovenije* and *Tušmobil d.o.o.* (formerly *Tuš Telekom d.o.o.*). *Tušmobil* filed a lawsuit in 2007 requesting over EUR 21 million plus interest for the damage caused by *Telekom Slovenije* abusing its dominant position by margin squeeze. In February 2015, the District Court in Ljubljana awarded damages in the amount of approx. EUR 1.7 million (plus interest), while the action was dismissed regarding the rest of the claim. In appellate proceedings, the Higher Court in Ljubljana found shortcomings of the contested judgment regarding the incompletely established facts, specifically the factual preconditions of the alleged abuse of the defendant's dominant position, and the damage allegedly suffered by the claimant. The court of first instance thus had to supplement the evidentiary proceedings accordingly and, based on the facts thus established, reconsider the merits of the still disputed part of the claim. The Higher Court stressed that it would be necessary to allow the defendant to challenge whether the findings of the regulatory telecommunications authority provide an appropriate basis for determining the defendant's dominant position and the alleged abuses on the relevant market. The Higher Court held that such analyses have the character of public documents, to which the presumption of truth attaches regarding the facts they set out, and that the burden of proof for rebutting this presumption thus lies with the defendant.[524]

Sinfonika v. Telekom Slovenije

Sinfonika d.d., an electronic telecommunications undertaking filed a damages action against *Telekom Slovenije* in 2008 alleging that it abused its dominant

[524] SI: Higher Court in Ljubljana, Decision of 13 May 2016, No. VSL Sklep V Cpg 1012/2015, ECLI:SI:VSLJ:2016:V.CPG.1012.2015.1.

position by introducing a central office exchange service (Centrex) with predatory prices, high switching costs, etc. The claim was almost EUR 35 million plus interest. It was rejected by the District Court in Ljubljana in 2010 stating that while the grounds for liability for damages (the abuse of dominant position) were provided, the plaintiff failed to provide evidence it had suffered damage because of the infringement. The decision was upheld by the Higher Court in Ljubljana in 2011 and is final.

Another action filed by *Sinfonika* against *Telekom Slovenije* was also dismissed in 2010. In the reasoning of the ruling, the court stated that while the grounds for liability for damages were provided, the plaintiff failed to provide evidence it had suffered damage it requested in the amount of approx. EUR 350,000. In 2011, the Higher Court in Ljubljana dismissed *Sinfonika's* appeal and confirmed the first instance judgment.[525]

Akton v. Telekom Slovenije

Slovenian telecommunications company *Akton d.o.o.* filed a lawsuit for EUR 1.5 million (later increased to approx. EUR 2.6 million) plus interest alleging *Telekom Slovenije*'s (formerly *Mobitel d.d.,* that merged by acquisition with *Telekom Slovenije* in 2011) abuse by charging prices for termination of calls in Slovenia that were higher than those set by the Agency for Communication Networks and Services of the Republic of Slovenia. *Akton* requested *Telekom Slovenije* to repay the sums charged above the set prices as well as reputational damage. The District Court in Ljubljana fully rejected the claim in November 2014. In 2016, the parties concluded a settlement. Following that, *Akton* withdrew the action.

Si.mobil v. Telekom Slovenije

Slovenian telecommunications company *Si.mobil d.d.* and *Telekom Slovenije* settled in December 2014 with regard to *Si.mobil*'s stand-alone damages claim of nearly EUR 287 million plus interest against *Mobitel* (later *Telekom Slovenije*) for its alleged abuse of dominant position on the retail market of mobile telecommunications services by using predatory pricing within its mobile subscription package *Itak Džabest*.

[525] SI: Higher Court in Ljubljana, Judgement of 18 May 2011, No. VSL Sodba I Cpg 1473/2010, ECLI:SI:VSLJ:2011:I.CPG.1473.2010.

Medinet v. Telekom Slovenije

Telekom Slovenije and *Medinet d.o.o.* (later part of *Amis d.o.o.*), a Slovenian telecommunications company, settled in 2004/2005 for EUR 1.43 million before the competition authority decision finding *Telekom Slovenije*'s abuse became final and before *Medinet* had filed a damages action against *Telekom Slovenije*. The basis of the claim was discrimination / unfair conditions in *Telekom Slovenije*'s wholesale or access offerings (especially relating to ATM-connections, ADSL access, and discounts) for *Medinet*, compared with how *Telekom Slovenije* treated its affiliate *SiOL*.

Amis v. Telekom Slovenije

In May 2008, *Telekom Slovenije* received a lawsuit from *Amis d.o.o.* for the payment of damages in the amount of nearly EUR 57 million arising out of the alleged abuse of its dominant position in the inter-operator broadband access market, in the unbundled local loop and sub-loop access market, and in the fibre-optics connections to collocations spaces market.

Quantum v. Telekom Slovenije

In 2014, *Quantum d.o.o.* filed an action against *Telekom Slovenije* with the District Court in Ljubljana claiming damages in the amount of almost EUR 0,5 million due to the abuse of dominant position by *Telekom Slovenije*. The plaintiff alleged that during 1994 and 1998, *Telekom Slovenije* did not enable it to charge calls to Internet hubs through user access via the 9xxx call number range according to the local tariff rate, due to which *Quantum* allegedly incurred damages. The abuse for 1996/1997 was found by the Slovenian competition authority already in 1997 which was followed by lengthy and at times inappropriate proceedings before the review courts.[526]

The question of running out of the limitation period was in focus of this case.[527] The first-instance court dismissed the claim as time-barred. It applied the rules of the OZ that was explicitly referred to by the then-valid competition act. The court explained why the rules of the later adopted competition act of 2008 (i.e. the ZPOmK-1) which introduced a suspension of limitation during

[526] For further details, see: STARC, Neva. *Zloraba prevladujočega položaja na trgu govorne telefonije - analiza odločbe UVK v primeru Telekom.* 2010, Diplomsko delo, Univerza v Mariboru.

[527] For further details, see: VLAHEK, Ana. *Challenges of Private Enforcement of Antitrust in Slovenia*, pp. 418–419.

the Slovenian competition authority or Commission proceedings could not apply retroactively, absent transitional provisions. It held that the subjective limitation period began at the latest with the claimant's complaint to the authority on 12 September 1996, when it had sufficient knowledge of the infringer and the damage. The objective period was deemed to have begun on 1 January 1995. As the harm was continuous, timely pursuit of the first loss was a prerequisite for later claim. This reasoning was confirmed by the Higher Court in Ljubljana in 2018.[528] The Higher Court held that the suspension of limitation periods due to proceedings before the authority was introduced only with the ZPOmK-1 – in 2008. This provision did not stem from prior case law under the previous competition acts, nor from prevailing doctrinal interpretation of the competition law and the law of obligations. In the Higher Court's view, it represented a change – an addition to the previously existing system of damages protection. The interpretation of the rules as suggested by the plaintiff, which would lead to application of the novel rules on suspension to a legal relationship that had already been completed by the time they entered into force, would amount to retroactivity and was thus inadmissible.

The longevity of this case assessment provides yet another illustration of the profound inefficiency of the Slovenian authorities in handling antitrust cases.

4.2 Cinematographic sector

Blitz Film & Video Distribution v. Kolosej kinematografi

In 2008, *Blitz Film & Video Distribution d.o.o.* filed a damages action against a major Slovenian cinema chain *Kolosej kinematografi* with the District Court in Ljubljana. This was a follow-on action after the Slovenian competition authority had issued the infringement decision but before the decision became final. It requested approx. EUR 940.000 of damages. In April 2012, the District Court issued an interlocutory judgment finding (only) that a part of films the plaintiff's claim is substantiated as regards the issue of liability (in part, it rejected the claim as unsubstantiated). It did not decide on the amount of the damages. Both parties appealed to the Higher Court in Ljubljana. In November 2013, the Higher Court upheld the appeals, quashed the judgment and remitted the case

[528] SI: Higher Court in Ljubljana, Judgment of 3 March 2011, No. VSL Sodba I Cpg 870/2010, ECLI:SI:VSLJ:2018:V.CPG.1385.2016.

for a re-trial providing the first instance court with substantial guidance as to proper procedural and substantive handling of the case. The District Court rendered another judgment, which was again appealed. In June 2015, the Higher Court in Ljubljana delivered its decision, addressing in particular question of a binding effect of a final decision of the Slovenian competition authority during a period when such effect was not expressly provided for in the competition act. The court also examined the methodology employed by the first-instance court in quantifying damages:[529]

"…the court of first instance set out, at length, in a clear and reasoned manner, the entire method by which it determined the amount of the damages claimed. In doing so, it relied on the data (tables containing nominations and projections of expected attendance with corresponding figures for actual attendance) submitted by the plaintiff into the case file, as well as on the report and opinion of the economic expert. In this way, it established the most probable extent of the damage suffered in a manner even significantly more detailed and comprehensive than is ordinarily expected when determining damages by way of equitable assessment (Art. 216 of the ZPP). The determination of damages on the basis of 'equitable assessment' is usually made on the basis of considerably looser or less well-defined reference points than those used by the first-instance court in the present case. The appellate court further notes that the assessment (and adjudication) of damages in the field of competition law infringements, both in theory and in practice, goes beyond the framework laid down by classical civil law rules of the law of damages. It does not merely involve establishing actual loss and lost profit in the sense of the provisions of the OZ, but also takes into account—and in European practice increasingly recognises—the so-called punitive premium, which originates in Anglo-Saxon legal systems, where damages serve a strongly punitive and deterrent function (in terms of both special and general prevention)."

[529] SI: Higher Court in Ljubljana, Judgment of 18 June 2015, No. VSL Sodba V Cpg 222/2015, ECLI:SI:VSLJ:2015:V.CPG.222.2015.

4.3 Postal services sector

Euromedia MB v. Pošta Slovenije

In 2008, the Slovenian competition authority accepted commitments by *Pošta Slovenije d.d.*, and *Euromedia* who was one of the providers of unsolicited mail distribution petitioned the authority to reopen infringement proceedings against *Pošta Slovenije*. In 2009, *Euromedia* filed a damages action with the District Court in Ljubljana against *Pošta Slovenije* requesting EUR 8,4 million of loss of profit because of the alleged predatory pricing. In 2013, the first instance court appointed an expert to help it determine whether the abuse had occurred, and whether *Euromedia* sustained any loss. It dismissed the action. Regarding some of the claims (for the financial years 2003 - 2005), the court of first instance held that they were time-barred and rejected them on that ground. It explained that the plaintiff sought damages on the basis that it had failed to achieve its annual business plan. The fact that it had not achieved the plan was known to it at the end of each financial year. At that point, it was aware both of the damage and of the alleged perpetrator. As claims for damage occurred before 29 May 2006 and the action was filed on 29 May 2009, they had become time-barred according to the rules of the OZ. The remaining claims (for the financial years 2006 - 2009) were dismissed on the ground that the defendant had not acted unlawfully. By referring to the case law of the CJEU, the court found that the defendant had not abused its dominant position. In addition, the claims were rejected because the plaintiff had failed to prove the occurrence of damage.

The Higher Court in Ljubljana dealt in detail with, *inter alia*, the question of whether interruption of the limitation period by the initiation of the administrative proceedings before the competition authority was available under the general rules the OZ (at that time, no specific provisions on this were set out in the competition act). It also assessed the legislative framework for assessing the claim for lost profits in the field of antitrust law. Regarding this, it explained that the claimant must specifically allege what its financial position is and would have been had the defendant not acted unlawfully. This may be assessed pursuant to Art. 216 of the ZPP enabling equitable assessment of the amount of the damage. It explained that since the case concerned the determination of lost profit in a relatively complex competition law dispute, reference to Art. 216 would in principle be possible. However, for an assessment of

damages there must exist at least reference points, i.e., indications based on which damages can be assessed at all. If even such reference points are absent, the assessment of damages and hence the justification for awarding compensation becomes impossible. In such a case, the damages claim is unfounded, as any determination of the amount of damages would rest merely on speculation rather than even minimal reference points. The appellate court therefore held that the claimant had failed to prove that it had suffered damage, and that its claim was unfounded for this reason. It also dealt with a proposal by one party to submit preliminary questions to the CJEU. As the suggested questions were not properly drafted (they asked for interpretation that could not be covered within the preliminary ruling proceedings and did not even concern EU law) and were not relevant for resolving the dispute, the appellate court did not make use of Art. 267 TFEU proceedings. In its reasoning, the Higher Court referenced also to the CJEU case-law.

In 2016, the Supreme Court eventually rejected the revision and confirmed the final judgment dismissing the action.[530] Regarding Art. 216 of the ZPP giving the courts authority to determine the amount of damages on the basis of equitable assessment, the Supreme Court stressed that that has its counterpart in the parties' duty to plead: the parties may be required to substantiate their allegations to which Art. 216 applies, but only to a limited extent; however the parties must in any case present allegations that serve as the basis for the assessment of damages. They may also be required to specify their allegations to the extent appropriate considering the circumstances of the case. There must be at least some reference points based on which damages can be assessed at all. If even such reference points are lacking, the claim may be decided according to the rule on the "burden of allegation and proof" set out the ZPP, since otherwise an equitable assessment would amount to mere speculation. The Higher Court also stressed that the material procedural guidance of the court of first instance does not mean that the court was obliged to instruct the parties' legal representatives as to which specific allegations they still had to put forward. With regard to *Euromedia's* referencing to consultation documents and draft directives, the Supreme Court explained that EU law does not establish any binding effect on national courts with regard to such documents.

[530] SI: Supreme Court, Judgment of 29 March 2016, No. VSRS Sodba III Ips 101/2015, ECLI:SI:VSRS:2016:III.IPS.101.2015, and SI: Higher Court in Ljubljana, Judgment of 20 March 2015, No. VSL Sodba V Cpg 58/2015, ECLI:SI:VSLJ:2015:V.CPG.58.2015.

4.4 Maritime transport sector

S5 vleka ladij v. Luka Koper

In 2010, the Slovenian competition authority adopted a decision which found that *Luka Koper* had abused its dominant position by restricting access for the company *S5 vleka ladij d.o.o.* to provide mooring/unmooring services in the port of Koper. *S5 vleka ladij* then filed a damages claim for EUR 2 million against *Luka Koper* with the District Court in Koper. The court issued an interlocutory judgment finding that the plaintiff's claim is well-founded regarding the period in which the infringement took place, while it dismissed the claim as regards the rest of the period claimed by the plaintiff as relevant for awarding damages. In February 2013, the Higher Court in Koper rejected the defendant's appeal and upheld the plaintiff's appeal finding that the first instance court incorrectly refused to take into account the period after the infringement ended solely on the ground that during that period the infringement ceased to exist. The Higher Court referred the case back to the first instance court instructing it to assess the plaintiff's claims accordingly in the new proceedings, as well to decide on the amount of the damage to avoid further delay of the proceedings. It also addressed the issue of binding effects of national competition authority's infringement decisions, as well as the but-for determination. Information on the outcome of the case is not publicly available.

4.5 Food sector

Sale of refined edible oils case

In this case, the plaintiff sought damages in the amount of EUR 78.321 plus interest for harm allegedly suffered because of the defendant's abuse of a dominant position. To substantiate its claims, it asked the court to request the Slovenian competition authority to assess the alleged infringement as the plaintiff could not have done this on its own, and to stay the proceedings for that purpose. The defendant opposed the claim, arguing, inter alia, that it did not hold a dominant position on the relevant market and, in any event, that the claimant's allegations of abuse were unfounded. The defendant also contested the amount of the damages claimed. During the proceedings, the plaintiff obtained

a response from the competition authority to its request for information regarding the defendant's market share. It initially asked the court to order the competition authority to determine the defendant's market share. The court of first instance eventually dismissed the claim based on the conclusion that the defendant's dominant position on the Slovenian edible oils market had not been established, and therefore it was not possible to proceed to assess the defendant's liability. The court held that it had no legal basis to order the competition authority to determine the defendant's market share in Slovenia, and it rejected the claimant's remaining evidentiary proposals (appointment of an expert, parties and witness testimony) as unnecessary and unsuitable for establishing the defendant's dominant position.

In its judgment in 2017, the Higher Court in Maribor stressed in appellate proceedings that the burden to allege and prove in this respect lies with the claimant. The court is only entitled and obliged to inform the competition authority of any action seeking damages for infringement of the antitrust rules. For the first-instance court to stay the proceedings, a procedure before the competition authority would have had to be already pending, which the claimant did not allege when submitting its motion for a stay, it merely asserted that such proceedings would be initiated in the future.[531]

5. Summary

The Slovenian framework for private enforcement of competition law has, on paper, undergone substantial development since the adoption of the ZPOmK-1 in 2008 and the subsequent transposition of the DD in it 2017, as well as the adoption of the ZKolT in 2017. The legislature has introduced a complete set of rules on individual and collective antitrust damages actions which demonstrates Slovenia's willingness to align its regime with EU standards and to provide plaintiffs with a theoretically comprehensive toolkit.

Yet practice paints a less optimistic picture. Slovenian courts have been confronted with only a handful of antitrust damages actions. Most of them are

[531] SI: Higher Court in Maribor, Judgment of 9 February 2017, No. VSM Sodba I Cpg 507/2016, ECLI:SI:VSMB:2017:I.CPG.507.2016.

brought by competitors rather than consumers. The main problem does not lie in inappropriate application of the antitrust damages regime by the courts that have generally appropriately tackled with the specifics of the antitrust damages regime, but in the fact that the proceedings are notoriously protracted, with some cases dragging on for more than a decade before any resolution is reached. Cooperation between courts and competition authorities appears to be rare. What also is evident from the case law analysed is that plaintiffs frequently fail to discharge their evidentiary burden by substantiating the alleged claims. Addressing different procedural issues (such as those regarding business secrets) before the courts can dig into the substance prolongs the judicial proceedings. The practice also shows that after a period of relative calm in private enforcement before Slovenian courts, recent years have seen an increasing number of private disputes in the field of telecommunications, touching on issues of both antitrust application and ex ante regulation.

What emerges is a regime that exists in form but not in full function. Slovenian private enforcement of competition law resembles to borrow the metaphor, a finely carved wooden sword: the structure in terms of both the rules and the courts has been present, but the sharpness required for effective deterrence and compensation has been lacking. As it stems from the case law, the accountability for that has lied to some extent with the plaintiffs themselves despite favourable rules on the binding effect of final infringement decisions, suspension of limitation, equitable assessment of the amount of the damage and other mechanisms fostering access to justice. Some potentially sharp edges can be discerned, particularly in relation to settlements and collectivisation. Further steps in improving the private enforcement of antitrust framework can, of course, be made. These include, inter alia, faster adjudication by the competition authority and the courts, both those reviewing infringement decisions and those handling antitrust damages actions, greater judicial specialization as well as more proactive cooperation between courts and competition authorities. Only through such measures can private enforcement evolve into a meaningful pillar of Slovenian competition law, complementing the existing framework and strengthening its practical impact.

CHAPTER 8

An ornamental legal framework – Private enforcement of competition law in Slovakia

by

Hana Kováčiková*+

1. Introduction

The right to an effective remedy and to a fair trial belongs to all whose rights and freedoms guaranteed by EU law are violated.[534] The right of injured party to claim for damages for loss suffered by competitor's conduct liable to restrict or distort competition was recognised by the CJEU in *Courage and Crehan535,* long before Slovakia became a member state of the EU. However, the 2013 Impact Assessment Report[536] of the Commission showed that the exercise of this right by injured parties was questionable. To overcome barriers such as the lack of appropriate national rules governing damages actions and the variety of legal frameworks of the Member States, the EU regulation was necessary. DD comprehensively established the right to compensation for harm resulting from infringement of EU and national competition for every injured party everywhere in the EU and obliged Member States to adopt procedural rules ensuring the effective exercise of that right.[537]

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+ This paper was prepared within the project VEGA 1/0710/23 "Damages in competition law and public procurement – limits and challenges to effective enforcement of the European Union Law".

534 Judgement of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, para. 44, Article 47 CHFREU

535 Judgement of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:456, para. 26.

536 COM(213) 404 final, SWD(2013) 203 final, p. 5.

537 Recital (4) of the DD, Judgment of 28 January 2025, *ASG 2*, C-253/23, EU:C:2025:40, para. 65.

This chapter deals with the Slovak style of private enforcement of competition law in both the ante- and post-DD periods. Slovakia transposed the DD into national legal order by Antitrust Damages Actions Act No. 350/2016 (hereinafter "SkADAA") which came into legal force on 27 December 2016. The SkADAA thus specifically complemented the general framework of already applicable rules. That is divided into several, both material and procedural laws, and covers also claims for damages arising from unlawful mergers and state aid. That makes the system a bit intricate. Information asymmetry, burden of proof, dependence on business relations, calculation of harm, market power, litigation costs, or even legal inexperience have been the usual obstacles[538] preventing the injured party from claiming for damages.

The author focuses mostly on the current legal framework (2025), as the pre-DD era was already covered by Ondrej Blažo.[539] However, to provide a complex understanding to the Slovak legal system in this area, the case law after Slovakia's accession to the EU in 2004 and before the adoption of SkADAA will also be examined.

Now, after more than two decades of the presence of general legislation and almost ten years after the new specific legislation came into legal effect, we can assess whether the existing legal framework in Slovakia provides an effective legal environment for claiming compensation by injured parties for damages caused by violations of competition laws. Therefore, a research question is whether Slovakia complies with its obligation to provide sufficient remedies in the field of competition law. This study employs a doctrinal and analytical research methodology, grounded in a comprehensive review of Slovak legislation and case law. The analysis draws on primary legal texts, including the SkADAA, the Civil Code ("SkCC) and Commercial Code ("SkComC), and the EU DD. Secondary sources such as academic publications, official reports from the European Commission, and prior empirical studies augment the legal analysis.

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538 Those could be derived e.g. from Commission's Green paper - Damages actions for breach of the EC antitrust rules COM(2005) 672 final, European Parliament resolution of 25 April 2007 on the Green Paper on Damages actions for breach of the EC antitrust rules (2006/2207(INI)) (OJ C 74E, 20.3.2008, pp. 365-658), Commission's 2013 Impact Assessment Report (Damages actions for breach of the EU antitrust rules).

539 See in this regard BLAŽO, Ondrej. Private (Non-)Enforcement of Competition Law in Slovakia. *EU and Comparative Law Issues and Challenges Series (ECLIC)*. 2024, vol. 8. DOI: 10.25234/eclic/35829.

A significant part of the research involves systematic examination of Slovak court decisions spanning the pre- and post-SkADAA periods to evaluate the practical application of the legal framework and identify jurisprudential trends, challenges, and inconsistencies. This empirical component includes case law scrutiny from various judicial instances, supplemented by responses obtained from courts regarding their caseload and handling of competition-related damages claims. Where public data on private enforcement are scarce, supplementary qualitative assessments have been incorporated based on expert commentaries and institutional reports.

The paper also reflects on the operational environment through thematic analysis of procedural difficulties such as evidentiary barriers, jurisdictional uncertainties, and access to collective redress mechanisms. This multi-faceted approach provides a holistic perspective on both the normative and practical dimensions shaping Slovak private enforcement.

2. Legislative framework

In Slovakia, a law which shall be applied when claiming damages for the breach of the competition law depends on the branch of the competition which was violated. Slovakia recognised three substantive legal sources in this regard. For antitrust, the *lex specialis* SkADAA which implemented the DD shall be applicable. The SkADAA specifically stipulates that a person who has suffered harm caused by an infringement of either EU or national antitrust law shall have a right to compensation.[540] However, SkADAA does not regulate claims for damages arising from the breach of merger regulation or the state aid. As those areas of enforcement law do not have their own specific legislation, a general law, established decades before the DD era, shall be applied instead.

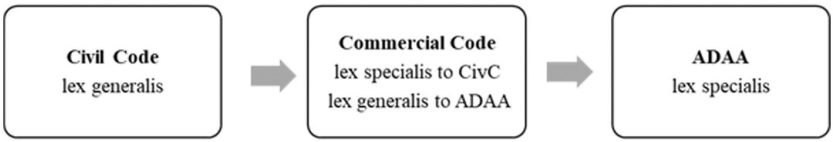
Here comes the intricacy. Slovakia offers two codes – the **SkCC**[541] that regulates private relations for everyone and the SkComC[542] adopted to regulate business relations between entrepreneurs (Figure 8.1).

[540] Article 3 SkADAA.

[541] Act No 40/1964 Coll. The Civil Code, as amended.

[542] Act No 513/1991 Coll. The Commercial Code, as amended.

Figure 8.1: Relations between laws regulating private enforcement in Slovakia



Source: processed by the author

The natural expectations are that private enforcement of all areas of competition law shall be regulated either by the SkComC or by the SkADAA as it concerns mostly business relations and one of the parties is always the entrepreneur. However, SkComC deals with claims for damages caused by a breach of the competition law that is regulated only by the Act on Protection of Competition[543] (hereinafter "SkAPC"). In this regard, the SkAPC substantially covers cartel agreements, abuse of dominant position and mergers, but not state aid which is regulated by the (different) Act on State Aid[544] (hereinafter "SkASA"). Therefore, for the cases of state aid, the general liability for damage stipulated in the SkCC should be applied.

However, situation is different if a contract on the provision of a state aid (hereinafter only "grant contract") was already concluded. According to Art 17(3) of the SkASA the aid is generally provided on the basis of contract. Nevertheless, a respective legal regime (SkCivC or SkComC) for this purpose is not established. Both Codes contain provisions on contractual relations and covers various types of contracts. Both also have the provision that it is possible, under their legal regime, to conclude event a contract, that is not regulated as a type of contract.[545] Art 261(9) stipulates, that contracts between an entrepreneur and a public law entity that are not regulated in SkComC and are regulated as a contractual type in the SkCC, shall be governed by the relevant provisions on this contractual type in the SkCC. Said in other words, if in such case a contractual type is not regulated in SkCC, parties (entrepreneur and state) may conclude the contract according to the provisions of the SkComC. The Supreme Court of the Slovak republic (hereinafter only "SCSR") in case *MIHO et. al. v*

543 Act No 187/2021 Coll. on Protection of Competition and on Amendments to Certain Acts, as amended.

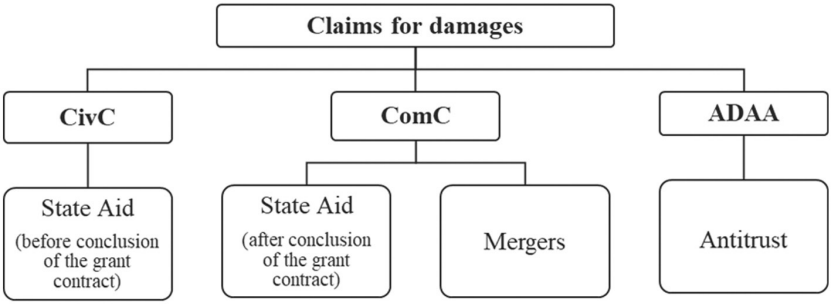
544 Act No 358/2015 Coll. on Regulation of Certain Relations in the Field of State Aid and De minimis Aid and on amendments to certain Acts (Act on State Aid), as amended.

545 Article 51CivC, Article 269(2) SkComC.

obec Šelpice[546] to this regard reminded that Article 262(3) SkComC allows the contracting parties (regardless of their nature) to agree that their relations will be governed by the SkComC, regardless of whether their contractual relations typologically correspond to the relations regulated in the SkComC.

The state therefore is entitled to conclude the grant agreement according to the provisions of the SkComC and the liability for damages that arises from the breach of such contract shall be therefore regulated by provisions on contractual liability under the SkComC instead of SkCC (Figure 8.2).

Figure 8.2: Scheme of substantive laws that regulate damages claims for damages for breach of specific branches of competition law in Slovakia (categorised from the most general law to the most specific law)



Source: processed by the author

Such fragmentation undoubtedly brings about various practical complications related, e.g., to different limitation periods, different rights of claimant during the litigation, or different standards and requirements for burden of proof. The next part, therefore, will deal with the substantive legal issues of all three regimes covering injured party, limitation periods, joint and several liability, scope of damages, quantification of harm, and passing-on of overcharges of all three regimes. The author will proceed from the most general (and at the same time the oldest) regime to the specific (and the newest) one. Such an approach enables one to provide insight also to the Slovak pre-DD legislation, which remains still valid for non-antitrust claims for damages and covers areas not regulated by the SkADAA.

[546] SK: Supreme Court, Judgement of 27 April 2015, No. 3Mcdo/40/2012, *MIHO a spol. v Obec Šelpice*, ECLI: SK:NSSR:2015:2108220433.1

2.1 Pre-DD legislation, yet still applicable

2.1.1 Civil Code – a general law to the general liability for damages

SkCC stipulates the general preventive duty, which obliges everyone to act in a manner that will prevent damages to health, property, nature and environment.[547] Since 1992,[548] the general preventive duty was complemented by the (then new) clause on general liability for damages: "everyone shall be liable for damage caused by a breach of a legal duty".[549,550] To successfully claim for damages, the injured party has to prove the existence of four conditions – unlawful act, existence of damage, causal link between unlawful action and the damage, and culpability. With respect to the unlawful action, the applicable law does not distinguish between the breach of legal duty arising from the law or contract. It also includes the breach of the general preventive duty. Insofar as the injured party can prove that the infringer breaches any of his/her/its legal duties, the first condition shall be deemed to be fulfilled. The type of damage that could be suffered is not defined by law. SkCC, though, establishes the right to financial compensation for actual loss and lost profit. That means that damage shall be understood as a harm that occurred in the property sphere of the injured party and is objectively expressible in money. Moreover, if the injured party requests it and if it is possible and reasonable, the injured party can also claim restoration to the original state.[551] As far as the scope of damages is concerned, the court considers also the possible breach of the general prevention duty. That means that if the damage was caused also by the fault of the injured party, such party shall bear the damage proportionately.[552] When proving the causal link, the injured party must prove, that the damage was caused directly due to the infringer's unlawful action. Moreover, such an unlawful action must be conducted in culpable consequence by the infringer. This means that the damaging

547 Article 415 SkCC.

548 This provision on general liability was introduced to Slovak legal order on 1 January 1992 by the Act No 509/1991 Coll. amending the SkCC.

549 Article 420(1) SkCC.

550 Earlier provisions distinguished between the liability of citizens and liability of (socialistic) organizations.

551 Article 442(1) SkCC

552 Article 441 SkCC.

outcome is not only caused by the infringer's unlawful act, but that act was performed with intentional or negligent fault.

The applicability of this provision can be well illustrated in case *S v Slovak Republic*[553] where the an entrepreneur (plaintiff) claimed for damages against the Slovak Republic caused by not providing the approved state aid. The S was, upon submitted project, eligible to draw a state aid under the scheme.[554] After the successful selection procedure before the evaluation committee, a grant contract should be signed. To this purpose, the minister of economy issued a proxy to the Slovak Tourism Agency, which was supposed to sign the contract on behalf of the state. However, after the completion of the selection procedure and before signing, the minister revoked the proxy, and the grant contract was never signed. The reason provided dealt with concerns about the fulfilment of the conditions of the scheme on the part of S. Consequently, the S did not draw the state aid. Therefore, it filed against the SR a claim for damages of nearly 5 million EUR. The courts found that the proxy was revoked without the existence of a legal reason. If the Agency had concerns about the fulfilment of the scheme conditions, it should submit the case back to evaluation committee, but was not entitled to consider it by itself (or by the minister), as the claimant's project was approved by the evaluation committee, the claimant was awarded a non-refundable financial contribution of SKK 150,000,000 (EUR 4,979,087.83) and the decision of the evaluation committee was approved by the minister. The applicable law[555] determined binding criteria for the affected entrepreneurs and for the institutions participating in the process of approving the provision of state aid. If the minister investigated through the internal control bodies whether the S had complied with the provisions of the scheme on which the project was to be implemented and subsequently revoked the proxy to sign the contract on the provision of a non-refundable financial contribution

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553 SK: Supreme Court, Judgement of 25 June 2013, No. 4 MCdo/2/2013, *S v Slovak Republic (for payment of EUR 4,979,087.83).*

554 Tourism business activities support scheme (State Aid Scheme) of Slovak Tourism Agency, available at: https://www.economy.gov.sk/uploads/files/VF3VpDBY.pdf (accessed on 4 September 2025).

555 State Aid Scheme, SkASA (then No. 231/1999 Coll.), Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (*OJ L 10, 13.1.2001, s. 33 – 42)*, and Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty *(OJ L 083 , 27.03.1999, pp.1-9).*

to the S, in the opinion of the court, it exceeded its material jurisdiction and authority. Such conduct of the state can be therefore considered a violation of the legal obligation broadly defined in SkASA and specified in the State Aid Scheme, which forms a binding substantive and procedural framework for the actions of the S and the SR.

The court also needed to deal with the existence of damage. The legal question was, how can the plaintiff claim for damages for not providing the state aid if the SkASA stipulates that there is no legal entitlement to state aid?[556] The court agreed[557] that the right to state aid is not equipped with a claim at the stage of submitting proposals and assessment by the evaluation committee. Only the results of the evaluation committee and the decision of the minister, as the aid provider, can individualise the claim in question, and thus create a right for the applicant that he can claim. The moment of concluding the contract only affects the creation of contractual relations. In particular, the moment when the minister decided to approve the non-refundable financial contribution to the S (which has the character of an administrative decision), a legal claim arose to conclude a contract on the provision of a non-refundable financial contribution and to provide financial resources. Given the absence of a legal claim stated by law, it is not possible for all subjects of private law to claim the right; however, those that meet the statutory or legally derived conditions have the right to claim a subjective right. The above gave rise to a legitimate expectation for the S of both the conclusion of a contract for the provision of non-refundable financial contribution and the provision of financial resources. The damage was then calculated as a loss of profit composed of the sum of non-provided entitled costs according to the approved budget of the project. Finally, the court concluded that the S met all conditions required for the conclusion of the grant contract. Therefore, there was no reason to question the causal link between state's unlawful conduct and the damage suffered by the S due to this conduct, or the amount of damage.

The SkCC recognises subjective and objective limitation periods. The right to compensation for damage shall become statute-barred two years after the date on which the injured party learns of the damage and of who is responsible for it. The right to compensation for damage shall become statute-barred at

556 Article 18(1) of the 1999 SkASA and Article 17(2) of the 2015 SkASA.

557 See reasoning on the page 3 of the judgement S v SR.

the latest three years, and in the case of damage caused intentionally, ten years after the date on which the event from which the damage arose occurred (…).[558] Missing the objective limitation period leads to the transition of the legal claim to natural obligation, i.e. if the defendant objects the passing of limitation period, the court must comply with such objection. In terms of private enforcement of the competition law, it might be a problem for an injured party to choose a suitable tool for a claim for damages. In case of follow-on actions, injured party takes the risk that competition authority will not reach a final decision within the course of the objective limitation period. However, without a final decision in administrative competition procedure, the quantification of damage and the proving the unlawful action of the infringer will be nearly impossible. Henceforth, if the injured party chooses to use the standalone action, he/she/it has to bear the burden of proof, including the burden to prove unlawful action of the infringer. The limitation period begins to run from the day on which the right could have been exercised for the first time.[559] That means, that injured party was able to file an action[560] before the court. By that time, injured party must specify and quantify the damage, as the claimed amount presents the basis on which court set the court fee (6% from the claimed amount, maximum of EUR 25,000[561]) and on which legal representation costs are based.

A limitation period is suspended if the injured party asserts a right in court and continues the initiated proceedings properly. The limitation period shall not run from this assertion for the duration of the proceedings.[562]

2.1.2 Commercial Code – both specific and general liability for damages in competition cases

The general liability for damages concept in commercial relations differs from the civil ones. The main difference is that proving the fault of the infringer

558 Article 106(1-2) SkCC.

559 Article 101 SkCC

560 According to Article 132 of Act No 160/2015 Coll. Civil Dispute Procedure, as amended ("SkCDP), the action shall contain (…) a true and complete description of the decisive facts, a description of the evidence to prove them, and a statement of claim, which must be clear and enforceable. Moreover, the claimant shall attach to the action all evidence except that which he cannot attach through no fault of his own.

561 Annex 1 of the Act No. 71/1992 Coll. on Court Fees and Fee for Extract from Criminal Records.

562 Article 112 SkCC

is not required, as commercial liability for damages is based on objective liability. The general clause derived from the SkComC states that anyone who breaches the duties to comply with the legally binding competition rules stipulated in SkAPC and not to unlawfully restrict competition shall be liable to compensate the other party for any damage thereby caused. However, to formulate such ruling, injured party must do a thorough search of SkComC to find the infringer's duty to comply with competition rules (Arts. 41-42),[563] then the provision on non-contractual liability (Art. 757)[564] which refers to the reasonable use of the contractual liability provision (Art. 373).[565]

The limitation period is four years[566] and begins to run from the day the injured party is aware or should be aware of damage and who is obliged to pay damages. The limitation period is limited to ten years from the day of unlawful act of the infringer.[567] If the injured party claimed for damages timely, before the limitation period passed, but the substance of the dispute was not yet decided, the limitation period continues to run. However, the objection of limitation cannot be raised in such cases. If the right to compensation for damages was legally granted in court later than three months before or after the expiration of limitation period, the decision may be enforced by court if the proceeding for its enforcement was initiated within three months of the date on which it could be initiated.[568]

In terms of proceedings, the injured party is facing the requirements similar to those claiming the civil liability for damages except the fact that they do not need to prove the fault of the infringer. However, in commercial cases, the court

563 Art. 41 SkComC: „*Competitors (...) are obliged to observe the legally binding rules of competition and may not abuse participation in the competition.*" Art 42 SkComC: „*Abuse of participation in competition is considered (...) unlawful restriction of competition. Unlawful restriction of competition is regulated by special law.*" [i.e. SkAPC].

564 Art. 757 SkComC: *"the provision of Art. 373 et seq. shall apply mutatis mutandis to [non-contractual] liability for damage caused by breach of obligations stipulated by ComC."*

565 Art. 373 SkComC: "*Whoever breaches his/her obligation (…) is obliged to compensate for the damage caused to the other party, unless he proves that the breach of obligation was caused by circumstances excluding liability*".

566 Article 397 SkComC.

567 Article 398 SkComC.

568 Article 408 SkComC.

fees are still the 6%, but the maximum limit rises twice as that in civil proceedings to EUR 50,000.[569]

Until the adoption of the SkADAA, SkComC was the relevant legal basis for claims for damages caused by infringement of the applicable antitrust and merger law. However, only a few judgments relating to antitrust damages actions and none relating to merger damages action are available. As the *Union Insurance Company saga* is comprehensively described by O. Blažo,[570] we can limit, with the reference to his work, just to the conclusion, that the Slovak courts de facto disabled the possibility to use the stand-alone actions by stressing that courts do not have the competence to decide on infringement of antitrust rules (as the competition authority has) and that it is possible to claim damages in competition matters only after the decision of the competition authority."[571,572] In this case, which started in 2013, an interesting point was that courts, when in 2019 (appeal court) 2020 (supreme court) denied their competence for stand-alone action, emphasized the wording of Art. 4(2) SkADAA,[573] despite its temporal scope prohibits its application on the legal relations that occurred before 26 December 2016.

Case *X v S*[574] then provides insight into the barriers that injured parties had to face even when they file the follow-on actions. The X was the customer of S, a fuel supplier in dominant position, which for some period of time refused to conclude purchase contracts with X so the X was forced to purchase supplies from other suppliers (at different conditions). Antimonopoly Office of the SR considered that as abuse of dominant position by discrimination and fined S.[575] X. Consequently, X as the injured party claimed for damages. However, courts[576] concluded that for conduct to be qualified as unfair competition, it must take place within the framework of economic competition that

569 Annex 1of the Act No 71/1992 Coll. on Court Fees and Fee for Extract from Criminal Records.

570 BLAŽO, Ondrej. *Private (Non-)Enforcement of Competition Law in Slovakia*, pp. 46–53.

571 *Ibid*., p. 51.

572 SK: Supreme Court, Judgment of 26 June 2020, No. 3Obdo/108/2019, *Union zdravotná poisťovňa, a.s. v Detská fakultná nemocnica s poliklinikou Banská Bystrica*, ECLI:SK:NSSR:2020:1213230629.2, para. 43-44.

573 *Ibid*, para. 45.

574 SK: Supreme Court, Judgment of 21 October 2008, No. 4Obo/194/2007, *X, s.r.o. v S, a.s. for payment of SKK 464,482.*

575 Decision of the Antimonopoly Office of the Slovak republic of 11 January 2001 No. 2001/DZ/P/2/3.

576 The first instance court was the Regional Court in Bratislava in case No 30Cb/17/01.

presupposes the existence of at least two competing entities. In this case the X was a purchaser of fuels from the S and, therefore, courts did not consider it a competitor neither as a consumer since it did not purchase diesel from the S for personal consumption, and there was an obligational relationship between the X and S, which differed from a competition-law relationship. Therefore, the courts stated that there was no mutual rivalry or competition between the X and the S and specifically no relationship aimed at outpacing competitors and gaining greater economic advantage and property benefit. The X, being a purchaser of fuels from the S, was not in a competitive relationship. The X was never a supplier of fuels, and thus was not in competition with the S, which supplied fuels to various purchasers, including the X. Failure to conclude purchase contracts, according to the courts, cannot be considered unlawful conduct or abuse of participation in economic competition in the regime of SkComC, since the conditions for establishing economic competition between the X and S were not satisfied. The fact that the S was fined by the Antimonopoly Office of the Slovak Republic for abusing its dominant position does not constitute grounds to establish that there was a competitive relationship or economic competition between the X and the S. Moreover, the courts concluded that S was not contractually obliged to supply fuels to X during the period for which X seeks damages and thus did not breach any other contractual obligation. Finally, the courts concluded that the X did not prove any unlawful conduct of the S causally linked to the damage for which compensation is sought in this case.

As there no judgment is available on claim for damages emerging from breach of merger law, we can conclude that Slovak commercial law provides, at least hypothetically, a possibility to claim for damages. However, it must have the character of follow-on action. Status of indirect injured parties remains unclear, however due to the adoption of the SkADAA we can rebuttably presume, that the courts might have changed their legal opinion from 2008 on perception of the concept of direct purchaser as non-competing injured party.[577]

[577] This presumption could not be verified, as there are not available any other decisions which would deal with such legal question.

2.2 Transposition of the DD

2.2.1 SkADAA – the solution?

Adoption of the SkADAA seemed to be the redemption from the legal misery of the injured parties, as it makes, at least at first sight, the private enforcement much easier. Slovakia transposed the DD timely and almost literally.[578] For the purpose of transposition, Slovak legislator decided to adopt a new law instead of amending and complementing the existing one (SkComC to this regard).[579] The process of drafting of the bill was consulted with the public, however the evaluation report from the process of drafting the bill was not published.[580] Then the government draft of bill was submitted to the Parliament by the Prime minister in September 2016. The draft passed three readings and was adopted by the Resolution of the Parliament No 344 of 29 November 2016.[581] The SkADAA was published in Collection of Laws on 22 December 2016 and came into legal effect on 27 December 2016. However, alongside the new legislation, for the purposes of transposition, the SkAPC also needed to be amended to comply with the Articles 17(3), 18(3) and 22(1) of DD.[582]

Considering the scope of the transposition, the SkADAA is a *lex specialis* toward (general) liability for damages provisions stipulated in SkComC, as this act specifically regulates certain legal relations related to the right to compensation for damages caused by a violation of Articles 101 and 102 TFEU

[578] See to this regard the Table of Conformity of the legal regulation with the law of the European Union, submitted during the legislative procedure [available at: https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=430299] (accessed on 8 September 2025).

[579] The Explanatory Memorandum states to this regard, that „the need for separate legal regulation is given by the specific features of the directive's norms, which regulate individual institutes and aspects of the application of compensation for damage caused or suffered as a result of a breach of the competition law provisions of the Member States and the European Union. Therefore, a special regulation of the legal conditions for the application of compensation for damage is proposed, which will ensure the full harmonisation of the Slovak legal order with the rules of the directive (...)". Available at: https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=430298 (accessed on 8 September 2025).

[580] Report on public participation in the drafting of legislation, available at: https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=430306 (accessed on 8 September 2025).

[581] Available at: https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=433705 (accessed on 8 September 2025).

[582] At the time of transposition of DD, SkAPC no 136/2001 Coll. was in force. It was later replaced by the SkAPC No 187/2021 Coll. However, SkADAA still refers to SkAPC 2001.

or national provisions on agreement restricting the competition and abuse of dominant position, and certain rules for the application of this right.[583] The relation between these two acts is confirmed in Article 21 SkADAA, which with exemption for the cases of Art 3(1-3)/Art. 3(1-3) DD (extent of compensation of damages), Art. 5/Art.10 DD (limitation period), Art. 6/Art. 11 DD (joint and several liability), Art. 7(1-2) /Art. 12(2-4) DD (passing-on of overcharge), Art. 8/Art. 13 DD (passing-on defence), Art. 9/Art. 14 DD (indirect purchasers), Art. 20/Art. 19DD (consensual settlements), refers, in relation with the liability for damages, to the use of the SkComC. The ADAA is also a *lex specialis* to the SkCDP,[584] when it comes to Art. 3(4) /Art. 17(1) DD (quantification of harm), Art. 4/ Art. 9 DD (effect of national decisions), Art. 7(3)/Art. 12 DD (passing-on overcharge), Art. 10/Art. 15 DD (actions for damages by claimants from different levels in the supply chain), Arts. 11-14 and 16/Arts. 5-6 DD (disclosure of evidence), Arts.17/Art. Arts. 7-8 DD (penalties) and Art. 19/Art. 18 DD (suspensive and other effects of consensual dispute resolution).As pointed out by O. Blažo, at the time of transposition, the SkADAA, SkComC and SkCDP represented *numerus clausus* measures for damages claims arising from competition law infringements.[585] However, this toolkit was in 2023 complemented by the Act on Representative Actions ("SkARA)[586] which applies *mutatis mutandis* to the collective enforcement of the right of consumers to compensation for damages caused by the infringement of EU and national antitrust law.The principle of effectiveness, which is stipulated in Article 4 DD requires that Member States ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law. In accordance with the principle of equivalence, national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 TFEU shall not be less favourable to the alleged injured parties than those governing similar actions for damages resulting from infringements

583 Article 1 SkADAA.

584 Article 22 SkADAA.

585 BLAŽO, Ondrej. *Slovakia*, p. 250.

586 Act No. 261/2023 Coll. on actions for the protection of collective interests of consumers and on amendments and additions to certain acts.

of national law.[587] Slovakia tried to comply with these principles at least with the creation of specialised commercial courts. The Municipal Court Bratislava III is then the specialised commercial court with a territorial jurisdiction for a whole country in all disputes arising from competition cases.[588,589] Despite the creation of commercial courts and confirmation of exclusivity of one competition court for disputes arising from competition cases was not the result of transposition of the DD, but a wider judicial reform connected mostly with the fulfilment of milestones relevant for Resilience and Recovery Plan,[590] it might also comply with the goals followed by the DD in this regard.[591] However, questions on competence still remain. When stating the exclusive competence in disputes arising from competition cases the SkCDP does not provide explanation on what "dispute arising from competition cases" means. It neither refers to any of competition laws, which could provide the navigation to consideration, whether the exclusive causal competence is given or not. Therefore, it is not clear, whether state aid damages actions, which falls under regulation by the SkCC should be filed to the specialised Municipal Court Bratislava III or rather to the general, i.e. residual courts of defendant.

Such confusion of parties or even courts can be describe for example on the case *SR v STM POWER*[592] where Slovak republic as a claimant (provider of a state aid) filed an state aid damages action based on the breach of the grant contract against the STM POWER as defendant, residing in Dubnica nad Váhom, to the general residual court of defendant, which was the District Court Trenčín. Surprisingly, neither defendant nor the first-instance and later the appeal courts

587 Article 1 SkADAA, Article 1 of the Act on Representative Actions.

588 Article 27 of the SkCDP.

589 Before the reform, such competence had the District Court of Bratislava II. The Municipal Court of Bratislava III took the agenda of previous court. Other commercial courts, however, not competent for competition cases, are Municipal court of Košice, District court of Nitra, District Court of Trnava, District Court of Prešov, District Court of Banská Bystrica, District Court of Trenčín, and District Court of Žilina.

590 So called „Judicial map" was introduced by Act No. 150/2022 Coll.

591 The judges of commercial courts are specialised in commercial relations and these courts concentrate the first- instance agenda in commercial cases for the whole district of regional courts in the territory of their seats.

592 See for example the case SK: District Court in Trenčín, Judgment of 8 January 2021, No. 36Cb/211/2016-925, *SR v STM POWER*, ECLI:SK:OSTN:2021:3116212914.13 and SK: Regional Court in Trenčín, Judgment of 29 June 2022, No. 8Cob/70/2021, ECLI:SK:KSTN:2022:3116212914.2

did not object the court's incompetence. Only two consequences can be derived from this situation: (1) the exclusive competence of Municipal Court Bratislava III to deal with competition disputes does not contain damages actions; or (2) the case was decided unlawfully by the incompetent courts.In this regard, it is interesting to find out, **how the courts perceive the issue of their own competence**. While preparing this chapter, the author requested all first-instances courts in Slovakia to provide various information relating the damages actions arising from infringement of any branch of competition law since 2000. 56% of the contacted courts searched their registers to determine whether they had handled damages actions relating to the breach of competition rules (antitrust, mergers, state aid). However, only 25% of the courts responded that they do not have competence to hear such cases, as exclusive competence lies with the Municipal Court Bratislava III. Paradoxically, the Municipal Court Bratislava III dismissed the request on information and denied to answer on damages actions, reasoning that "*the court does not have the requested information (…) as searches can only be carried out based on the name of the claimant, defendant, or legal representative, or in relation to a specific registry number*."[593] Contrary to this reasoning, actions concerning the protection of rights arising from competition law are registered in a special register "CbHs" (Cb = commercial, Hs = competition).[594] At the very least, basic statistics extracted from the court's electronic register using the "CbHs filter" could undoubtedly be provided. According to the author's opinion, the only competent court for competition law damages actions should be the specialized commercial Municipal Court Bratislava III. Appeal court is then the Regional Court in Bratislava, against whose judgment, an extraordinary appeal to the Supreme Court of the Slovak republic can be Filed (8.3). However, due to the unclear interpretation of Article 27 of the SkCDP, injured parties still file their actions also to the (non-specialised) commercial courts (figure 8.4) or residual courts of defendants (Figure 8.5). Those courts often preserve their competences without even considering the

[593] Decision of the Municipal Court of Bratislava III of 17 July 2025, Denial of Access to Information, 1SprI/91/2025.

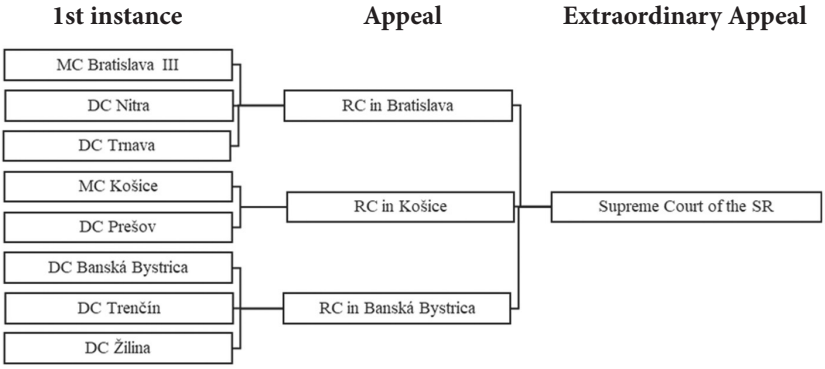
[594] Art.163 + Section II(6) of the Annex I to Decree of the Ministry of Justice of the Slovak republic No 543/2005 Coll. on the Administrative and Office Regulations for District Courts, Regional Court, Special Court and Military Courts.

exclusive power of Municipal Court Bratislava III. Such confusing approach leads to further fragmentation, related to appeal courts as well (figures 3-5).

Figure 8.3: System of procedure according to SkCDP in Slovakia in antitrust damages cases, if the exclusive competence is applied.

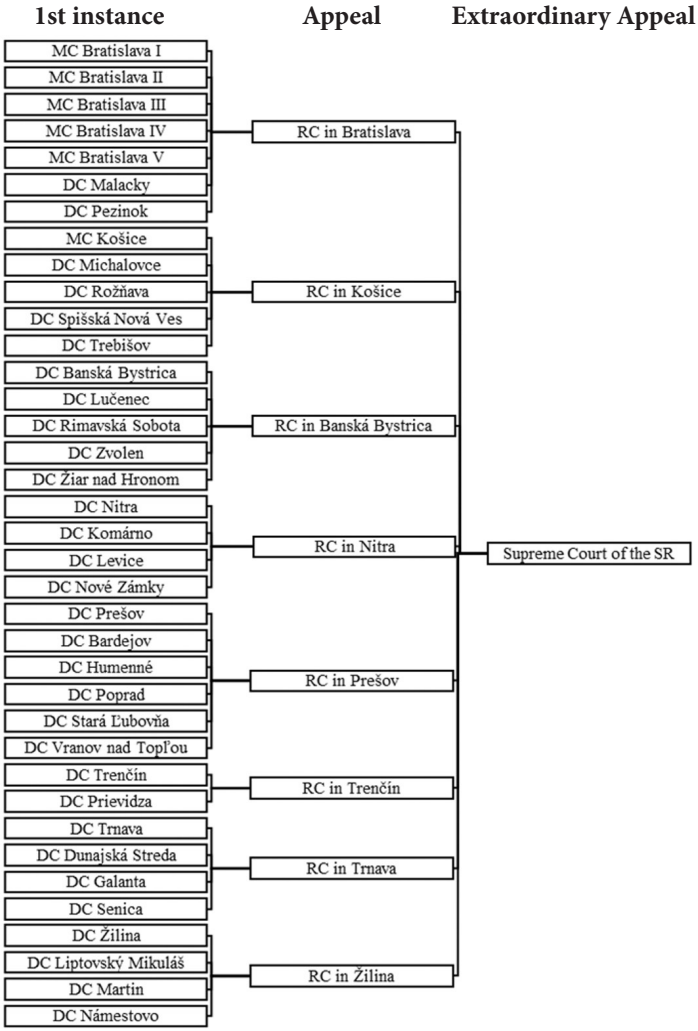
Processed by the author.

Figure 8.4: System of procedure according to SkCDP in Slovakia in competition damages cases (mergers, antitrust) if the competence of the defendant's residual commercial court is applied.



Processed by the author. RC = regional court, MC = municipal court, DC = district court.

Figure 8.5: System of procedure according to SkCDP in Slovakia in competition (state aid) damages cases if the general competence of the defendant's residual court is applied.



Source: processed by author according to Art. 3 of Act 371/2004 Coll.[595]

[595] Act No 371/2004 Coll. on the Seats and Districts of Court of the Slovak Republic and on the Amendment of Act No 99/1963 Coll. Civil Procedure Code, as amended.

Slovak law has established **specialised courts**[596] – the Municipal Court Bratislava IV,[597] the District Court Banská Bystrica,[598] and the Municipal Court Košice[599] also **for class actions**. However, this rule does not apply in cases of procedural community [procesné spoločenstvo] stipulated in Art 75 et seq. of the SkCDP which is "generally permissible in almost all proceedings without limitation on the subject matter of the dispute or the nature and number of parties."[600] In such cases, since they are not regulated by the SkARA, the competent court will be determined either through exclusive competence (Municipal Court Bratislava III) or according to the district of residence of the defendant.

2.3 Substantive law issues

Considering the substantive law issues, as said above, they mirror those of the DD.

Limitation periods

In comparison to the shorter limitation periods stipulated in SkCC and SkComC, the SkADAA provides for a five year limitation period, which starts to run when infringement of competition rules has ended and the injured party learns or can reasonably be expected to learn that the conduct constitutes an infringement of competition law, that he has suffered damage as the result of the infringement and the identity of the infringer. In case that immunity recipient is concerned, the limitation period expires one year after the injured party became aware or could have become aware that compensation damages can only be claimed from the person exempted from fines by the competition authority. The stipulation of a one-year period is the display of procedural autonomy of the state, as the DD required for these cases to ensure that the limitation period is reasonable and sufficient to allow injured parties to bring claims for damages.

596 Article 9 of the Act on Representative Actions.

597 The Municipal Court Bratislava IV has the territorial jurisdiction for the districts of Regional Court in Bratislava, Regional Court in Trnava, and Regional Court in Nitra.

598 The District Court Banská Bystrica has the territorial jurisdiction for the districts of Regional Court in Žilina, and Regional Court in Trenčín.

599 The Municipal Court Košice has the territorial jurisdiction for the districts of Regional Court in Košice, and Regional Court in Prešov.

600 FICOVÁ, Svetlana, Imrich FEKETE and Martin KRIŽAN. *Mechanizmus uplatňovania kolektívnych nárokov v podmienkach Slovenskej republiky*. Praha: Leges, 2018, p. 192. p. 116.1

As this period is shorter than those in SkCC and SkComC, sufficiency in this regard might be questionable.

Hence, the following principles of application of the limitation period can be derived: (1) The limitation period will not begin to run until the infringement of competition law has ceased. (2) The knowledge of the damage must be actual; it is insufficient merely to be aware of the possibility of learning about the damage. For this purpose, the day on which the decision of competition authority becomes final may be regarded as the date the injured party actually learnt about the anticompetitive conduct and its perpetrator.[601] (3) A claim for damages becomes time-barred no earlier than five years from the date on which the conditions (1) and (2) are fulfilled or until after the injured party became aware or could have become aware that only immunity recipient can be sued.

The SkADAA does not provide for an objective limitation period. Therefore, the right of the injured party to claim for damages is not weakened by the duration of the lengthy administrative procedure.

Joint and several liability

Slovakia by mirroring Art. 11 DD to Art. 6 SkADAA ensured that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law; with the effect that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated. However, joint and several liability is not a new concept, as it already has been recognised in both SkCC (Art. 438) and SkComC (Art. 383) as well.

SMEs have a specific regime of liability giving regard to their economic significance and limitation of scope of injured parties just to their own direct and indirect purchasers (Art. 11(2) DD/Art. 6(5) SkADAA). A specific regime from the specific regime related to SMEs is stipulated also in Art. 6(6) SkADAA (Art. 11(4) DD) that derogates the exemption provided to the infringer due to its economic insignificance, which leads to the full application of the right to compensation for harm in full also with an impact on SMEs.

[601] See to this regard case *SR v STM POWER*, para. 1.3.

Another specific regime applies to the immunity recipient within the leniency programme. As explained in Explanatory Memorandum of the SkADAA,[602] "it is appropriate that natural or legal persons who have been granted immunity from fines by the competition authority under a specific leniency programme be protected from disproportionate claims for damages, bearing in mind that the decision of the competition authority finding an infringement may become final with respect to the immunised person earlier than it becomes final for other infringers who have not been granted immunity. As a result, injured parties may prefer to initiate claims against the immunized person. Therefore, it is appropriate that the principle of joint and several liability for the entire damage does not apply to persons granted immunity from fines, and that compensation claims against infringers be limited to the damage caused by those persons to their own direct or indirect customers, or, in the case of a purchasing cartel, to their own direct or indirect suppliers. To the extent that the cartel caused harm to persons other than the customers or suppliers of the infringer, the contribution of the immunized person should not exceed its proportional liability (share in the caused damage) for the damage caused by the cartel. Immunized persons should continue to bear full liability towards other injured persons, other than their direct or indirect customers and suppliers, only if those persons have no possibility to obtain compensation for the damage suffered from other infringers." Challenges connected with transposition of this provision were already described by O. Blažo and author refers to his work in this regard. They include, e.g., confusing wording of the provision of limited liability of immunity recipients, the definition of "SME" or balancing the favourable treatment to SMEs and principle of full recovery of damages.[603]

Quantification of harm

The burden of proof rests on the claimant.[604] However, if the amount of damages caused by the infringement of the competition law can be determined only with disproportionate difficulty or cannot be determined at all, the court shall

602 Explanatory Memorandum to Act No 350/2016 Coll. Available at: https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=430298 (Accessed on 10 September 2025).

603 BLAŽO, Ondrej. *Slovakia*, pp. 254–255.

604 SkCDP, Article 8 of the Basic Principles: the parties to the dispute are obliged to identify the factual allegations important for the decision in the case and support their claims with evidence, in accordance with the principle of effectivity and according to the instructions of the court.)

determine it according to its own estimate.[605] That means that if the claimant proved that he has suffered damage, but based on the available evidence it is practically impossible or excessively difficult to quantify the damage suffered precisely, the court shall do so. Such an estimation is usually based on the evidence provided, expert opinions,[606] or if the decision depends on the assessment of facts requiring scientific knowledge and the complexity of the issues under consideration is such that it is not sufficient to secure a qualified opinion from a qualified person, the court shall order expert evidence and appoint an expert. If the court has appointed several experts, they can produce a joint report.[607]

In this regard, the Antimonopoly Office of the Slovak Republic (hereinafter "SkNCA") may also be of assistance. Upon request by the court, the SkNCA shall provide cooperation or assistance in determining the amount of damage, if the court deems such assistance appropriate.[608] The obligation of the SkNCA to cooperate with the court (such as providing opinions on motions to present evidence from its file on the disclosure of the evidence) in proceedings related to claims for damages under the SkADAA was introduced by transposition of the DD. To date, courts have not ruled on the merits in any proceedings seeking compensation for damages caused by a breach of antitrust rules, so this competence remains to be tested in the future.

Passing-on overcharge

When considering the harm, **passing-on of overcharge** must not be forgotten. The provisions in the SkADAA replicated those of DD. To this regard, O. Blažo criticized that Slovak legislator did not ensure the transposition of appropriate procedural rules to avoid overcompensation.[609] However, the author of this chapter does not consider it as necessary. According to already existing rules contained in SkCDP, the claim, which is exceeding its redressability must be in exceeding extent dismissed by the court. That means that court cannot admit a right which is not recognized in law, or which contravene law. Any further special procedural measure does therefore seem unnecessary and duplicated.

605 Article 3(4) SkADAA / Art. 17(1) DD.

606 Article 264(1) of the SkCDP shall apply to this regard.

607 Article 207 of the SkCDP

608 Article 16(1)s of the SkAPC.

609 BLAŽO, Ondrej. *Slovakia*, p. 256.

Interest

Furthermore, payment of interest also needs to pay the attention. Right to claim payment of interest alongside the claim for damages is not specifically stipulated neither in SkCC nor in SkComC.[610] However, the Supreme Court of Slovak republic (hereinafter only "Supreme Court") in case *D.M. v M*[611] for the purposes of general liability for damages concluded, that the legal relationship resulting from the damages shall be considered as an obligation relationship[612] to which the general provisions apply, including the provisions on the delays.[613] If the infringer, in the position of debtor, fails to provide monetary compensation for damages no later than the last day of its maturity, he is in default and, the injured party, in the position of creditor, has the right to demand from the infringer, in addition to damages compensation, interest on the delay (default interest). Since the SkCC does not stipulate the time of performance for a claim for compensation for damage, it must be assumed that the infringer is obliged to compensate for the damage on the first day after the injured party requested him to perform.[614]

The SkADAA expressly establishes the payment of interest as part of the claim when exercising the right to full compensation by the injured party, and shall apply, unlike the courts established for SkCC and SkComC regime, from the day that damage occurs.

The rate of default interest also depends on the legal basis on which the compensation for damages is claimed. In case of state aid damages actions according to SkCC, the default interest rate is calculated as the basic interest rate of the European Central Bank (hereinafter only "ECB") valid on the first day of delay + 5 percentage points.[615] However, in case of merger damages actions according to SkComC, as well as in case of antitrust damages actions according to SkADAA (which refers to the subsidiary use of SkComC), the default

[610] However, in both cases it is enshrined in the provisions relating to the delay in the payment of a financial debt.

[611] SK: Supreme Court, Decision of 26 May 2010, No. 6Cdo/16/2010, *D.M. v M. on payment of interest*.

[612] According to Article 489 SkCC obligations arise from legal acts, in particular from (...) from damages caused, (...).

[613] Article 517 SkCC.

[614] Article 563 SkCC.

[615] Article 3 of the Regulation of the Government of the Slovak Republic No 87/1995 Coll. implementing certain provisions of the Civil Code.

interest can be calculated in two ways[616]: (i) as the basic interest rate of the ECB valid on the first day of the relevant calendar half-year of delay + 8 percentage points[617]; or (ii) as the basic interest rate of the ECB valid on the first day of delay + 9 percentage points.[618]

2.4 Procedural law issues

Standing

The SkCDP governs the procedure of claiming compensation for damages before the courts unless SkADAA does not specifically stipulate others. The SkADAA introduced the active legitimation to any subject (natural person, legal entity, public authority, consumer) who has suffered damage caused by a breach of antitrust rules. As pointed out by Ficová et al. (2018, p. 34) the right to claim full compensation for damage against the violator of competition law is granted to both direct and indirect purchaser. Slovak legislator omitted to transpose wide definition of the claimant as stipulated in Art. 2(4) DD. Anyway, existing law already provides sufficient possibilities as to act on behalf of injured party (e.g. through the legal representative[619]), as well as succession in the right of the alleged injured party (by contractual cession of right[620] or by legal cession[621]).

616 Article 1 of the Regulation of the Government of the Slovak Republic No 21/2013 Coll. implementing certain provisions of the Commercial Code.

617 The rate of default interest determined in this way shall be applied throuhout this calendar half-year of delay. This half-year rating will be used during the whole time of delay.

618 This flat rate of default interest will apply throughout the entire period of delay.

619 SkCDP, Art. 89: „*A party may be represented in proceedings by a representative of his or her choice. An elected representative may not be represented, unless a special law provides otherwise. If the elected representative is not an attorney, the court shall decide by a resolution delivered to the represented party that representation is not permitted if the representative is clearly not qualified for proper representation or they act as a representative in several proceedings. If a party is represented by an attorney, representation by a representative other than an attorney is excluded.*", Art. 90: „*A party must be represented by an attorney-at law in disputes concerning the protection of economic competition. This does not apply if (a) the party is a natural person who has a second-level university law degree, (b) the party is a legal person and its employee or member acting on its behalf has a second-level university law degree. If a party fails to choose a lawyer within a reasonable period of time set by the court, its actions shall be disregarded; the court shall inform the party thereof.*"

620 Art. 524 et seq. SkCC.

621 Art. 64 of SkCDP.

Finally, if injured parties are consumers, they can be collectively represented by the representative body that is registered as an authorised entity by the Ministry of Economy of the SR.

Aspects such as **disclosure of evidence** and **effect of national decisions** are regulated basically the same as those in DD. A deeper analysis was already provided by O. Blažo.[622]

Consensual dispute resolution in antitrust enforcement

The SkADAA provides the exact transposition of the Articles 18-19 DD.

Class actions

Slovak legal order provides various possibilities in situations if claims are to be filed by more than just one injured party. The status of the claimant (consumer, entrepreneur, legal entity) is the decisive point for application of special procedure relating to representative actions, which are available only for consumers.[623] Other subjects have at their disposal other substantive (e.g. cession) or procedural (joining of claims) legal tools.

Representative actions for consumers are enshrined in the SkARA. The Ministry of Economy maintains the list of authorised entities that are entitled to represent injured consumers before the court. Representative body must have the form of legal person that (a) is established in accordance with the legal order of the Slovak Republic, (b) carries out activities aimed at promoting and protecting the interests of consumers, (c) operates in the non-profit sector, (d) is not subject to bankruptcy proceedings, is not bankrupt, is undergoing restructuring or has not had a bankruptcy petition rejected due to lack of assets, (e) proves that it has been actively involved in the field of consumer protection for 12 months prior to submitting an application for inclusion in the list of authorised entities, (f) is independent and is not influenced by persons who have an economic interest in filing an action for the protection of the collective interests of consumers, other than consumers, (g) has not been removed from the list of authorised persons in the last 12 months, (h) has published, in

622 BLAŽO, Ondrej. *Slovakia*.; BLAŽO, Ondrej. *Private (Non-)Enforcement of Competition Law in Slovakia*.

623 According to Art. 52 SkCC a „consumer" is a natural person, who in connection with consumer contract (i.e. any contract, regardless of its form, concluded between entrepreneur and a consumer), an obligation arising from it or s commercial practice, is not acting within the scope of his business or profession.

particular on its website, information demonstrating that it meets the above-mentioned criteria and information on the sources of its financing, its organisational, management and membership structure, legal purpose and its activities.[624] Slovakia implemented an opt-in model in which consumers must fill applications for an intention to file an action to take part in collective redress. Consumers can apply only at any notary office from the time of announcement of the intention to file the damages action by the qualified entity in Business Journal (at least two months before the motion) until the end of period when the court of first instance closes proving of evidence. The consumer shall pay the registration fee of amount EUR 20, which was established by the Decree of the Ministry of Justice of the Slovak Republic No 289/2023 implementing certain provisions of the Act No 261/2023. The SkARA recognises as victim only a consumer who has suffered damage caused by a breach of consumer protection legislation, that, however, includes also the infringement of competition rules. The funding of claims by litigation funders is allowed in Slovakia. The costs of the proceedings for the issuance of a remedial measure may be borne by a third party, however entitled person may not be influenced in this regard by a third party in a way that would harm the collective interests of consumers affected by the action, and the action may not be brought against a defendant who is a competitor of the third party or against a defendant on whom the third party is dependent. [625]Representative actions for entrepreneurs are not available in Slovakia. Though, for collective redress, they still have **collective actions** at their disposal. Specifically, everyone (consumers, entrepreneurs, legal entities) has at his/her/its disposal general rules on procedural community stipulated in SkCDP, Article 75: "Several entities may appear on the plaintiff or defendant side. If more than ten entities appear on one side, the court may decide that only one entity will act for the community. Others will be instructed that they will not be served with further decisions and summonses to the hearing, except for the motion to initiate proceedings and amend the claim, if they do not notify within 15 days of delivery of the resolution that they do not agree with such a procedure."

In addition, the court itself can join more separate claims into one joint proceeding. The **joining of claims of several victims** is regulated through

[624] Art. 6 of SkARA.

[625] Article 18(2) of SkARA.

Article 166 of SkCDP. Under this provision, while respecting the principle of effectivity, the court shall join into one joint proceeding such proceedings which have been initiated before it and are factually related or concern the same parties. If such proceedings have been assigned to several judges in the same court, the judge before whom the proceedings were initiated earlier shall decide on the joining of the proceedings.

Finally, the **bundling of several claims** can be provided through the cession. The full transfer of the claim is substantively regulated in Art. 524 SkCC. Under this provision, the creditor may assign his claim to another person by written agreement, even without the debtor's consent. The assigned claim also includes its accessories and all rights associated with it.

Such a toolkit, therefore, provides a sufficient platform of solutions in case that multiple victims decide to claim for damages collectively.

2.5 Post-DD adjustments

The SkADAA was supplemented in 2023 by an adoption of the SkARA. The original general provision of Art 1 SkADAA ("This act regulates certain legal relations related to the right to compensation for damage caused by a violation of competition law and certain rules for the application of this right.") was supplemented that the exercise of right of consumers to compensation for such damages shall be regulated by the provisions of SkARA.[626] Slovakia went beyond the requirements of DD in this regard. As there are no publicly known cases according to this Act, its effectivity in practice needs to be tested in the future.

3. Types of private enforcement measures

In the Slovak legal order, there are several types of private enforcement measures. The main types include civil actions for damages, class actions, interim measures, restitution, or actions for the protection of reputation and good name.

[626] Title VII of the SkARA.

Despite the SkCDP[627] in principle allows the use of stand-alone actions, the Supreme Court, by its decisions case *Union Insurance Company628* held that there is no power, when adjudicating a damage action for breach of competition law, to decide as a prejudicial question the existence if the infringement if such a decision lies within the exclusive competence of an administrative authority. The reasoning therefore strictly confines private antitrust enforcement to the **follow-on** model. Individual claims are complemented by **class actions**. To succeed in these types of claims, the claimant must prove, firstly, a final decision on infringement of the competition law. The final decision must be issued by the SkNCA or by the final decision of the court reviewing the decision of the SkNCA.[629] Such final decision issued in another Member State is deemed to be prima-facie evidence of an infringement of competition rules, unless the contrary is proven in damages proceedings. Secondly, the claimant must prove the damage. Since the adoption of the SkADAA, unless the infringer (defendant) proves otherwise in the proceedings, it is presumed that the cartel always causes harm. Quantification of harm can be challenging, as discussed above. Nevertheless, without harm, no procedural success will be achieved. Third, the injured party must not be complicit in the damage (a general preventive obligation under Art. 415 SkCC is always taken into consideration).

To ensure the future execution of the damage decision, in cases where there is a risk that infringer may attempt to evade liability through various business operations (e.g., close the business and operating a new one, removing property from the company, assuming artificial obligations), the claimant has at their disposal the remedy of an interim measure. It is a special motion regulated in Art. 325 et seq. of SkCDP, by which the claimant may, before the court issues a substantive decision, request the court to order the defendant to deposit a sum of money for safekeeping, to prohibit the disposal of certain items or rights, or require, refrain from performing, or to tolerate certain actions. The aim of this measure is to prevent imminent harm, secure evidence, or maintain

627 Article 194(1) of SkCDP: "A question that is within the jurisdiction of a public authority other than the authority under Article 193 may be considered by the court itself, but it may not decide on it.

628 SK: Supreme Court, Judgment of 26 June 2020, No. 3Obdo/108/2019, *Union zdravotná poisťovňa, a.s. v Detská fakultná nemocnica s poliklinikou Banská Bystrica*, ECLI:SK:NSSR:2020:1213230629.2.

629 Article 4(1) SkADAA.

the status quo during litigation. However, the Slovak courts have a rather restricted approach to this measure. An essential condition is the requirement to describe the decisive facts justifying the need for urgent adjustment of circumstances, as well as to credibly demonstrate the validity and duration of the claim for which protection is sought. Hovewer, in competition cases, where the claimant often lacks sufficient information, meeting this requirement may be complicated.

These measures need to be exercised before courts, which causal and territorial competence is discussed above. However, in addition to the remedies under SkADAA, other remedies enshrined in general codes (SkCC or SkComC) can be exercised before the court with general jurisdiction (figure 5).

Restitution is the remedy that requires the defendant to return property, assets, or restore a situation prior to unlawful conduct. Courts may order the revearsal of contract or conditions imposed under illegal agreements and if the competition infringement led to particular property or assets being transferred, the court can order their return to the original order. The claimant bears the full burden of proof as this type of remedy is not enshrined in the SkADAA, but just in general SkCC (Art. 442 (3). Up to this date, such actions have not been publicly reported.

Actions for the protection of a good reputation (Art. 19b(3) SkCC) are relevant in scenarios involving allegations of cartelization, abuse of dominance, unfair commercial practices, state aid or strategic defamation among market players. The injured party does not need to prove intent as strict liability applies in these cases. The court will then balance the right to the reputation with the right to free expression. In case *CHEMES,*[630] the Supreme Courtreaffirmed that the protection of reputation covers any unauthorized interference, including those that only threaten, and not just directly violate, the good name. The defendant bears the burden of proof that is, the defendant must prove the truthfulness of assertions and claimant does not need to prove their falsity. The court also held that when a private entrepreneur seeks public funding, it enters the public sphere and public interest. Consequently, the public has the right to discuss and investigate how these funds will be used, in what amount and under what conditions, as well as to learn about any risks and whether the funds are

[630] SK: Supreme Court, Decision of 30 January 2019, No. 1Cdo/144/2018, *CHEMES, a. s. v B.V.O. on protection of good reputation of legal entity*, ECLI:SK:NSSR:2019:8310211009.2, paras. 34, 29.

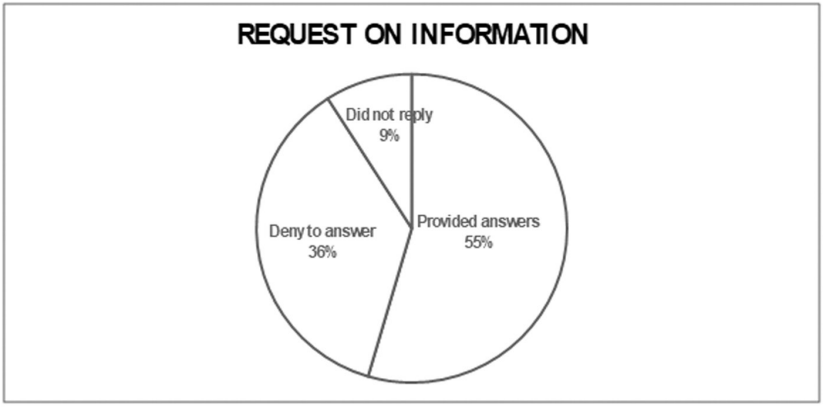
entrusted to a reliable and responsible entity. Therefore, an applicant for public funds must tolerate a reasonable level of criticism, difficult questions, and various assessments from experts, politicians, and the general public. A legal entity has a good reputation from the moment it is established. The good reputation of a legal entity must be assessed in each specific case based on its conduct in the business relationship. If a legal person fails to fulfil his obligations in a timely and proper way, it cannot be considered to enjoy a good reputation. Therefore, the mere publication of false information that affects the reputation of a legal person generally constitutes an infringement of its good name. However, not every disclosure of false information automatically results in such an infringement. An infringement occurs only if the falsehood exceeds a certain permissible intensity to a degree that is no longer tolerable in a democratic society. As the vagueness of these principles requires a case-by-case approach, it can lower the motivation of injured parties to use this type of remedy.

The complicated litigation procedure presents the other barrier to the use of other remedies. As the SkADAA strictly limits the damages only to actual loss, lost profit, and interest, exercising these other, general rights requires other litigation under different legal regime and before the different court than the claim for damages was proceeded. It also means doubling the litigation costs. These remedies, therefore, present rather theoretical possibilities than effective solutions.

4. Private enforcement cases

The author contacted all 32 first-instanced courts, which may have competence to decide on private enforcement cases with a request for information on how many actions for damages arising from cartels, abuse of dominant position, mergers and state aid under SkComC and SkADAA (individual/collective actions, stand-alone/follow-on actions) they handled since 2001. 29 courts delivered their responses, of which 17 replied that they did not decide on such cases. Just one court replied that there is a case from 2018, however, currently suspended. Three courts did not respond at all. The rest of the courts (including the Municipal Court of Bratislava III) dismissed the request and denied to provide an answer arguing that they cannot find this information (Figure 8.6).

Figure 8.6: Visualisation of courts' reaction



Source: Processed by author.

The author therefore realised a desk-research based on a manual search of both public and private databases containing the judgments of Slovak courts, using philtres such as "claim for damages", "competition law", "TFEU", "Act No 350/2016", etc. Publications related to private enforcement of competition law in Slovakia[631] were used, as well.

Using this method, eight judgments can be found, or at least information on these judgments.

4.1 State Aid

***Mesto* Trnava v City-Arena and City Arena PLUS632**

The case concerns a dispute between the City of Trnava as claimant and two companies, City-Arena a.s. and City-Arena PLUS a.s. as defendants, regarding the determination of ownership rights to certain real estate properties in the Trnava district and allegations related to the provision of unlawful state aid.

631 BLAŽO, Ondrej. *Slovakia*.; BLAŽO, Ondrej. *Private (Non-)Enforcement of Competition Law in Slovakia*.

632 SK: District Court in Trnava, Judgment of 14 September 2019, No. 39C/30/2017, *Mesto Trnava v 1) City-Arena, a.s. a 2) City-Arena PLUS, a.s. o určenie vlastníckeho práva*, ECLI:SK:OSTT:2018:2117221806.4.

The claimant transferred to the defendant real estate properties at a significantly lower price than the market value (EUR 1). The purpose of the sale was to enable the investment to the new football stadium. Later, the claimant argue that this transfer constitutes unlawful state aid under Art. 107(1) TFEU due to the undervaluation of properties and lack of notification to the Commission. By its action, the claimant sought the declaration of ownership of the transferred properties. The claimant was unsuccessful, as the court found that the alleged breach of state aid rules did not automatically invalidate the purchase contract or result in immediate ownership reversal: "There is no provision in the Slovak Civil Code or any other regulation according to which any State aid granted without prior notification and/or authorisation by the Commission would be invalid ab initio. Even if such a provision existed, it would not affect the obligation to recover. The above also shows the clear preference of the Court of Justice of the EU for "recovery" over "nullity" even in Member States in which State aid measures are considered invalid. "Nullity" could therefore be an obstacle to "recovery". Moreover, the legal consequences of the invalidity of a measure of possible unlawful State aid cannot be inferred by analogy from the legal provisions of other Member States if our legal system does not recognise such a consequence."[633]

An interesting point is that the district court interpreted also provision 108(3) TFEU: "The Court states that this provision is directly effective against the State (the Member State shall not). It does not prohibit the receipt of aid. The provision of Article 108(3) TFEU prohibits the Member State from implementing the proposed measure, in accordance with the case-law of the CJEU, it grants the national court the **power to implement measures to protect individuals before the measure is granted, but does not provide for the sanction of invalidity of the measure in the event that it has already been implemented** (ex post)."[634] The court also stated that damages claims based on unlawful state aid require a clear determination of illegality by the Commission before court may grant relief (this condition was not met in this case). The claimant did not appeal the judgment.

633 *Ibid*, para. 104.

634 *Ibid*, para. 96.

S v Slovak Republic[635]

The factual basis of the case is already described in part 2.1 of this chapter. The case centred on whether the SR breached legal obligations under applicable state aid law with the key question whether unlawful revocation of authorization constitute a breach causing damage compensable under civil law (Art. 420 SkCC)? The Supreme Court in its judgment stressed the principle of legal certainty and stability of legitimaly and *bona fide* acquired rights once a binding administrative decision approving the grant exists (decision of the evaluation committee). Despite the state aid law does not establish an automatic entitlement to aid, right arise if the administrative acts create enforceable claims, as was in this case. The ministry's revocation of authorisation violated its own regulation in the form of the "Scheme of the State Aid" and thus breached its legal obligations. The court acknowledged the causal link between breach of the Ministry and claimed damages determined as loss on entitled costs within the project budget.

The case proved that civil courts may assess liability and damages flowing from breach of state aid-related administrative obligations.

SR v STM POWER[636]

The case was discussed also in part 2.2 of this chapter. The claimant, the Slovak Ministry of Economy (represented by the Slovak Innovation and Energy Agency), claimed damages amounting to € 5,998,810.98 against STM POWER a.s. (the defendant) as repayment of a non-repayable financial contribution (NrFC). The NrFC was granted as part of the Operational Program Competitiveness and Economic Growth for a project titled "Line for the Production of Equipment for the Production of Energy from Renewable Sources." A government audit found violations of the SkAPC related to distorted competition in a procurement tender carried out for the project. As a result, the financial contribution paid to the defendant was deemed irregular, and the claimant sought its recovery as well as damages for breach of contractual obligations related to ensuring lawful competition in public procurement. The defendant contested the claim, arguing

635 SK: Supreme Court, Judgement of 25 June 2013, No. 4MCdo/2/2013, *S v Slovenská republika o zaplatenie EUR 4,9799,087.83*4.

636 SK: Regional Court in Trenčín, Judgment of 29 June 2022, No. 8Cob/70/2021, *Slovenská republika – Ministerstvo hosporárstva Slovenskej republiky v STM POWER a.s. o zaplatenie EUR 5,998,810,98 s* príslušenstvom, ECLI:SK:KSTN:2022:3116212914.2

the wrongful application of the laws and disputing the existence of damages and liability. The court confirmed the liability for damages caused by the breach of competition law through the failure to conduct competitive procurement.

The court applied the SkComC to this relationship instead of SkCC with arguing that the liability arising from contractual relationship is concerned. This case proves that damages and recovery claims related to competition breaches can include government or public funding contexts, with courts applying strict standards to uphold competition principles. The court upheld claims for the repayment of funds and damages for breach of competition law by cartel conduct in procurement, applying principles of commercial law to hold the defendant liable for the resultant financial harm.

4.2 Antitrust

DAMIJO KOMPLET v Východoslovenská vodárenská spoločnosť[637]

The claimant, DAMIJO KOMPLET, s.r.o., sought damages of EUR 240,855.64 against the defendant, Východoslovenská vodárenská spoločnosť, a.s. for the unlawful interruption of raw water supply. The plaintiff intended to manufacture bottled table water using raw water supplied by the defendant, treated with microbiological UV radiation rather than chlorination, per relevant health regulations. Despite initial deliveries of raw water in 2000, the defendant interrupted supply later that year without prior warning or contractual basis. The interruption lasted until February 2004, following decisions by the SkNCA that found the defendant had abused its dominant market position by unlawfully restricting water supply. The plaintiff claimed lost profits from production disruptions and costs incurred preparing for manufacturing bottled water. The court examined liability for breach of contract and competition law violations, specifically abuse of dominant position under Slovak trade law (Art. 41-43 SkComC). The defendant's interruption of raw water supply without legal justification was considered by the SkNCA as unlawful and as an abuse of dominant position. The SkNCA's decision confirming prohibited conduct was binding on the court. However, the claimant bore the burden of proving the

[637] SK: District Court in Svidník, Judgment of 17 March 2017, No. 1Cb/230/2004, *DAMIJO KOMPLET, spol. s r.o. v Východoslovenská vodárenská spoločnosť, a.s.*, ECLI:SK:OSSK:2017:8604114180.27.

causal link between the defendant's unlawful conduct and the claimed damages (lost profits). Although the court acknowledged the defendant's unlawful behaviour, the plaintiff failed to fully prove the extent of damages and causation. Moreover, the court held that the claimant himself violated the preventive duty (Art. 415 SkCC) when did not take any measures to prevent the occurrence of damage or mitigate it. As the court explained, if in this situation the claimant nevertheless exercised his right to compensation for damage against the defendant, he must have been aware that the liable party is not obliged to compensate for damage that arose because the injured party failed to comply with this duty (in this case the relevant point was that despite denial of supplies and awareness of this fact, the claimant concluded new contract and was aware of impossibility of their fulfilment).

The decision confirms that even before the SkADAA, abuse of dominant position leading to unlawful refusal to supply can be basis for damages claims, but claimants must meet high standards of evidence for causation and loss in competition law context. The claimant did not appeal the judgement of the court of first instance. The litigation lasted 13 years and the competence of the court was determined according to the seat of defendant.

X v S (2008)638

The claimant (X., s.r.o.) filed a damages claim against the defendant (S., a.s.) alleging unlawful discrimination and abuse of dominant position in the supply of motor fuels. The claimant argued that between 1996 and 1999, the defendant refused to enter into purchase contracts for fuel deliveries with the claimant, while contracting with other buyers, thereby discriminating against the claimant. This conduct allegedly forced the claimant to purchase fuel from alternative suppliers at higher prices, resulting in financial damage. The SkNCAissued a decision that that the defendant abused its dominant position and imposed a fine. However, the court established that the claimant was not a competitor of the defendant according to Art. 44 SkComC but merely a contractual counterpart (buyer), thus not engaged in a competitive relationship on the relevant market. The Supreme Court emphasised that failure to conclude purchase contracts cannot be considered an unlawful act if the conditions for competition are not met.

638 SK: Supreme Court, Judgment of 21 October 2008, No. 4Obo/194/2007, *X.,s.r.o. v S., a.s. o zaplatenie SKK 464 482*.

Since the claimant failed to establish the competitive relationship, the claim for damages was denied.

The case illustrates the strict interpretation that Slovak courts applied to the competition law concept of a claimant's legal standing in damages claims in pre-DD period.

X v S (2009)639

The claimant (X. s.r.o.) sought damages for alleged unlawful discrimination by the defendant (S., a.s.) in the supply of motor fuels. The claimant alleged that from July to October 1998, the defendant abused its dominant position by refusing to supply motor diesel fuel in railway tanks to the claimant while supplying other selected buyers under more favourable terms. This forced the claimant to purchase fuel from alternative sources at higher prices, which caused economic damage. In this regard, the SkNCA found the defendant responsible for abusing its dominant market position and imposed a fine. The court dismissed the claim by reasoning that competition law damages claims require a demonstrable competitive relationship between the claimant and the defendant.

The Supreme Court, therefore, reaffirmed its strict interpretation of liability and limitation of damages claims based on breach of competition law in Slovak private law when there is no market rivalry.

***Union zdravotná poisťovňa v Detská* fakultná nemocnica s poliklinikou Banská Bystrica640**

The claimant, Union, a health insurance company, filed a claim against the defendant, Detská fakultná nemocnica s poliklinikou Banská Bystrica, for damages that allegedly arose from the defendant's conduct related to a contract on the provision of healthcare services. In 2013, the defendant had issued a notice of termination of the contract, which was later supplemented by a contract amendment adjusting healthcare service pricing to the detriment of the claimant. The claimant alleged that the amendment was signed under duress connected with alleged anticompetitive conduct by the defendant. The courts

639 SK: Supreme Court, Judgment of 14 January 2009, No. 2Obo/58/2008, *X.,s.r.o. v S., a.s. o zaplatenie SKK 830 653*.

640 SK: Supreme Court, Judgment of 26 June 2020, No. 3Obdo/108/2019, *Union zdravotná poisťovňa, a.s. v Detská fakultná nemocnica s poliklinikou Banská Bystrica*, ECLI:SK:NSSR:2020:1213230629.2.

examined whether this conduct constituted a breach of competition rules and led to compensable damage.

As mentioned in part 2.1 of this chapter, the case clarifies the limits of civil courts in adjudicating damages claims grounded in competition law breaches, emphasizing the exclusive role of the SkNCA in establishing violations. The consequence of this judgment is the exclusion of standalone actions on damages claim as the civil courts, according to this judgement, cannot independently evaluate or decide on whether competition law was violated as part of the damages claim.

***A.*-C. v G-I. I. C.641**

The claimant, an organization for collective management of copyright (A., B. C.), sued the defendant (a hotel operator) for damages related to unauthorized public transmission of protected works. The claimant holds authorization from the Slovak Ministry of Culture to manage copyrights and represents authors and rights holders in connection with literary, dramatical, audiovisual, and other artistic works. The defendant operated a hotel with 71 audiovisual devices enabling public transmission of protected works to hotel guests without a collective license agreement with the claimant. The claimant sought compensation as unjust enrichment corresponding to twice the usual fee for use of such works, based on its licensing tariff. The defendant contested the claim, raising issues of the claimant's active legitimation, the scope of transmission, and alleging abuse of the dominant position by the claimant through high fees. This was later confirmed by the SkNCA who decided that the claimant abused its dominant position by charging the excessive prices for the provision of licencing services and imposed the claimant a fine. A defendant who was sued due to the infringement of copyright rights managed by the claimant was at the same time a victim of anticompetitive behaviour of the claimant, who by the way how it managed the copyright infringed the prohibition of abuse of dominant position. However, the court focused on copyright infringement rather than the merits of competition law claims and therefore dismissed the defendant's arguments as outside the scope of this proceeding. The court held that in complex disputes with overlapping intellectual property and competition law

641 SK: Regional Court in Trenčín, Judgment of 31 January 2024, No. 19Co/154/2019, *A., B., C., D., E., F. v G. H. I. I.C. o zaplatenie EUR 4,189 s príslušenstvom*, ECLI:SK:KSTN:2024:3116204463.3.

issues, enforcement and damage claims may require distinct legal processes and judicial competence.

5. Evaluation of the environment for the private enforcement of competition law

Implementation of the SkADAA brought harmonised rules, including presumptions of damage, disclosure obligations and joint liability, which legally empower the injured parties. Another catalysing element can be seen in the creation of a specialised court with an exclusive competence to handle competition law disputes as well as the adoption of a legal framework for collective redress. A legal certainty grew up by clear establishing of the extent of damages (actual loss, lost profit and interest) and the standing of claimant improved by extension to everyone, who suffered harm due to the anticompetitive behaviour of the infringer.

However, the limited case law before the adoption of the SkADAA and none of the case law after the adoption of the SkADAA signalise that barriers for private enforcement of competition law are still present. They limit both the quality and the intensity of the enforcement. The legal environment is characterised by fragmented legal framework, procedural hurdles, and institutional shortcoming that all together inhibit effective claims for damages arising from competition law infringements.

The diversity of three different parallelly applicable regimes complicates the choice of suitable law and procedural rules, having serious impacts on the enforceability of the claimant rights (Figure 8.7).

Figure 8.7: Comparison of regimes of the SkCC, SkComC and the SkADAA

	SkCC	**SkComC**	**SkADAA**
Limitation periods			
Subjective	2y	4y	5y /1y
Objective	3y	10y	-

	SkCC	SkComC	SkADAA
Competent Court	the residual court of defendant	MC BA III / the residual commercial court of defendant	MC BA III
Information asymmetry	Problem of the claimant	Problem of the claimant	Disclosure granted[642]
Quantification of harm	claimant	claimant	Claimant / Court
Presumption of harm	Not applicable	Not applicable	applicable
Liability	Subjective liability (fault must be proved)	Strict liability	Strict liability
Joint and several liability	possible	possible	possible
Court fees	6%, max. EUR 25,000	6%, max EUR 50,000	6%, max EUR 50,000
Default interest legal basis	Acknowledged by the courts	Acknowledged by the courts	Stipulated by law
Default interest rate	ECB+5% from the day of request	ECB+8% /ECB+ 9% from the day of request	ECB+8% /ECB+ 9% from the day of damage

Source: Processed by the author.

The difficulties start already in the phase of choosing the correct court **where to claim**. Despite a specialised commercial court with exclusive jurisdiction for disputes arising from competition cases, uncertainty about court competence

642 With the limits set in 11-17ADAA / 5-7 DD.

and jurisdiction adds procedural complexity and may lead injured parties to file claims in inappropriate courts, risking delays.

Questions remain also in the second phase connected with **what to claim** and under **what legal regime**. Moreover, to succeed in an action for damages, injured parties must wait for the decision of the SkNCA on infringements of Articles 101 or 102 TFEU before initiating civil proceedings. As the courts disabled the use of stand-alone actions, injured parties must often wait years until they have the final decision of the SkNCA on infringement of competition rules (often followed by subsequent two-instance judicial review) at their disposal. By the time a final decision is rendered, victims may no longer have a substantive interest in pursuing damages claims. Furthermore, natural attrition such as personnel changes (resulting in loss of key witnesses), the inherent difficulties of obtaining disclosure of information critical for damages quantification, the stringent standard of proof required (including lack of available experts and high costs associated with expert reports, the burden to prove causation and in the claims under SkCC, also fault), and the generally high costs of bringing a damages action, in particular, a court fee set at 6% of the claimed amount, plus legal representation costs, represent substantial obstacles. Additional disincentives include the potential for ongoing commercial relationships with the defendant, low expectations of recovering full compensation (stemming from inadequate judicial expertise), and the generally low level of public trust in the judicial system. M. Nosa also pointed to the natural apathy of consumers along with the high costs of the procedure compared to the suffered harm.[643] Taken together, these factors constitute significant barriers that serve to discourage victims from lodging private damages actions.

6. Suggestions for further development

The application practice proved, that despite the literal transposition of the DD, barriers to private enforcement of competition law are still present. To

[643] NOSA, Michaela. Kolektívna žaloba o náhradu škody spôsobenej porušením pravidiel o ochrane hospodárskej súťaže (alebo aplikácia právnej úpravy kolektívnej žaloby zo Spojeného kráľovstva Veľkej Británie a Írska: „to much ado about opt-out...“). In: IVANČO, Marek, ed. *Mechanizmus uplatňovania kolektívnych nárokov v podmienkach SR: Zborník príspevkov z medzinárodnej vedeckej konferencie*. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2018, p. 94.

improve the environment and address the inhibiting factors determined in previous subchapter, few improvements can be suggested:

1. **One applicable legal regime**. The coexistence of three parallel legal regimes (SkCC, SkComC, SkADAA) creates complexity and legal uncertainty. Harmonising them into one legal framework would reduce confusion about substantive rights, limitation periods, and ease procedural choices.
2. **One competent court**. Clarifying the exclusive competence of the Municipal court of Bratislava III according to Art. 27 of the SkCDP for all competition-related damages, including state aid and merger cases would enhance predictability and consistency. The current unclear court competence leads to fragmentation and procedural inefficiencies.
3. **One limitation period**. The fragmented limitation periods and the presence of objective limitation periods according to SkCC and SkComC, combined with lengthy administrative investigations, create obstacles to effective enforcement. Unifying of limitation periods for the damages arising from the breach of competition law improves the chances of injured parties to succeed with their claims for compensation.
4. **Extension of the collective redress mechanism beyond consumers**. Entrepreneurs currently rely just on tools like joinders and assignments. Introducing more robust collective redress options for other groups such as SMEs, would encourage joint enforcement and spread costs.
5. **Professionalisation**. Specialized training programmes for judges on competition law and economic evidence could improve the judicial handling of complex economic and legal issues, improve claimants' confidence and improve case outcomes.
6. **Public awareness**. Better dissemination of case law, statistics on private enforcement and public awareness about enforcement rights may work as the catalysing element and encourage injured parties to claim damages.

7. Conclusions

The Slovak legal framework for private enforcement of competition law has undergone significant development due to the transposition of the DD. This legislation introduced important substantive and procedural innovations.

However, despite these improvements, the overall environment remains fragmented and complex, due to the coexistence of three legal regimes (SkCC, SkComC, SkADAA), each imposing different standards, limitation periods and procedural rules. This fragmentation, complemented with persistent confusion on court competence, often leads to legal uncertainty and judicial inefficiencies, which can deter injured parties from pursuing the claims for damages. The strict judicial stance limiting stand-alone actions and requiring the prerequisite of a final decision of the SkNCA contributes to lengthy delays and undermines the practical effectiveness of private enforcement. Additional barriers include burdensome evidentiary regime, a costly litigation process and a general lack of judicial experience in complex competition matters.

Therefore, further reforms seem to be necessary to nurture a truly effective private enforcement of competition damages and to achieve the goals pursued by the EU in DD that are to empower victims of anticompetitive conduct and thus strengthen the enforcement of competition law in a manner that supports fair and competitive markets for the benefit of the economy and society at large.

This conclusion at the same time provides the answer to the research question whether Slovakia complies with its obligation to provide sufficient remedies in the field of competition law. Slovakia indeed has the legal framework regulating the enforcement of competition damages, but as the analysis proved, just the ornamental one.

B. PUBLIC PROCUREMENT

CHAPTER 9

Private enforcement of public procurement law in Czechia – has anybody seen it yet?

by

Michal Petr*

1. Introduction

Private enforcement of competition law is not frequent in the Czech Republic. Nonetheless, it is based on dedicated provisions of law, there is a decent discussion of it in academic literature and some cases are reported in the media. Conversely, none of this is present with regard to private enforcement of public procurement law. There is no specific legal basis for it (with the exception of special provisions on nullity of contracts). There is practically no academic discussion on it (with the exception of a couple of articles concerning nullity). And no cases have been discussed in the public.

This Chapter will therefore be based mostly on legal theory and on the analysis of general legislation. This being said, a few cases where the private claims were based on the breach of public procurement law have already reached the Supreme Court of the Czech Republic; we will give special attention to these.

In this chapter, we will briefly outline the Czech legislative framework (Section 2) and discuss in more detail the types of available private enforcement measures (Section 3). General case-law on private enforcement will not be mentioned here, because it fully corresponds with that described in the Chapter on competition law. Instead, we will introduce the few cases of private enforcement of public procurement law that have actually reached the Supreme Court (Chapter 5). We will then briefly evaluate the legal environment for private enforcement (Section 6) and suggest its potential enhancement (Section 7).

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2. Legislative framework

All the public procurement directives are transposed into the Public Procurement Act (hereinafter referred to a "CzPPA").[645] The one currently in force was adopted in 2016. The CzPPA does not contain any provisions concerning its private enforcement. The only exception is a special regulation of nullity of contracts based on a breach of procurement rules, implementing the RemD (See below in Section 3.2). The public authority reviewing the legality of public procurement in the Czech Republic is the Office for the Protection of Competition (hereinafter referred to as "CzNCA").

No specific provisions on public enforcement of public procurement law are contained in the general civil law either. All the claims therefore need to be based on the general provisions of the Civil Code (hereinafter referred to as "CzCC")[646] and enforced according to the Civil Procedure Code (hereinafter referred to as "CzCPC").[647]

3. Types of private enforcement measures

As has already been mentioned above, there are no special rules on private enforcement of public procurement law in the Czech Republic (with the exception of nullity of contracts). General rules of civil law therefore apply.

In principle, in case of an unlawful conduct, the following private claims may be raised:

i. for the nullity of a contract or other juridical action;
ii. for damages;
iii. for recoupment of unjustified enrichment;
iv. for an injunction (cease-and-desist order) or restitution;
v. for adequate satisfaction.

645 Act No. 134/2016 Coll., on Public Procurement, as amended.
646 Act No. 89/2012 Coll., Civil Code, as amended.
647 Act No. 99/1963 Coll., Civil Procedure Code, as amended.

In addition, it is also in principle possible to base the claim on a breach of unfair competition rules. If, in business relations, a person gets into conflict with good morals of competition as a result of his conduct capable of causing harm to other competitors or customers, such a person has competed unfairly.[648] It is a settled case law that actions contrary to law constitute unfair competition, including the breach public procurement legislation (see below in Section 3.1). Unfair competition is prohibited, and there is a list of claims that a person harmed by unfair competition may raise.[649] These correspond with the "general" claims above. The difference is only procedural – different courts are competent to decide on unfair competition claims. In the rest of this chapter, we will separately discuss the different private claims that may be made in case of breach of public procurement legislation.

3.1 Unfair competition

According to the CzCC, where, in business relations, a person gets into conflict with good morals of competition as a result of his conduct capable of causing harm to other competitors or customers, such a person has competed unfairly. Unfair competition is prohibited.[650] It is undisputed that conduct against the law is always against good morals of competition as well; conduct in breach of CzPPA is used as an example.[651]

The rules on unfair competition may thus serve as a legal tool to privately enforce public procurement rules. These rules include the list of private-law claims: a person whose right has been jeopardised or violated by unfair competition may request the violator to refrain from competing unfairly or to remove a defective state. He may also request adequate satisfaction, compensation for damage and restitution of unjustified enrichment.[652]

In practice, these provisions are used in private enforcement of public procurement only rarely, in connection to claims for adequate satisfaction (see

[648] Sec. 2976 (1) CzCC.

[649] Sec. 2988 CzCC.

[650] Sec. 2976 CzCC.

[651] E.g. ONDREJOVÁ, Dana. *Nekalá soutěž v novém občanském zákoníku. Komentář* Praha: C. H. Beck, 2014, p. 57.

[652] Sec. 2988 CzCC.

below in Section 3.6). Regional Courts have jurisdiction to hear unfair competition cases in first instance.[653]

3.2 Nullity

According to general provisions of the CzCC, a contract (or any other juridical action) is invalid if it is contrary to a statute, if so required by the sense and purpose of that statute.[654] According to CzPPA, however, a contract concluded as a result of a tendering procedure shall become invalid for being in breach of the CzPPA solely where the CCA imposed a ban on the performance of such a contract.[655] This is without prejudice to invalidity based on other grounds. This provision is supposed to implement Article 2d RemD, according to which the Member States must ensure that a contract breaching certain rules of public procurement shall be considered ineffective. The Czech law assigns nullity as a civil-law consequence of such an infringement.

In case a contract was concluded between the contracting authority and tenderer despite the most serious violation of the tendering procedure (the exhaustive list of such infringements contains e.g. conclusion of a contract without a proper notification, or despite a ban to conclude a contract, etc.),[656] it is possible to file a petition with the Office to impose a ban on the performance of the contract. Even if the conditions for imposing the ban are met, the Office may still decide not to impose it, if the contracting authority is able to demonstrate public interest upon continuation of the contract.[657] The contract is *ab initio* void only if the ban on the performance was actually granted.[658]

The proceedings for the imposition of a ban on performance of a contract have been subject to criticism for many reasons,[659] including the fact that the

653 Sec. 9 (2) (h) CzCPC.

654 Sec. 580 (1) CzCC.

655 Sec. 264 (2) CzPPA.

656 Sec. 254 (1) CzPPA.

657 Sec. 264 (3) and (4) CzPPA.

658 Sec 264 (2) CzPPA.

659 BRODEC, Jan and Václav JANEČEK. Neplatnost právního jednání pro rozpor se zákonem o veřejných zakázkách. *Jurisprudence* [online]. 2015, vol. 24, no. 4, p. 3 [accessed 05.11.2025]. Available at: https://www.jurisprudence.cz/cz/casopis/neplatnost-pravniho-jednani-pro-rozpor-se-zakonem-o-verejnych-zakazkach.m-134.html; RAUS, David. Soukromoprávní důsled-

petition to the Office may be filed at the latest within 6 months since the contract was concluded,[660] or that it is unclear to what breaches of the CzPPA this provision actually applies. In case of breach of provisions of the PPA other than those specifically listed in Section 254 (1) CzPPA, do the general provisions of the CzCC apply, and may their breach lead to nullity, or is to possible to claim nullity according to the CzCC only in case other laws than the CzPPA were breached? The former interpretation is arguably more persuasive,[661] the latter nonetheless seems to be supported by most of the commentaries.[662]

Concerning the court proceedings on nullity, District Courts have jurisdiction.[663] The claimant needs to prove not only that the contract in question is contrary to the public procurement law (and thus illegal), but also that there is a pressing legal interest on the court deciding on the nullity.[664] There is no time limitation for bringing this type of claim.

3.3 Damages

Anyone harmed by an illegal conduct may claim damages. Such claims would be governed by the provisions on liability for torts.[665] In cases related to public procurement, it is sometimes claimed that the tenderer was harmed by the contract awarded (illegally) to another tenderer or by the cost to submit the tender in case the procedure was (illegally) cancelled by the contracting authority.

i. According to CzCC, a tortfeasor becomes obliged to provide compensation if he interferes with rights of the victim by a culpable breach of a statutory duty, enacted to protect such rights.[666] Thus, to establish liability for damages under the Czech law, the following criteria need to be met:illegal conduct;

ky porušení zákona o veřejných zakázkách nedůvěřivým pohledem s povytaženým obočím a vráskami na čele. *Právní rozhledy*. 2011, vol. 19, no. 18, p. 659.

660 Sec. 254 (3) CzPPA.

661 BRODEC, Jan and Václav JANEČEK. *Neplatnost právního jednání pro rozpor se zákonem o veřejných zakázkách*, p. 3.

662 PODEŠVA, Vilém et al. *Zákon o zadávání veřejných zakázek. Zákon o registru smluv. Komentář*. Praha: Wolters Kluwer, 2016, p. 962.; ŠEBESTA, Milan et al. *Zákon o zadávání veřejných zakázek. Komentář*. Praha: C. H. Beck, 2022, p. 1540.

663 Sec. 9 (1) CzCPC.

664 Sec. 80 CzCC.

665 Sec. 2894 *et seq.* CzCC.

666 Sec. 2910 CzCC.

ii. harm sustained by the victim;
iii. causal nexus between the illegal conduct and the harm;
iv. culpability.

Concerning the illegality, it is necessary to establish that the CzPPA was breached by the defendant.

Concerning the harm, it needs to be precisely substantiated. The harm may constitute of both the actual damage and the lost profit.[667] As far as the actual damage is concerned, it covers the loss which has already occurred; according to the case-law of the Constitutional Court, it is the harm to assets and liabilities which can be expressed in money, consisting in the reduction, decrease or diminution of assets already possessed by the victim, as well as the expenses necessary to remedy such diminution.[668] Concerning the lost profit, it covers the profit the victim would have achieved, but has lost it because of the illegal conduct. According to the case law of the Supreme Court, it applies to situations where the conduct leading to profit has already started (or was without doubt about to start), but it was interrupted by the illegal conduct; under regular course of affairs, the profit would have emerged.[669]

The causal nexus between the illegal conduct and the harm needs to be substantiated to the extent of near certainty; it is not enough to claim it is probable or that it is so under general course of affairs.[670] The causation is normally treated as a condition *sine qua non* – without the infringement, the harm would not have occurred (or would have occurred differently);[671] it is a matter of facts, not a matter of law.[672]

667 Section 2952 of theCzCC.

668 CZ: Constitutional Court, Ruling of 30 April 2002, No. Pl. ÚS 18/01, ECLI:CZ:US:2002:Pl.US.18.01.1.

669 CZ: Supreme Court, Decision of 22 October 2014, No. 25 Cdo 2912/2012, ECLI:CZ:NS:2014:25.CDO.2912.2012.1.

670 CZ: Supreme Court, Judgment of 27 September 2006, No. 25 Cdo 508/2005, ECLI:CZ:NS:2006:25.CDO.508.2005.1; see also HULMÁK, Milan et al. *Občanský zákoník VI. Závazkové právo. Zvláštní část (§ 2055-3014). Komentář*, p. 1550.

671 CZ: Constitutional Court, Ruling of 1 November 2007, No. I. ÚS 312/05, ECLI:CZ:US:2007:1.US.312.05.1; see also: Ibid., p. 1551.

672 CZ: Supreme Court, Judgment of 21 February 2002, No. 21 Cdo 300/2001, ECLI:CZ:NS:2002:21.CDO.300.2001.1.

The tortfeasor is only liable for a culpable breach of statutory duties, whether negligent or intentional;[673] the negligence is presumed.[674] The defendant needs to rebut this presumption. The benchmark is an average person[675] - the defendant is only liable if he did not act with diligence that would be expected from an average person.[676] The victim may claim that a higher level of diligence was to be expected from the tortfeasor who is specifically qualified or a professional;[677] under such conditions, the standard of diligence would be that expected from the relevant position or profession of the defendant (*lege artis*). The plaintiff needs to substantiate that such a higher level of diligence was to be expected from the defendant, the defendant than needs to show that he was acting *lege artis*.

District Courts have jurisdiction to decide on damages.[678] If, however, the plaintiffs base their claim on unfair competition, the Regional Court would decide in first instance.[679]

In case of actins for damages, there is a 10 years (15 years in case of intentional conduct) objective limitation period[680] (calculated from the facts themselves, i.e. when the relevant conduct or event actually took place) and a three years subjective one[681] (counted from the date the plaintiff became aware of the damage and the person responsible for it).[682]

3.4 Unjustified enrichment

According to the CzCC any person who is enriched at the expense of another without a just cause must, to the extent of his enrichment, make restitution to the impoverished person. Unjustly enriched is typically a person who acquires a pecuniary benefit without a legal cause or on the basis of a legal cause which

673 Sec. 2910 CzCC.
674 Sec. 2911 CzCC.
675 Sec. 2912 (1) CzCC.
676 MELZER, Filip and Petr TÉGL. *Občanský zákoník : velký komentář. Svazek IX, § 2894-3081*, p. 310.
677 Sec. 2912 (1) CzCC.
678 Sec. 9 (1) CzCPC.
679 Sec. 9 (2) (h) CzCPC.
680 Sec. 636 CzCC.
681 Sec. 629 (1) CzCC.
682 Sec. 620 (1) CzCC.

expired.[683] With regard to public procurement, the unjustified enrichment claims typically concern the security deposited with the contracting authority.[684]

The plaintiffs need to prove that

i. they have made a payment (or gave other pecuniary benefit) to the defendant (typically, the contracting authority);
ii. there was no legal cause for the payment or the legal cause for it has expired.

District Courts have jurisdiction to decide on unjustified enrichment.[685] If, however, the plaintiffs base their claim on unfair competition, the Regional Court would decide in first instance.[686]

In case of claims for unjustified enrichment, there is a 10 years (15 years in case of intentional conduct) objective limitation period[687] (calculated from the facts themselves, i.e. when the relevant conduct or event actually took place) and a three years subjective one[688] (counted from the date the plaintiff became aware of the damage and the person responsible for it).[689]

3.5 Injunctions and restitutions

Even though specifically mentioned in the list of claims available for those harmed by unfair competition, we are not aware of any case based on these provisions. This possibility will therefore not be discussed any further.

3.6 Satisfaction

Adequate satisfaction is aimed at compensating immaterial harm. Therefore, non-pecuniary form of satisfaction is preferred. In public procurement context, a public apology has once been sought (see below in Section 5.4). Pecuniary

683 Sec 2991 CzCC.
684 Sec. 41 CzPPA.
685 Sec. 9 (1) CzCPC.
686 Sec. 9 (2) (h) CzCPC.
687 Sec. 638 CzCC.
688 Sec. 629 (1) CzCC.
689 Sec. 620 (1) CzCC.

satisfaction is admissible only if other form would not be able to provide a real and sufficiently effective compensation.[690]

Similar to claims for damages, the plaintiff needs to establish

i. illegal conduct;
ii. immaterial harm sustained by the victim;
iii. causal nexus between the illegal conduct and the harm;
iv. culpability.

In detail for these conditions, we may refer to the text in Section 3.3 concerning damages.

District Courts have jurisdiction to decide on immaterial harm.[691] If, however, the plaintiffs base their claim on unfair competition, the Regional Court would decide in first instance.[692]

In case of actins for adequate satisfaction, there is a 10 years (15 years in case of intentional conduct) objective limitation period[693] (calculated from the facts themselves, i.e. when the relevant conduct or event actually took place) and a three years subjective one,[694] counted from the date the plaintiff became aware of the harm and the person responsible for it.[695]

4. Case law relevant for private enforcement of public procurement law

The general civil case-law relevant for private enforcement of public procurement law correspond with those relevant for private enforcement of competition law, discussed earlier in this publication. We therefore refer the reader to the chapter concerning competition law.

690 Sec. 2951 (2) CzCC.
691 Sec. 9 (1) CzCPC.
692 Sec. 9 (2) (h) CzCPC.
693 Sec. 636 CzCC.
694 Sec. 629 (1) CzCC.
695 Sec. 620 (1) CzCC.

5. Private enforcement cases

It is not possible to identify all the cases concerning private enforcement of public procurement law in the Czech Republic. The judgments of District and Regional Courts are not systematically published in a way that could be mechanically searched. There is no specific evidence of private enforcement judgments by the courts. There is practically no academic debate concerning private enforcement of public procurement law, and thus, no cases are mentioned in the scientific literature.

For the purposes of this publication, we searched the public database of the Supreme Court for all the judgments referring to CzPPA. Based on this, we were able to assemble this basic overview of relevant case-law.

5.1 Jurisdiction of civil courts

Civil courts were frequently reluctant to accept their jurisdiction in claims based on public procurement legislation. In a case concerning claimed unjustified enrichment due to the alleged breach of CzPPA by the contracting authority, the Regional Court in Ostrava decided the claimant should have brought objections against the conduct of the contracting authority, and – if not successful – petition to the supervisory authority, i.e. the Office. As the plaintiff failed to do so, the civil court lacks jurisdiction, because it is only the Office that has power to review the regularity of public procurement.[696] The Supreme Court nonetheless annulled this judgment, concluding that the civil courts have jurisdiction to assess whether the CzPPA was breached.[697] This conclusion was confirmed by the Constitutional Court in a separate case.[698]

[696] CZ: Regional Court in Brno, Judgment of 24 November 2021, No. 70 Co 10/2021-167.

[697] CZ: Supreme Court, Judgment of 26 April 2023, No. 23 Cdo 1051/2022, ECLI:CZ:NS:2023:23.CDO.1051.2022.1.

[698] CZ: Constitutional Court, Ruling of 2 November 2021, No. Pl. ÚS 24/21, ECLI:CZ:US:2021:Pl.US.24.21.1.

Specific questions were raised in connection with the "small-scale public contracts",[699] which are excluded from the public procurement procedure;[700] it is not possible to file objections against the conduct of the contracting authority with regard to such contracts[701] and the Office lacks jurisdiction to review them.[702] In case of one such small-scale contract, the plaintiff filed a claim to the District Court in Prague 3, asking the award of the contract to another tenderer to be annulled. The District Court closed the proceedings and passed the claim to the Office.[703] On appeal, the Municipal Court in Prague annulled this judgment. Because the jurisdiction of the Office is excluded, it is on civil courts to conduct the review.[704] The Supreme Court concurred. The civil courts have jurisdiction, but only to review the conduct of the contracting authority in the light of civil law,[705] not the CzPPA.

5.2 Damages

We managed to identify several cases concerning claims for damages. In one of them,[706] the plaintiff was excluded from the participation in the procurement procedure for formal reasons, despite the fact he offered the best tender; the public contract was then awarded to another tenderer. The plaintiff asked the supervisory authority, i.e. the Office, to open *ex offo* proceedings with the contracting authority; the Office did so and decided that the contracting authority breached the CzPPA.

699 According to Sec. 27 PPA, small-scale public contract means a public contract having an estimated value equal to, or lower than CZK 3,000,000 (EUR 120 000) in the case of a public supply contract or a public service contract, or CZK 9,000,000 (~EUR 360 000) in the case of a public works contract.

700 Sec. 31 CzPPA.

701 Sec. 241 (1) CzPPA.

702 Sec. 248 (2) CzPPA.

703 CZ: District Court in Prague 3, Judgment of 25 january 2019, No. 21 C 31/2019-10.

704 CZ: Municipal Court in Prague, Judgment of 25 February 2019, No. 69 Co 62/2019-19.

705 CZ: Supreme Court Judgment of 18 September 2019, No. 32 Cdo 2300/2019, ECLI:CZ:NS:2019:32.CDO.2300.2019.1.

706 CZ: District Court in Prague 1, Judgment of 10 February 2023, No. 75 C 109/2021-85; CZ: Supreme Court, Judgment of 17 December 2024, No. 25 Cdo 380/2024, ECLI:CZ:NS:2024:25.CDO.380.2024.1.

The plaintiff thereafter filed an action for damages, claiming actual damage (the cost of preparing and submitting the tender) and lost profit (because it was not awarded the contract). The District Court in Prague 1 decided in favour of the plaintiff,[707] the Municipal Court in Prague nonetheless dismissed the action.[708] According to the Municipal Court, damages cannot be awarded as the plaintiff breached its obligation to prevent the harm: the plaintiff should have submitted a formal request to the Office to review the conduct of the contracting authority; as a result, the contracting authority would not have been allowed to conclude the contract, because that is the legal consequence of formal investigation. The Supreme Court concurred.[709]

In other cases, the plaintiff has nonetheless been successful. The Supreme Court thus confirmed that if the contracting authority cancelled the procurement procedure in breach of the CzPPA, the cost to prepare and submit a tender constitute harm that must be compensated by the contracting authority.[710]

We are not aware of any judgment in which the plaintiff successfully claimed lost profit for not being awarded the public contract. The Supreme Court nonetheless confirmed that it is possible to claim damages if the claimant was excluded from the procurement procedure in breach of the CzPPA and it was highly probable that otherwise, his tenderer would have been selected.[711]

5.3 Unjustified enrichment

We managed to identify several cases concerning claims for unjustified enrichment. In one of them,[712] the plaintiff was excluded from the participation in the procurement procedure after the contract had been awarded to him, because it had not submitted the requested documents. As a consequence, the

[707] CZ: District Court in Prague 1, Judgment of 10 February 2023, No. 75 C 109/2021-85.

[708] CZ: Municipal Court in Prague, Judgment of 21 July 2023, No. 14 Co 125/2023-122.

[709] CZ: Supreme Court, Judgment of 17 December 2024, No. 25 Cdo 380/2024, ECLI:CZ:NS:2024:25.CDO.380.2024.1.

[710] CZ: Supreme Court, Judgment of 26 July 2016, No. 25 Cdo 1409/2015, ECLI:CZ:NS:2016:25.CDO.1409.2015.1.

[711] CZ: Supreme Court, Judgment of 21 April 2022, No. 25 Cdo 1417/2020, ECLI:CZ:NS:2022:25.CDO.1417.2020.1.

[712] CZ: Municipal Court in Brno, Judgment of 11 September 2020, No. 36 C 122/2019-123; CZ: Regional Court in Brno, Judgment of 24 November 2021, No. 70 Co 10/2021-167.

contracting authority decided to keep the security deposit. The plaintiff claimed that the actions of the contracting authority breached the public procurement regulation. In particular, the procurement procedure should have been cancelled, and the security deposit should have been returned to the plaintiff.

The District Court in Ostrava dismissed the claim, acknowledging that the contracting authority acted in line with the CzPPA.[713] On appeal, the Regional Court in Brno concurred;[714] the rest of the case was focused on the jurisdiction of civil courts, as described above in Section 5.1.

In a similar case, the District Court in Ostrava[715] as well as the Reginal Court in Ostrava[716] reviewed in detail the conduct of the contracting authority and concluded it had not breached the CzPPA. These judgments were annulled by the Supreme Court, that decided that both the courts erred in law,[717] these courts nonetheless arrived at the same conclusions in the renewed proceedings,[718] which the Supreme Court ultimately endorsed.[719] The plaintiff therefore ultimately was successful.

5.4 Satisfaction

We were able to identify one case in which an unsuccessful tenderer sought a satisfaction from another tenderer who was awarded the public contract. The plaintiff claimed that the defendant included false information in the tender, which enabled him to win the contract; had the defendant submitted correct information, the plaintiff would have won.

The claim was made on the legal basis of the rules on unfair competition. The plaintiff was successful in the first instance. The Regional Court in Ostrava ordered the defendant to publish an apology in daily press.[720] On appeal, the

713 CZ: Municipal Court in Brno, Judgment of 11 September 2020, No. 36 C 122/2019-123.

714 CZ: Regional Court in Brno, Judgment of 24 November 2021, No. 70 Co 10/2021-167.

715 CZ: District Court in Ostrava, Judgment of 17 May 2018, No. 131 C 55/2017-34.

716 CZ: Regional Court in Ostrava, Judgment of 10 December 2018, No. 8 Co 291/2018-73.

717 CZ: Supreme Court, Judgment of 27 October 2021, No. 29 Cdo 1675/2019, ECLI:CZ:NS:2021:29.CDO.1675.2019.1.

718 CZ: District Court in Ostrava, Judgment of 28 July 2022, No. 131 C 55/2017-151; CZ: Regional Court in Ostrava, Judgment of 4 November 2022, No. 8 Co 203/2022-177.

719 CZ: Supreme Court, Judgment of 30 December 2024, No. 29 Cdo 456/2023, ECLI:CZ:NS:2024:29.CDO.456.2023.1.

720 CZ: Regional Court in Ostrava, Judgment of 20 February 2019, No. 7 Cm 8/2015-343.

Superior Court in Olomouc nonetheless annulled this judgment and dismissed the claim, arguing that no undertaking or consumer could have been harmed by the false information contained in the defendant's tender, as it was not published and was to be opened only by the contracting authority.[721] The Supreme Court of concurred. It did not specifically address the issue of possible harm, but it concluded that public apology would in any event be unavailable as unproportional, as the actions of the defendant (i.e. the tender submitted to the contracting authority) were not made in public.[722]

6. Evaluation of the environment for private enforcement of public procurement law

There is no specific regulation concerning private enforcement of public procurement law. That is not necessarily a bad thing. The claims for damages may be raised directly on the basis of Civil Code, as well as other ones (in particular unjustified enrichment); yet others are available on the basis of the provisions of unfair competition.

Despite this, the reported experience with private enforcement is – if any – extremely limited. Or possibly, there are a lot of private enforcement cases, but they cannot be traced. In any event, private enforcement of public procurement rules is not discussed in legal science.

This lack of cases is surprising. There are hundreds of decisions on the regularity of public procurement every year issued by the Office. One might expect a lot of "follow-on" claims. The legislation needed to raise them is in place. Not many take the opportunity. Lack of awareness may be one of the causes.

7. Suggestions for further development

As mentioned above, there is no specific legal basis for private enforcement of public procurement law. It is arguably not strictly necessary, but it might

[721] CZ: High Court in Olomouc, Judgment of 22 August 2019, No. 4 Cmo 83/2019-405.

[722] CZ: Supreme Court, Judgment of 30 September 2020, Ref. No. 23 Cdo 408/2020, ECLI:CZ:NS:2020:23.CDO.408.2020.1.

make the enforcement easier. As a comparison, specific private enforcement provisions used to be part of the competition law.[723] Current competition law only refers to the enforcement rules, applicable to unfair competition claims.[724] Something similar could be adopted with regard to public procurement. That would not only outline the rights of the potential claimants in a much clearer way, but also enable the much more specialised Regional Courts to take jurisdiction in the first instance.

Secondly, we take the position that accessible evidence of private enforcement cases is necessary, both for the courts, to be able to construct a robust jurisprudence, and especially for the claimants. If the courts were obliged to report the private enforcement cases to the Office, a database of them might be created on its website.

8. Summary

Not much is to be said about the private enforcement of public procurement law in the Czech Republic. It does exist, but its actual extent is unknown. If there are any specific legal challenges connected with it, they are not publicly discussed. Without more publicity concerning such cases, it does not seem likely that there would be any private enforcement to talk about.

[723] Act. No. 63/1991 Coll., on the Protection of Competition (no longer in force), Sec. 17.

[724] Sec. 2990 CC.

CHAPTER 10

Private Enforcement of Public Procurement Law in Croatia – Administrative and Civil Law Compete

by

Marko Turudić*

1. Introduction

The title of this Chapter might be somewhat misleading, due to different interpretations what 'private enforcement' in public procurement context is. Public procurement remedies in the European Union (EU) are based on the premise of private enforcement – the so-called 'supplier-based' system. This means that the overwhelmingly most important tool for the enforcement of the legality of public procurement procedures are – remedies, and remedies procedures are initiated by – economic operators – private legal entities. So, 'private enforcement' *stricto sensu* is – the enforcement of public procurement rules via private (economic operator) initiative.[726] Public enforcement is to be understood as procedures conducted by public authorities *ex officio* – such as administrative supervision conducted by the Croatian Ministry of Economy.

But 'private enforcement' in the context of this Chapter should be seen as a subcategory of the overall concept of 'private enforcement' – enforcement of public procurement rules via Croatian private (civil) law, with emphasis on damages and contract execution dispute resolution – the only relevant parts of Croatian public procurement law still infused with civil law.

Today – public procurement law in Croatia is firmly anchored in public (administrative) law. Public procurement procedures are administrative procedures, and so are appeal procedures. Judicial protection is ensured before

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726 CARANTA, Roberto and Vítězslava FRIČOVÁ. EU Procurement and Concessions. In: SCHOLTEN, Miroslava, ed. *Research handbook on the enforcement of EU law*. Cheltenham: Edward Elgar Publishing Limited, 2023, p. 432.

the High Administrative Court of the Republic of Croatia (Visoki upravni sud Republike Hrvatske – VUSRH). Public procurement contracts are administrative contracts. This approach is rooted in French legal tradition, and maybe the most important benefit or advantage over the civil law approach of some other Member States, at least historically, was more transparency and less problems in the understanding of the need for and importance of remedies in public procurement procedures.[727]

This was not the case always however – a substantial practical and academic debate revolved around three essential questions; what is the legal nature of public procurement procedures, what is the legal nature of award decisions and what is the legal nature of administrative contracts? The answers to these questions are not of exclusively academic value and significance – they shaped law applicable in public procurement procedures, in contract execution, but also private (civil law) enforcement of public procurement rules. All of these questions were resolved recently (at least they should have been) via judgement of the Supreme Court of the Republic of Croatia (Vrhovni sud Republike Hrvatske – VSRH)[728], where the VSRH unquestionably defines public procurement contracts as administrative contracts, which in turn makes it impossible to define public procurement procedures as *sui generis* procedures (as opposed to administrative procedures) and award decisions as something other than administrative acts. This should have also (to an extent) influenced the scope and frequency of use of private law tools at the disposal of economic operators when public procurement contract execution issues arise, but as this chapter will show - the legislator and courts are (intentionally or not) slow to adapt.

Public procurement enforcement in Croatia is almost exclusively – public (administrative) law based. Appeals to the Croatian State Commission for Supervision of Public Procurement Procedures (Državna komisija za kontrolu postupaka javne nabave – DKOM) are the most used remedy (unfortunately the number of submitted appeals is dropping recently due to limiting legislative amendments), followed by administrative disputes before VUSRH. Interim

[727] CARANTA, Roberto. Many Different Paths, but Are They All Leading to Effectiveness? In: TREUMER, Steen and Roberto CARANTA, eds. *Enforcement of the EU Public Procurement Rules*. Copenhagen: DJØF Publishing Copenhagen, 2011, p. 56.

[728] HR: Supreme Court, Judgement of November 8 2023, Rev 139/2023-5, ECLI:HR:VSRH:2023:4865.

measures and the remedy of ineffectiveness is also used and decided upon in this administrative law context.

Private (civil law) enforcement is limited to damages and public procurement contract disputes. But even damage claims can be resolved before the VUSRH (an administrative law court), and public procurement contract disputes should be resolved before the same court since public procurement contracts are defined as administrative contracts now. Another avenue for 'private justice' with regard to contract disputes are private arbitrations. The number of private arbitrations of public procurement contracts seems to be increasing, and the lack of transparency of these procedures makes them largely incompatible with core public procurement principles.

This Chapter will show that, even though some private enforcement avenues exist for economic operators under Croatian public procurement rules, they are very rarely used and very rarely successful if used. Thus, the only realistic avenue are - administrative law remedies.

2. Legislative framework

The Public Procurement Act[729] (*Zakon o javnoj nabavi - ZJN*) is the central and most important public procurement legal act in Croatia. Directive 2014/24/EU[730] and Directive 2014/25/EU[731] were transposed in ZJN, while Directive 2014/23/EU[732] was transposed in a separate Concessions Act[733] (*Zakon o koncesijama - ZK*). ZJN offers various avenues for legal protection and rights enforcement for contracting authorities.

729 Act No. 120/16 OG, The Public Procurement Act, as amended (ZJN).

730 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94.

731 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, '*OJ L 94, 28.3.2014, s. 243 – 374).*

732 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, *(OJ L 94, 28.3.2014, s. 1 – 64).*

733 Act No.69/17 OG, Concessions Act, as amended (ZK).

The most important legal remedy in public procurement procedures is the appeal. Appeals are submitted to DKOM[734] in a general timeframe od 10 days since receiving or publishing of the decision that is being appealed.[735] Unlike in other Croatian administrative procedures, public procurement appeals can be submitted at the very beginning of the public procurement procedure (appeal against procurement documentation) or at the end (against the award decision). It is explicitly stated that the appeal procedure is conducted according to the provisions of ZJN and the General Administrative procedure Act[736] (*Zakon o općem upravnom postupku – ZUP*); and that the appeal procedure is based on the principles of public procurement and administrative procedure.[737] This means that the appeal procedure is legislatively designated as an administrative procedure, unlike the public procurement procedure itself. This unusual legislative oversight was corrected by the VSRH's judgement mentioned *supra*, which designated public procurement contracts as administrative contracts.

One of the defining characteristics of Croatian public procurement appeals are – the appeal fees. Economic operators that plan to submit an appeal must pay the appeal fee to the state budget. If they fail to do so – their appeal will be dismissed. If the appeal is rejected – the appeal fee is not returned to the appellant. But if the appeal is successful – the appeal fee is reimbursed from the contracting authority's budget – meaning that appeal fees have a punitive affect towards the contracting authority. Appeal fees are a long-standing part of Croatian public procurement law. But recently, via the 2022 ZJN amendments, they were significantly increased (up to 100 times for procurement documentation appeals – more on this *infra*), which resulted in a significant drop of submitted appeals is subsequent years.[738]

DKOM's decisions may be reviewed before the VUSRH in an administrative dispute.[739] General administrative disputes are conducted according to the Administrative Disputes Act[740] (*Zakon o upravnim sporovima* – ZUS), and ZJN

734 Article 398 of ZJN.

735 Article 406 of ZJN.

736 Act No. 47/09 OG, General Administrative Procedure Act, as amended (ZUP).

737 Article 399 of the ZJN.

738 See: TURUDIĆ, Marko. How Much Is Too Much: Are the New Public Procurement Appeal Fees in Croatia in Line with the Remedies Directive? *European Procurement & Public Private Partnership Law Review*. 2024, vol. 19, no. 3. DOI: 10.21552/epppl/2024/3/6-

739 Article 434 of the ZJN.

740 Act No.36/24 OG, Administrative Disputes Act (ZUS).

is *lex specialis*. Administrative disputes may be initiated in 30 days since the delivery of DKOM's decision.[741] VUSRH had 30 days to issue its judgement.[742] This is an instructive deadline since there are no prescribed consequences if the VUSRH fails to issue a judgement in this timeframe. Nevertheless, the VUSRH consistently issues judgements in or around this deadline.

With regard to private (civil law) enforcement – ZJN contains two relevant provisions. Firstly – Article 435 prescribes that any person that suffered damages due to violations of the ZJN can ask for damages in front of a competent court according to the general damages provisions. Secondly, Article 313 of ZJN prescribes that the liability of the contracting parties for the fulfillment of obligations under a public procurement contract, in addition to the provisions ZJN, shall be governed, as appropriate, by the provisions of the Law on Obligations[743] *(Zakon o obveznim odnosima – ZOO*). Both of these provisions point to the application of the central Croatian civil law act to determine damages in any stage of a public procurement procedure, and the fulfillment of obligations in public procurement contracts. But the venues for applying these aspects of private enforcement are diverse and up for debate.

3. Types of private enforcement measures

Private law enforcement measures in Croatian public procurement law may be divided into two main subcategories; damages and contract (performance) disputes.

3.1 Damages

Article 435 of the ZJN is the central (albeit short) provision establishing damages rules; 'every person who has suffered damage due to a violation of the ZJN has the possibility to seek compensation before the competent court in accordance with the general provisions on compensation for damages.' This

741 Article 40 of the ZUS.

742 Article 434(3) of the ZJN.

743 Act No.35/05 OG, Law on Obligations, as amended (ZOO).

provision opens thee important questions; who can sue for damages, what is a 'competent court', and what law is applicable? Also, it is important to delineate the practical and theoretical prerequisites for a successful damage claim.

Who can sue for damages?

According to this provision – the right to ask for damages is established broadly. Article 435 mentions 'every person who has suffered damage' – this includes physical and legal persons, and every other economic operators that participated in a public procurement procedure. But – the wording of the Article ('every person') supports the interpretation that even physical or legal persons that did not participate in a public procurement procedure have the right to ask for damages.

What is a 'competent court'?

Depending on the circumstances of the case and on the decision od the person planning to ask for damages; the establishment of a competent court varies. A 'competent court' may be the VUSRH, or one of the territorially competent Commercial Courts.

If a person plans to initiate an administrative dispute before the VUSRH against DKOM's decision – a subordinate request for damages may be submitted with the lawsuit. If the administrative dispute involves the return of an item or a claim for compensation of damages, the claim concerning the items and the amount of damage suffered must be included in the lawsuit.[744] Article 118 of ZUS shortly delineates the VUSRH's competence with damages. VUSRH shall, within the scope of the claim, also decide on compensation for damages and the return of items. When the VUSRH determines that an administrative contract has been unlawfully terminated or is null and void, it shall also decide on compensation for damages. VUSRH shall reject the claim for compensation for damages and the return of items if it determines that the plaintiff caused the damage or contributed to its occurrence through their own actions.

But if a person decides not to pursue an administrative dispute, or is unsuccessful with its administrative dispute, it can file a lawsuit seeking damages to the territorially competent Commercial court.

[744] Artice 39(2) of the ZUS.

What law is applicable?

'General provisions on compensation for damages' are primarily civil law provision of the ZOO. Requirements for liability are somewhat standard and in accordance with comparative civil law provisions of other Member States; whoever causes damage to another is obliged to compensate for it unless they prove that the damage occurred without their fault.[745] For damage caused by an object or activity that poses an increased risk of damage to the environment, liability shall be imposed regardless of fault.[746] Liability regardless of fault shall also apply in other cases provided for by law.[747] 'Damages' are defined as the diminution of a person's property (material damage), the prevention of its increase (loss of profit), and the infringement of personal rights (non-material damage).[748]

The person that suffered damage is entitled to compensation both for material damage and for loss of profit.[749] The court must determine the amount of compensation according to prices at the time of the court's decision.[750] When assessing the amount of loss of profit, account shall be taken of the gain that could reasonably have been expected in the ordinary course of events or under special circumstances, the realization of which was prevented by the act or omission of the tortfeasor. [751] The court shall, taking into account the circumstances that arose after the damage was caused, award compensation in an amount necessary to restore the injured party's financial situation to the state it would have been in had the harmful act or omission not occurred.[752]

These provisions may be applied no matter the avenue where the party decided to initiate the procedure for establishing and awarding damages; before the VUSRH or before the territorially competent commercial court.

Prerequisites for a successful damage claim

The main prerequisite is the establishment of a causal link between the harmful act and the damage, and the injured party must prove that the damage

745 Article 1045 of the ZOO.
746 *Ibid*.
747 *Ibid*.
748 Article 1046 of the ZOO.
749 Article 1089(1) of the ZOO.
750 Article 1089(2) of the ZOO.
751 Article 1089(3) of the ZOO.
752 Article 1090 of the ZOO.

occurred precisely because of the actions of a contracting authority; via execution of an award decision, via other actions of contracting authorities, as well as the conclusion, termination, and performance of an public procurement contract, and that there is a causal connection between such acts or omissions and the damage claimed.[753] In practice, plaintiffs often fail to prove that the damage was causally linked to the alleged improper or unlawful conduct.[754]

A prerequisite for a successful damages claim is the existence of unlawfulness on part of the contracting authority – this means that there was demonstrative illegal or improper conduct. Determining the existence of such conduct, if one accepts that there is objective liability, represents the main issue in relation to this special form of liability for damages.[755]

3.2 Contract (performance) disputes

Things get much more complicated with contract performance disputes, as the applicable law and avenue for disputes diverges dependent of the understanding is a public procurement contract an administrative contract or a private (civil) law contract.

The central ZJN provision in this regard is Article 313, which establishes that the liability of the contracting parties for the fulfilment of obligations under a public procurement contract shall, in addition to the provisions ZJN, be governed accordingly by the provisions of the law regulating obligations (ZOO).

A widely accepted and narrow interpretation of this provision was the main cause public procurement contracts in Croatia have widely been considered – civil law contracts, and contract performance disputes have been resolved in front of territorially competent commercial courts instead of administrative courts, and private arbitrations (more on this *infra*).

This important doctrinal and practical issue has been resolved by the VSRH in the judgment of 8 November 2023[756] (mentioned *supra*). In the judgement, VSRH states that the validity of a public procurement contract under ZJN

[753] See: JUG, Jadranko and Inga VEZMAR BARLEK. Naknada štete u upravnom sporu. *Zbornik radova Pravnog fakulteta u Splitu*. 2013, vol. 50, no. 2, p. 447.

[754] *Ibid*.

[755] *Ibid*.

[756] HR: Supreme Court, Judgement of November 8 2023, Rev 139/2023-5, ECLI:HR:VSRH:2023:4865.

should be assessed under the special regime for administrative contracts in Articles 150–154 of the ZUP, and not solely under the ZOO. VSRH further states that public procurement contracts share the features of administrative contracts, as they involve a public body, arise from a regulated procedure, and are concluded under strict legal conditions that limit the parties' contractual freedom. Because of this, VUSRH claims, the broader nullity rules in ZUP apply, while ZOO provisions still apply *mutatis mutandis* to the parties' liability for performing contractual obligations.

Unfortunately, this VSRH judgement is still being ignored by the legislator as necessary ZJN amendments to reflect the judgement have still not been introduced. Furthermore, contract performance issues are still being resolved in front of territorially competent commercial courts, and not in front of VUSRH as demanded by the fact that public procurement contracts must be considered administrative contracts.

Another (and frequently used) avenue of private enforcement with regard to contract performance disputes are private arbitrations. The predominance of the notion of public procurement contracts as civil law contracts has led to the 'privatization' of contract execution, and therefore - of contract disputes. This is especially baffling since public procurement procedures, decisions and remedies are firmly anchored in administrative (public) law. Furthermore, this 'privatization' of public procurement contracts, their execution and arising disputes can minimize the importance of public interest awareness and protection with regard to contract execution, as it can reduce the level of transparency when amending contracts or interpreting mutual obligations arising from it.

This is especially important as there seems to be a shift in the views of the applicability of arbitration for disputes where a public body is one of the parties, at least in some Member States.[757]

4. Relevant case law

There is very little case law relating to damages in public procurement procedures in Croatia. While it is difficult to authoritatively state why economic

[757] For example, see FR: Council of State, Decision of 17 October 2023, No. 465761, *SMAC v. Ryanair*, ECLI:FR:CECHR:2023:465761.20231017.

operators are reluctant to utilize these legal avenues, I believe there are a few reasons that might avert them.

Firstly, economic operators might be reluctant to sue for damages as they fear they might reduce their chance to be awarded new contracts with the same contracting authority or be labelled a 'problematic' economic operator which would in turn affect their possibility of acquiring new public procurement contracts in general. This is a view that also discourages the use of public procurement remedies to some extent.

The other reasons are legislative and case-law related; it is very difficult to prove the existence of the prerequisites for damages award (especially causality), and it is very difficult to prove the existence of illegality or inappropriateness of the contracting authorities' actions to such an extent that would justify the award of damages.[758] Furthermore, award of damages due to the loss of an opportunity – specifically, in public procurement procedures, to conclude a public procurement contract - does not constitute a separate ground for compensation under Croatian law or court practice.[759]

Contract execution disputes are, on the other hand, presumably much more widely used – but case law is not easily available and accessible. There is a stark contrast between the public availability of public procurement documents of every public procurement procedure, DKOM's and VUSRH's case-law, and civil law contract execution disputes. While the former is all publicly available without anonymization, the latter is not - making the extremely sensitive and important phase of contract execution significantly less transparent. This is even more evident when the parties to a public procurement contract agree on an arbitration clause in case of contract execution disputes. Arbitration disputes are even more secretive and opaque, and it is practically impossible to access arbitration decisions as they are not openly published.

4.1 Damages Case-Law

One of the rare instances of a damage claim related to a public procurement procedure is a case brought before the Croatian first instance Commercial

[758] For a similar view see: KUHAR, Maja. Naknada štete zbog gubitka prilike kao posljedica nezakonitosti u postupku javne nabave. *Pravo i porezi*. 2025, no. 1, p. 20.

[759] *Ibid*.

Court in Split[760] (*Trgovački sud u Splitu - TSS*). One of the issues brought before the TSS was the issue of damages arising through the set-off claim filed by the defendant on 1 September 2023. The defendant (a contracting authority!) claimed to have a receivable from the claimant (an economic operator!) in the amount of EUR 232,264.91 for compensation of damages. The defendant described the damages as both direct and indirect. The direct actual damage, according to the defendant, resulted from the annulment of its second decision on contract award dated 21 July 2022 and consisted of the costs of the appeal proceedings that it had to pay to two appellants, the costs of external experts, and the costs of its employees. The indirect damage, the defendant argued, arose from the inability to conclude the public procurement contract for the works in question. The defendant considered the unlawful act that caused the damage to be the submission by the claimant, in June and July 2022, of false information, specifically a particular statement and the ESPD form containing incorrect information about a key expert. On 11 September 2023, the claimant fully disputed the set-off claim. He denied the existence of any unlawful act and any causal link between his conduct and the alleged damage. He stressed that he had not caused any damage to the defendant.

TSS rejected the set-off claim as unfounded. It found that the conditions for calling on the guarantee had not been met and that the claimant had not evaded any of his obligations in the public procurement procedure. By not accepting the allegation of unlawful conduct by the claimant, TSS also dismissed the possibility that the defendant would be entitled to compensation for damages.

important example is the judgement of the Commercial Court in Osijek (*Trgovački sud u Osijeku - TSO*) on 22October 2021.[761] The claimant asked for damages on the account of loss of profit and standard damages due to illegal award decision of the contracting authority and illegal decision on appeal by DKOM – illegalities established by the judgement of VUSRH. The claimant claimed that there was a causal link between the damage allegedly suffered and claimed in this lawsuit, and the harmful act – being the conduct of state bodies in the implementation of the public procurement procedure. As the claimant's bid was legal and was ranked second, the claimant believes that, had

[760] HR: Commercial Court in Split, Judgment of 17 October 2023, No. 5 P-612/2022-17.

[761] HR: Commercial Court in Osijek, Judgement of 22 October 2021, No. P 256/2020-13;. For another analysis of the same judgement see: KUHAR, Maja. *Naknada štete zbog gubitka prilike kao posljedica nezakonitosti u postupku javne nabave*, p. 21.

the contracting authority and DKOM acted lawfully, its bid would have been selected as the most advantageous.[762]

TSO emphasizes that the award decision in the public procurement procedure in question was annulled, which means that the entire evaluation procedure was also annulled, and that there is no guarantee that the claimant's tender would be selected in the new public procurement procedure.[763] And even if the claimant's tender was selected – other tenderers might appeal, and the use of remedies might again result in annulment.[764]

TSO was of the opinion that the claimant did not prove the existence of a causal link between the unlawful conduct of the contracting authority and DKOM and any damage it claims to have suffered and seeks in this lawsuit, because in this procedure it has not been proven that, in the absence of such unlawful conduct, its bid would have been selected as the most advantageous, and that a contract for the performance of the works subject to the public procurement would ultimately have been concluded.[765] The claimant's claim is based only on assumptions and not on facts that would reliably indicate that, in the absence of the unlawful conduct of the said public bodies, it would ultimately have had a concluded contract for the execution of the works that were the subject of the public procurement.[766]

5. Evaluation of (private) enforcement

The overall public procurement enforcement landscape in Croatia is currently in a state of crisis. Since late 2022 and the significant increase of public procurement appeal fees - there has been a large drop in the annual number of submitted appeals.

Originally, and since the entry into force of the ZJN, these were the appeal fees were set up in ranges dependent on the estimated procurement value;

– EUR 666.00 for the estimated value of procurement up to EUR 100,000.00,

762 HR: Commercial Court in Osijek, Judgement of 22 October 2021, No. P 256/2020-13, para 37.

763 *Ibid.* para 40.

764 *Ibid.* para 41.

765 *Ibid.* para 42.

766 *Ibid.*

- EUR 1,333.00 for the estimated value of procurement from EUR 100,000.00 to EUR 200,000.00,
- EUR 3,333.00 for the estimated value of procurement from EUR 200,000.00 to EUR 1,000,000.00,
- EUR 6,000.00 euro for the estimated value of procurement from EUR 1,000,000.00 to EUR 3,333,333.00,
- EUR 9,333.00 for the estimated value of procurement from EUR 3,333,333.00 euro to EUR 8,000,000.00,
- EUR 13,333.00 euro for the estimated value of procurement of more than EUR 8,000,000.00,
- for appeals against contract notices, the appeal fee was fixed in the amount of EUR 666.00.[767]

After the late 2022 amendments, the appeal fees were significantly increased;

- EUR 1,332.00 for the estimated procurement value of up to EUR 265,440.01,
- 0.5% of the estimated procurement value for the estimated procurement value from EUR 265,440.01 to EUR 13,272,000.00,
- EUR 66,360.00 for the estimated procurement value of more than EUR 13,272,000.00.[768]

The most significant change was the increase of the appeal fees for appeals against contract notices. The corresponding section of Article 430 that introduced the fixed amount appeal fee for appeals against contract notices was erased. Now, those appeal fees are also calculated in the same way as standard appeal fees. This means that for an appeal against a contract notice where the estimated procurement value is more than EUR 13.272.000,00 – the appeal fee would increase one hundred times. According to DKOM's annual report for 2023, there was;

- a drastic reduction in the numbers of submitted appeals from 2021 to 2023;
- an additional reduction in the number of submitted appeals in 2024 – 19% less than in 2023 for the same time-period;
- the percentage of procurement documentation appeals in the overall number of appeals has dropped from 30% in 2023 to 13.71% in 2023.[769]

[767] Article 430 of the 2016 ZJN.

[768] Article 430.a of the 2022 ZJN.

[769] TURUDIĆ, Marko. *How Much Is Too Much*, p. 193.

This is especially problematic because the annual statistics show an constant yearly increase in the overall number of conducted public procurement procedures – meaning that the percentage of public procurement procedures under review is dropping even faster.[770] The Ministry of Economy – body competent for the monitoring of the public procurement system in Croatia – has the authority to conduct public procurement administrative supervisions *ex officio* in any point of a public procurement procedure and during contract execution. Unfortunately, in 2023 the Ministry conducted only 241 administrative supervisions, which is insignificant when taking into account that there were over 30,000 published public procurement contracts in 2023.[771]

Private enforcement, in the sense of application private law norms establishing damages and resolving contract disputes in public procurement, is used even significantly less. Public procurement damages claims are statistically insignificant, while contract execution disputes are fairly common – but mostly not accessible to the public. There seems to be an increase in private arbitration procedures as an avenue for contract dispute resolution, a significantly less transparent form of dispute resolution than civil law court procedures.

6. Suggestions For Further Development

Enforcement of public procurement rules in Croatia is in need of a serious overhaul. There are three main pain-points that need to be addressed immediately: appeal fees, legal nature of administrative contracts and arbitration as a form of contract execution dispute avenue.

Since the increased appeal fees came into force, there has been a significant decrease in the number of submitted appeals. This is especially problematic

[770] See DKOM's Statistical Report for 2023 <https://www.dkom.hr/UserDocsImages/dokumenti/izvjescaORadu /Izvješće%20o%20radu%20za%202023.pdf?vel=3215706 > accessed 14 August 2025 and the Ministry of Economy's Statistical Public Procurement Report for 2023 <https://www.javnanabava.hr/userdocsimages/userfiles/file/ Statistička%20izvješća/Godišnja/Statisticko_izvjesce_JN_2023.pdf> accessed 14 August 2025.

[771] Ministry of Economy's Statistical Public Procurement Report for 2023 <https://www.javnanabava.hr/userdocsimages/userfiles/file/ Statistička%20izvješća/Godišnja/Statisticko_izvjesce_JN_2023.pdf> accessed 14 August 2025, p. 6.

since the EU Remedies Directive[772] established a supplier-based system of public procurement rules enforcement – meaning that the establishment of legality of public procurement procedures mainly depends on the initiative of economic operators via remedies use. Therefore, it is crucial that the Croatian legislator reduces the appeal fees soon.

The legislator needs to amend the ZJN to reflect the recent change of the understanding of the legal nature of public procurement contracts – VSRH defined them as administrative contracts. This change is important for private law enforcement, since it changes courts competent for damages claims and contract dispute resolution. VUSRH should be the only competent court.

Private arbitrations as a venue for contract dispute resolution lack the transparency necessary to resolve disputes significantly public in character. Arbitral awards are not publicly available, even the names or arbitrators are not available, and arbitral procedures are not open to the public. It is therefore necessary to exclude the possibility of arbitrations as a dispute resolution mechanism for public procurement contract execution or implement new and significantly more transparent rules.

7. Summary

Croatia's public procurement enforcement is dominated by administrative law remedies, leaving private (civil) law enforcement – damages claims and contract execution disputes – largely peripheral.

Damages actions, despite broad standing under Article 435 of the ZJN, are rare due to high evidentiary hurdles, lack of 'loss of opportunity' recognition, and fears of damaging relationships with contracting authorities. Limited case law shows courts' reluctance to link procedural illegality directly to recoverable loss.

The 2022 appeal fee increase has sharply reduced the number of submitted appeals, especially to procurement documentation, undermining the EU's

[772] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts *(OJ L 335, 20.12.2007, s. 31 – 46)*.

supplier-based oversight model. Public supervision is too limited in scale to fill this gap. Simultaneously, the rise of private arbitration for contract disputes introduces opacity into a process that demands transparency, potentially eroding trust and accountability.

Reform should focus on three priorities: lowering appeal fees to restore access to remedies, amending the ZJN to codify the administrative nature of public procurement contracts, and restricting or regulating private arbitration to ensure higher levels of transparency.

CHAPTER 11

Private enforcement of public procurement law in Poland

by

Paulina Korycińska-Rządca*

1. Introduction

In Poland, legal protection against violations of public procurement law can be sought through two parallel avenues: public enforcement, exercised by specialized public bodies such as the National Appeals Chamber (pol. *Krajowa Izba Odwoławcza*, KIO[774]) and the Public Procurement Court (pol. *Sąd Zamówień Publicznych*[775]), and private enforcement, involving civil law claims pursued by private parties (primarily contractors) before ordinary courts. The public route focuses on the legality and fairness of procurement procedures whereas private enforcement aims to provide individual redress, primarily through claims for damages or annulment of contracts. Despite its formal availability, private enforcement remains a secondary route.

This chapter examines the legal and practical framework of private enforcement of public procurement law in Poland. It focuses on the conditions under which civil claims, particularly for damages or contract annulment, can be brought by private parties. The analysis aims to identify key factors that may hinder the development of private enforcement of public procurement law in Poland. The discussion draws on statutory analysis, procedural mechanisms

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774 KIO is a first-instance specialized body which adjudicates disputes arising from procurement procedures as well as issuing opinions on objections raised by contracting authorities to the results of control conducted by the President of the Public Procurement Office (Art. 473(1) PlPPA).

775 This is a second-instance body hearing appeals against KIO decisions, operating as a specialized division of Warsaw District Court (Art. 580(1) PlPPA).

and judicial practice to assess the viability of civil law remedies in safeguarding private parties' interests within the public procurement system.

2. Legislative framework

The Polish public procurement system is primarily governed by the Act of 11 September 2019 – Public Procurement Law (PlPPA),[776] which came into force on 1 January 2021. This act governs the award of public contracts and design contests,[777] setting out the entities subject to its provisions, exclusion grounds, applicable procedures for awarding contracts, requirements concerning public procurement contracts, the competent authorities, legal remedies, dispute resolution mechanisms and oversight measures including financial penalties.

The PlPPA expressly provides for a public enforcement pathway centred around the KIO, a first-instance specialized body[778] that adjudicates disputes arising from procurement procedures.[779] KIO may order remedial actions such as the repetition or annulment of procedural acts, modification of contract provisions, or, in limited cases, the annulment or shortening of concluded contracts.[780] Appeals against its judgements are heard by the Public Procurement Court whose judgement may, in turn, be challenged by a cessation appeal to the Supreme Court. While this control mechanism is initiated by private parties, it operates within a public-law framework,[781] in particular KIO does not

776 Act on Public Procurement Law, as amended, Journal of Laws 2019, item 2019.

777 PlPPA applies to classical procurement conducted by public contracting authorities where the contract value is at least PLN 130,000 (~EUR 30,720), as well as to sectoral (utilities) procurement by sectoral contracting authorities, and to procurement in the fields of defense and security by both public and sectoral contracting authorities, in both cases where the contract value meets or exceeds the relevant EU thresholds. Additionally, the PlPPL covers classical procurement by subsidized contracting authorities in specific circumstances, provided the contract value also meets or exceeds the EU thresholds (Art. 2(1) PlPPA).

778 CJEU recognized KIO as a court or tribunal within the meaning of 267 TFEU – see: Judgement of 13 December 2012, *Forposta SA and ABC Direct Contact*, C465/11, ECLI:EU:C:2012:801, para 18.

779 Art. 473(1) of PlPPA.

780 Art. 554(3) of PlPPA.

781 The status of KIO and nature of its proceedings remains contested in Polish legal literature – see e.g.: GRZEŚKOWIAK-STOJEK, Dorota, Agnieszka MATUSIAK and Julia JARNICKA. J. Jarnicka, Commentary to Article 473. In: JAWORSKA, Marzena, ed. *Prawo zamówień publicz-*

have jurisdiction to adjudicate on claims for damages, including those arising from unlawful actions or omissions of the contracting authority during public procurement proceedings in cases where a procurement procedure is cancelled for reasons attributable to the contracting authority.[782] Thus, this proceeding does not lead to the awarding of damages and cannot be qualified as private enforcement.

Furthermore, the PlPPA does not provide for a distinct civil liability regime for damages arising from violations of public procurement provisions, referring in such matters to the Act of 23 April 1964 – Civil Code (PlCC).[783] [784] However, it does regulate the issue of contract annulment. Yet, even in that context, certain aspects are also governed by the general civil law principles, which will be discussed further in part 3.1.

3. Types of private enforcement measures

3.1 Overview of private enforcement measures in public procurement

Although Polish law does not provide a separate regime of liability of contracting authorities for unlawful actions or omissions in the procurement procedure, there are legal instruments rooted in general civil law available to private parties seeking redress for procurement-related harm. The main private enforcement measures include claims for damages or payment the bid bond (pol. *wadium*), actions for contract annulment and – in certain cases – interim relief.

Damages may be pursued under the general tort liability rules of the PlCC (notably Article 415), provided that the claimant can demonstrate an unlawful

nych. Komentarz. Warszawa: Wydawnictwo C.H.Beck Sp. z o.o., 2024.; GRANECKI, Paweł and Iga GRANECKA. P. Granecki, I. Granecka, Commentary to Article 505. In: *Prawo zamówień publicznych. Komentarz*. Warszawa: Wydawnictwo C.H.Beck Sp. z o.o., 2024.; RÓŻOWICZ, Konrad. Charakter prawny wyroków wydawanych przez Krajową Izbę Odwoławczą. *Studia Prawa Publicznego*. Uniwersytet im. Adama Mickiewicza w Poznaniu, 2016, no. 2 (14), p. 152. DOI: 10.14746/spp.2016.2.14.6

782 PL: Supreme Court, Resolution of 25 February 2021, No. III CZP 16/20.

783 Civil Code, as amended, Journal of Laws 1964, No. 16, item 93.

784 Article 8(1) of PlPPA.

act or omission, fault, damage and a causal link. Claims may also be grounded in Article 704 § 2 of the PlCC, which states that where the contracting authority unlawfully and culpably refuses to conclude a contract with the winning bidder, that bidder may seek damages or demand payment of double the bid bond.[785] The prerequisites for liability under this provision mirror those of general tort liability. The burden of proof as to all of these elements rests on the party pursuing the claim[786] and the courts tend to adopt a restrictive approach which results in a high evidentiary standard. These issues will be discussed further in parts 3.2.3. and 3.2.4

Contract annulment is regulated more directly within the PlPPA, implementing EU Directive 2007/66/EC. Article 457 PlPPA provides specific and narrow grounds for judicial annulment, such as awarding contracts without prior publication or violating standstill obligations, which has to be interpreted restrictively.[787] The action may be brought by the President of the Public Procurement Office or – if the contract was awarded without prior publication of a contract notice in breach of applicable rules – by contractor with an interest in the award, within four years from the date of the contract's conclusion or amendment. Outside these specific scenarios, annulment may theoretically be sought under Article 705 of the PlCC, if the result of the tender was unlawfully or immorally influenced. However, such recourse is exceptional, given the *lex specialis* character of the PlPPA.

Interim relief is the most fragile component of private enforcement. While the PlPPA provides for a temporary prohibition on contract signature during the pendency of appeal proceedings before the KIO,[788] this prohibition ceases to apply once the KIO ruling is issued. Although a party may file a complaint against the KIO ruling with the Public Procurement Court, the protective effect of the standstill mechanism under the PPL no longer applies at this stage. Legal scholars and practitioners have criticized this solution, calling for the extension of the prohibition on contract signature to cover the period of judicial review of KIO decisions.[789] Theoretically, contractors may seek interim measures un-

785 PL: Regional Court in Warsaw, Judgement of 18 December 2023, No. XXV C 250/21.

786 Article 6 of the PlCC.

787 See: Judgement of 11 September 2014, *Fastweb*, C19/13, ECLI:EU:C:2014:2194, para 40.

788 Art. 577 of PlPPA.

789 BANASZEWSKA, Anna. *Skarga na orzeczenie Krajowej Izby Odwoławczej jako środek ochrony prawnej w systemie zamówień publicznych*. Warsawa: Wolters Kluwer Polska, 2018, p. 487.;

der the general rules of the Act of 17 November 1964 – Code of Civil Procedure (PlCPC),[790] but the prevailing interpretation – particularly by the Warsaw Regional Court, which has exclusive jurisdiction over appeals against KIO rulings – is that such relief is inadmissible during judicial review of KIO rulings.[791] As a result, contractors are left without effective means to prevent the conclusion of contested contracts, even where judicial review is pending. The lack of effective interim relief at the judicial stage exposes contractors to the risk that contracts may be concluded before their complaints are resolved, undermining the effectiveness of private enforcement. This gap in protection calls for legislative intervention.

3.2 Damages in public procurement cases

Competent Courts

Claims for damages arising from infringements of public procurement law fall outside the jurisdiction of both the KIO and the Public Procurement Court, whose competences are limited to reviewing the lawfulness of procurement procedures and ordering corrective measures. As such, private enforcement in the form of civil liability remains the exclusive domain of the ordinary courts with specific competence rules depending on the nature and value of claims.

Jurisdiction in such cases is primarily governed by the general rules of the PlCPC with the value of the claim determining the appropriate level of the judiciary. District Courts (pol. *sądy rejonowe*) are competent to hear first-instance claims up to PLN 100,000 (approx. EUR 23,000), while Regional Courts (pol. *sądy okręgowe*) hear claims exceeding that amount.[792] In cases involving complex legal issues, a District Court may refer the case to the competent

DZIERŻANOWSKI, Włodzimierz. O potrzebie usprawnienia środków ochrony prawnej. *Public Procurement Law*. 2016, vol. 48, no. 1, p. 35.

790 Civil Procedure Code, as amended, Journal of Laws 1964, No. 43, item 296.

791 PL: Regional Court in Warsaw, Order of 13 May 2019, No. XXIII GCo 5/19; Regional Court in Warsaw, Order of the of 31 January 2020, No. XXIII Ga 2162/19; Regional Court in Warsaw, Order of the of 6 November 2020, No. XXIII Ga 1711/20; Regional Court in Warsaw, Order of the of 22 February 2024, No. XXIII Zs 16/24. A dissenting opinion was offered, however, in the Regional Court in Warsaw, Order of the of 23 February 2021, No. XXIII Zo 3/21; Regional Court in Warsaw, Judgment of the of 25 March 2021, No. XXIII Zs 26/21.

792 Art. 17(4) of PlCPC.

Regional Court,[793] although the latter may decline jurisdiction if it finds no sufficient justification for the transfer.[794]

Territorial jurisdiction follows general civil procedural law principles. As a rule, the competent court is that of the defendant's domicile.[795] However, in tort-based procurement claims, jurisdiction may also be established under the *lex loci delicti* rule, before the court in whose district the harmful event occurred.[796]

Limitation Periods

The Polish legal system does not provide a specific limitation period for claims arising from violations of public procurement law. Such claims are typically brought under the general rules of tort liability, as they usually concern situations where no contractual relationship exists between the claimant and the contracting authority.

Accordingly, the standard limitation period is three years, counted from the date on which the injured party became aware, or acting with due diligence could have become aware of both the damage and the identity of the liable party.[797] Determining the starting point of this period may raise interpretative challenges, especially in complex procurement procedures where the damage and causal link not be immediately evident. According to case law, the claimant is considered to have the requisite knowledge when they are aware of the negative consequences of the unlawful act and possess sufficient information to attribute liability to a specific entity with a sufficient degree of probability.[798] This means that a failure to investigate potential wrongdoing does not suspend or delay the commencement of the limitation period.

In addition to the relative three-year term, claims are also subject to an absolute ten-year limitation period, running from the date of the event giving rise to the damage, regardless of the claimant's awareness.

793 Art. 18 § 1 of PlCPC.

794 Art. 18 § 2 of PlCPC.

795 Art. 27–30 of PlCPC.

796 Art. 35 of PlCPC. For contractual disputes, the place of performance of the obligation may alternatively determine jurisdiction (Art. 34 of PlCPC).

797 Art. 442 § 1 of the PlCC.

798 PL: Supreme Court, Order of 30 August 2022, No. I CSK 2960/22. See also PL: Supreme Court, Order of 22 October 2024, No. I PSK 84/23.

In exceptional circumstances where the damage results from a criminal offence (pol. *zbrodnia* or *występek*), a longer limitation period of twenty years applies, starting from the date of the offence irrespective of the claimant's knowledge of the damage and the liable party. While rarely invoked, this extended period may become relevant in cases involving criminal interference with public procurement procedures, such as bid-rigging or the disruption of a public tender as penalized under Article 305 of Act of 6 June 1997 – Penal Code (PlPC).[799]

Attributability of Liability

Civil liability of contracting authorities for unlawful actions or omissions related to the procurement procedure is governed primarily by the general provision of Article 415 of the PlCC, which imposes liability for damage caused by unlawful acts or omissions.[800] In the context of public procurement, such liability may arise from breaches of either procedural or substantive rules governing the procurement process. To succeed in a claim, the claimant must prove the four standard prerequisites of tort liability: (1) an unlawful act or omission attributable to the contracting authority; (2) fault, usually in the form of negligence; (3) actual damage; and (4) a causal link between the unlawful act and the damage suffered.

In cases where the contracting authority has stipulated in the tender procedure that participants are required to submit a bid bond and the contracting authority evades the conclusion of the contract, the claim may alternatively be grounded in Article 704 § 2 of the PlCC. In such a situation, if the claimant seeks only the payment of double the bid bond, they must demonstrate that the contracting authority evades the conclusion of the contract. However, if the claimant pursues compensation, which they are alternatively entitled to, it is necessary to also prove the amount of damage and the causal link between the organiser's evasion and the damage suffered.

799 Act on Penal Code, as amended, Journal of Laws, No. 88, item 554.

800 It is also possible to pursue contractual liability under Article 471 of the PlCC for non-performance or improper performance of a contract, but this presupposes that the contract has already been concluded; thus, it does not constitute a form of private enforcement of public procurement rules.

In each scenario, the burden of proof for these elements of liability lies with the claimant.[801]

In the process of establishing the elements of liability, a prior decision by the KIO may, in some cases, serve as a valuable piece of evidence, particularly with respect to the unlawfulness of the contracting authority's conduct during the procurement procedure. A KIO ruling that is suitable for execution may be granted an enforcement clause pursuant to Article 562 of PlPPA. In such cases, under Article 365 § 1 of the PlCPC, the ruling becomes binding not only on the parties but also on other courts and public authorities, including civil courts adjudicating damages claims.[802] Similarly, if a KIO ruling is challenged before the Public Procurement Court and the court issues a final judgment, that judgment will also have binding effect in subsequent proceedings.[803] However, not all KIO rulings are capable of enforcement and where no enforceability is granted, such decisions do not formally bind the civil court. Nonetheless, even such KIO rulings may support the claimant's position, especially in establishing the unlawfulness of the procurement procedure.

While establishing the occurrence of an unlawful act may, in some cases, be supported by prior findings in KIO proceedings or publicly available documentation, demonstrating fault, damages[804] and causation often proves more problematic, particularly in claims involving lost profits or loss of opportunity. Courts tend to adopt a restrictive approach, requiring a high degree of certainty as to the hypothetical outcome of the procurement process. This is especially visible in cases where the claim is based on the assertion that the claimant would have been awarded the contract but for the contracting authority's unlawful conduct.

In such cases, courts are generally unwilling to infer liability from mere procedural irregularities unless the claimant can demonstrate, with near certainty, that they would have obtained the contract had the rules been followed

801 Article 6 of the PlCC.

802 The binding effect of judgements issued in other cases pertains exclusively to the operative part of the judgement. However, factual findings may be covered by the authority of res judicata to the extent that they individualize the operative part as a judgement of the subject matter of the dispute and define the essence of the given legal relationship (see: Judgement of Supreme Court of 11 February 2014, Case no. I UK 329/13; Judgement of Court of Appeal in Poznań of 7 April 2022, Case no. III Aua 1247/20).

803 Article 365 § 1 of the PlCPC.

804 The difficulties in proving the damages will be discussed in part 3.2.4.

correctly. This standard significantly raises the evidentiary threshold, limiting the practical enforceability of claims, especially in competitive procedures where multiple bids were submitted and the outcome is inherently uncertain.

The attribution of liability is therefore not merely a question of formal legal criteria but also reflects judicial expectations concerning the degree of probative certainty required to attribute responsibility to the contracting authority.

Damage Quantification

Quantification of damages arising from public procurement law violations presents significant challenges due to the nature of such damages and the high evidentiary standards.

Polish law recognizes two categories of compensable damage: actual loss (*damnum emergens*) or lost profit (*lucrum cessans*).[805]

Actual loss typically covers reasonable expenses incurred by an economic operator in preparing and submitting a tender that is subsequently rejected due to the contracting authority's unlawful conduct. This encompasses bid preparation costs, guarantee fees and other expenses directly incurred by contractor in reliance on proper procurement procedures. These costs are usually straightforward to quantify and prove.

Lost profit pertains to the profit a contractor would have earned if the procurement process had been lawfully conducted and the contract awarded to them. This category of damage present significantly greater challenges, as Polish courts set a high evidentiary standard, requiring the claimant to demonstrate with a high degree of probability (not just plausibility) that they would have won the contract absent the procurement violation. This evidentiary standard requires contractors to prove a hypothetical alternative outcome, creating substantial practical barriers for these claims.

Regarding the concept of loss of opportunity (pol. *utracona szansa*) as a distinct category of damage which has gained attention following the CJEU judgment in *INGSTEEL* (C-547/22),[806] Polish law does not expressly recognize this type of damage. [807] Taking this into account and the high evidentiary standard in

[805] Art. 361 § 2 of PlCC.

[806] Judgement of 6 June 2024, *INGSTEEL*, C547/22, ECLI:EU:C:2024:478.

[807] The issue of loss of opportunity is rarely debated in Polish legal literature, see more, SITNIK, Piotr. Searching for a new rationale for compensating loss of a chance in Polish tort law. Lessons

damages claims cases the practical application by national courts of the concept of loss opportunity remains uncertain.

Moreover, quantification is further complicated by the structure of public procurement itself. Competitive tendering by its nature involves multiple contingencies and strategic decisions by various bidders. Establishing a linear causal link between the authority's breach and the claimant's loss, especially where the procurement process has not advanced to the award stage, may prove to be an evidentiary hurdle that claimants might struggle to overcome.

3.3 Procedural law issues

Legal standing and capacity requirements

In cases for damages arising from public procurement law violations, standing requirements for private enforcement actions require that a claimant demonstrate both legitimate interest in the procurement procedure and the potential harm from damages incurred due to the alleged violations. The scope of parties eligible to bring claims may include participating contractors, excluded contractor and in certain cases even potential contractors who did not submit a bid.

Contractors who actively participated and submitted bids possess the clearest standing to pursue damages claims, as they have demonstrated a concrete and direct interest in the outcome of the procurement. Excluded contractors may also have standing, provided they can show that their exclusion was unlawful and that it adversely affected their chance of securing the contract. In terms of legal standing, more complex are cases involving potential contractors – entities that refrained from participating. For these parties, establishing standing requires evidence of both a genuine intention to participate and the capability to submit a qualifying bid. These claims often face significant evidentiary challenges, particularly in proving hypothetical participation scenarios and their possible outcomes.

Moreover, situations in which contractors jointly seek the award of a contract (e.g. concluding a consortium arrangement or a civil law partnership agreement) may create standing complexities as individual participants may

to be learned from England and Wales. *Review of European and Comparative Law*. 2017, vol. 30, no. 3. DOI: 10.31743/recl.4164

have different interests and potential claims arising from the same procurement violations. The legal framework governing such joint participation affects both standing requirements and damages calculations. The contractual arrangements between the participants may also influence these determinations.

Evidence and discovery

The evidentiary framework plays a pivotal role in private enforcement actions seeking damages for infringements of public procurement law. As is typical in civil proceedings, the burden of proof lies with the claimant, who must substantiate each element of liability through admissible and convincing evidence. This requirement, although seemingly straightforward, creates significant practical challenges in procurement-related disputes, particularly due to the fact that the existing discovery mechanisms are substantially limited.

Polish civil procedure does not provide for a discovery phase comparable to those found in common law jurisdictions, where parties are entitled to obtain broad disclosure of relevant documents from one another. Instead, proceedings in this field are largely documentary and adversarial in nature. Each party is responsible for submitting its own evidence and there is no general entitlement to compel the opposing party to disclose potentially incriminating or exculpatory material. This asymmetry may have a chilling effect on legitimate claims, particularly where the claimant does not have direct access to documents in the possession of the contracting authority or competing bidders.

In practice, documentary evidence constitutes the backbone of procurement damages litigation in Poland. Parties typically rely on materials generated during the procurement procedure, such as tender documentation, correspondence with the contracting authority, price justifications or technical specifications. When it comes to documents which are not public, access outside of litigation proceedings is conditioned on general provisions concerning the right to public information. Yet, this route is fraught with limitations as such access can be limited by confidentiality protections, particularly concerning trade secrets.

Within the proceedings themselves, Polish civil procedure permits a party to request that the court order a party or third party to deliver a specific document. However, this mechanism is of limited as the party must identify the document with precision, which presupposes at least some knowledge of its existence and content – a requirement that defeats the very purpose of such procedural tools in situations of asymmetrical information.

In addition to documentary evidence, expert opinions are often indispensable in procurement damage cases, especially in demonstrating the quantum of damages or in dealing with issues such as abnormally low tenders.

Lastly, under Polish procedural rules, evidence should generally be submitted with the initial pleadings. Exceptions exist for instance, where the need to submit evidence arises at a later stage or when the party was objectively unable to do so earlier – but courts interpret these exceptions restrictively. This reinforces the front-loaded nature of litigation and adds another layer of difficulty for claimants operating under informational disadvantage.

Taken together, the limitations of the Polish evidentiary framework, particularly the absence of discovery, constitute an impediment to effective private enforcement of procurement rules. The resulting asymmetry in access to information not only burdens claimants with near-impossible evidentiary expectations but also risks disincentivizing legitimate litigation and undermining the compensatory and deterrent functions of damages claims in public procurement.

4. Consensual Dispute Resolution

Polish public procurement law expressly acknowledges the role of consensual dispute resolution mechanisms in disputes arising from public contracts. Article 591 of PlPPA provides that, in pecuniary matters where a settlement is legally permissible, either party to a public contract may request mediation or another form of amicable resolution. Such a request may be directed to the Arbitration Court at the General Counsel to the Republic of Poland (pol. *Sąd Polubowny przy Prokuratorii Generalnej Rzeczypospolitej Polskiej*), a chosen mediator, or another neutral facilitator. Public contracts may also include clauses on alternative dispute resolution (ADR), but even without one, a consensual procedure may proceed if the other party consents to a request submitted under Article 591(1) PlPPA.

However, this provision applies only where a contract for the performance of a public procurement has been concluded. It does not extend to disputes arising before contract formation or outside the scope of such a contract, including most damages actions based on general civil liability rules. These typically concern alleged breaches during the procurement procedure, when no

legal agreement has yet been made with the claimant. Consequently, although Article 591 PlPPA appears to support ADR, its relevance to private enforcement is limited, especially in cases brought by unsuccessful bidders.

In such instances, only general ADR mechanisms under the PlCPC remain available, such as court-annexed mediation[808] or arbitration.[809] These, however, depend on the parties' willingness and procedural initiative. Moreover, their practical effectiveness is often constrained by the nature of public procurement disputes. Public entities are typically risk-averse in settling disputes due to concerns about breaching the discipline of public finances and potential liability for unjustified settlements. This institutional caution further discourages the use of ADR, even when legally permissible. Furthermore, a practical increase of the use of ADR mechanisms requires not only legal framework but also continued cultural and institutional adaptation, within both public and private sector entities.

To sum up, while the PlPPA formally endorses consensual dispute resolution in post-contract disputes, its practical relevance to private enforcement is limited by both its narrow scope and the structural reluctance of public entities to engage in settlement procedures. The need to rely on general ADR frameworks in pre-contractual disputes highlights the fragmented nature of enforcement and casts doubt on the broader utility of ADR in this field.

5. Case law relevant for private enforcement of public procurement law

For many years, doubts persisted as to whether a contractor seeking to pursue claims arising from violations of public procurement law, including claims for the return of the bid bond, was first required to exhaust the entire appeal procedure before the KIO and, if unsuccessful, proceed with a complaint to the Public Procurement Court. In civil cases concerning the return of the bid bond, the case law was divided: while in some cases courts held that exhaustion of

808 Articles 183–183 of the PlCPC.

809 Articles 1154–1217 of the PlCPC.

the KIO procedure was a prerequisite,[810] others adopted a different approach.[811] This uncertainty created a significant procedural obstacle and disincentivised private enforcement, particularly in time-sensitive or lower-value cases. A significant change occurred with the Supreme Court's landmark resolution of 25 February 2021 (III CZP 16/20),[812] which unequivocally confirmed that a contractor may pursue damages directly before a civil court, without the need for a prior final ruling of the KIO or a judgment of a court reviewing such a decision. Even though the judgement was issued under the previous legislation governing public procurement in Poland before PlPPA entered into force, it remains relevant under the current legal framework.[813]

This resolution clarified that the civil liability regime for procurement-related breaches operates autonomously and does not depend on the outcome or even initiation of administrative review proceedings. The Supreme Court thus reinforced the dual-track nature of procurement enforcement, whereby public and private remedies coexist and may be pursued independently, subject to general principles of civil law.

However, the Court also indicated that a failure to challenge the contracting authority's decision before the KIO may be relevant when assessing contributory fault under Article 362 of the PlCC. A claimant who had the opportunity to challenge an unlawful action or omission via the administrative route but voluntarily refrained from doing so may be deemed to have failed to mitigate their loss. In such cases, the amount of damages awarded may be reduced accordingly. This creates a functional link between public and private enforcement: while access to civil remedies is not formally conditioned on exhausting administrative remedies, the claimant's procedural behaviour in the earlier stages of the procurement process remains legally relevant.

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[810] PL: Supreme Court, Order of 7 May 2010, No. V CSK 456/09; Supreme Court, Order of the of 27 November 2014, No. IV CSK 115/14; Court of Appeal in Kraków, Judgment of of 12 July 2016, No. I Aca 340/16; Regional Court in Szczecin, Order of 21 December 2016, No. VIII Gz 218/16.

[811] PL: Supreme Court, Judgement of 11 May 2012, No. II CSK 491/11; Supreme Court, Order of 12 February 2014, No. IV CSK 291/13.

[812] See PL: Supreme Court, Resolution of 25 February 2021, No. III CZP 16/20.

[813] On this judgement see more: SIWIK, Robert. Repair of procurement damage: discussion on the basis of the supreme court's Resolution of 25 February 2021 (III CZP 16/20). *Contemporary Central & East European Law*. 2023, no. 2 (134). DOI: 10.37232/cceel.2023.03.

In effect, the resolution strikes a balance. It affirms the autonomy of private enforcement while encouraging diligent and timely exercise of procedural rights under the public enforcement regime. Contractors remain free to choose their enforcement path, but the consequences of that choice (particularly in terms of potential reduction of compensation) cannot be disregarded.

6. Private enforcement cases

Private enforcement of public procurement law remains underdeveloped in Poland. Despite the formal availability of civil remedies, including claims for damages, such actions are relatively rare in practice.

A precise assessment of the volume of private enforcement of public procurement law cases in Poland is inherently difficult. Such disputes are adjudicated by civil courts dispersed throughout the country and there is no dedicated case category or registry that would allow for systematic identification and tracking of procurement-related damages claims. As a result, available data is fragmentary, and the true scale of private enforcement remains largely unknown.

Where such cases are brought, they most commonly concern situations in which the contracting authority unlawfully refuses to conclude a contract with the winning bidder. These cases typically involve demands for the return or doubling of the bid bond[814] or claims for damages – usually based on Article 704 § 2 of the PlCC. It has been clarified in the case law that the contractor who won a public tender but did not conclude the contract due to the fault of the contracting authority may claim compensation covering not only actual loss but also lost profits.[815]

Notably, in at least one reported case, civil liability was successfully established against another tenderer who submitted a false declaration, which in turn led to the exclusion of the claimant. The court found that this conduct gave rise to tort liability and awarded damages.[816]

814 PL: District Court in Gdańsk, Judgment of 25 May 2017, No. XII Ga 191/17.

815 PL: Supreme Court, Judgment of 14 January 2016, No. IV CSK 226/15; Court of Appeal in Katowice, Judgment of 24 January 2022, No. V AGa 350/21; District Court in Warsaw, Judgment of 18 December 2023, No. XXV C 250/21.

816 PL: Court of Appeal in Gdańsk, Judgment of 31 January 2017, No. V Aca 268/16.

In practice, the damages cases are procedurally demanding. They often require complex evidence, including expert opinions and detailed reconstructions of hypothetical contract performance scenarios.

7. Evaluation of the environment for private enforcement of public procurement law

The current legal and institutional framework for private enforcement of public procurement law in Poland remains underdeveloped and functionally constrained. While civil liability for procurement violations is formally recognized, effective enforcement is hindered by multiple systemic barriers.

Substantively, the high evidentiary threshold, particularly for lost profit claims, imposes a significant burden on claimants, who must prove a counterfactual procurement outcome with near-certainty. The non-recognition of loss of opportunity as an independent damage category further narrows the scope of recoverable harm.

Procedurally, claimants face severe informational asymmetries due to the absence of effective discovery instruments. Access to crucial documents held by contracting authorities or competitors is limited and front-loaded evidentiary requirements discourage litigation. Additionally, the formal possibility of ADR remains largely theoretical in pre-contractual disputes, as public entities display institutional reluctance toward settlements.

Although the Supreme Court's resolution in case III CZP 16/20 affirmed the autonomy of private enforcement, the practical impact has been muted. Follow-on litigation remains rare, indicating that formal rights are not translating into accessible remedies.

Taken together, the environment for private enforcement is characterized by legal fragmentation, procedural rigidity and institutional inertia.

8. Suggestions for further development

Improving the environment for private enforcement of public procurement law in Poland requires a combination of legislative and cultural changes.

First, there is a pressing need to introduce targeted disclosure mechanisms that would mitigate the current evidentiary imbalance. Enabling claimants to access key documents held by contracting authorities or competitors under judicial control could enhance the fairness and efficiency of damages litigation.

Second, Polish law should explicitly recognise loss of opportunity as a category of compensable damage. As the PlCC currently limits compensation to actual loss and lost profit, this change would require legislative amendment. Such a reform would reflect the growing relevance of probabilistic harm in public procurement contexts and ensure greater alignment with developments at the EU level.

Third, reforms are needed in the methodology used to assess the quantum of damages, especially in cases involving lost profit or loss of opportunity. Courts should be equipped to engage with probabilistic models of harm and economic counterfactuals. Achieving this requires not only legislative changes but also ongoing training and capacity-building for judges handling procurement-related cases.

Fourth, greater emphasis should be placed on the use of ADR. While ADR is formally available, its practical uptake remains minimal. Addressing this gap requires both legal facilitation, such as clarifying the liability framework for public officials engaging in settlements, and a broader cultural shift within public institutions, where risk aversion and fear of accountability often discourage amicable resolution.

Finally, any meaningful reform must also address the wider challenges facing private enforcement in Poland. The difficulties observed in procurement litigation, such as high costs, long duration and uncertainty as to the result of the claim, are symptomatic of deeper systemic issues affecting civil justice as a whole. Strengthening private enforcement thus requires broader efforts to streamline proceedings, reduce costs and enhance judicial efficiency. Importantly, high-profile, successful damages claims could play a catalytic role in legitimizing private enforcement and encouraging greater recourse to civil remedies across the board.

9. Summary

Private enforcement of public procurement in Poland operates within a fragmented legal framework that seems to prioritize public oversight over civil remedies. While the KIO provides effective first-tier enforcement for substantive law and procedural violations, the private damages system remains underdeveloped and presents significant barriers to successful claims.

The current system's effectiveness is limited by high evidentiary standards, lack of specialized procedures and insufficient coordination between different enforcement mechanisms. Market participants face particular challenges in quantifying damages.

Key reform priorities should focus on developing specialized civil procedures for procurement disputes, providing clearer guidance on damages quantification and expanding ADR mechanisms. Enhanced coordination between administrative and civil enforcement tracks would improve overall system coherence and effectiveness.

The evolution toward more robust private enforcement requires both legislative reforms and cultural shifts within the legal profession and public administration. Success will depend on addressing existing barriers while building on the strong foundation provided by existing public enforcement mechanisms.

CHAPTER 12

The eye of the beholder. Private enforcement of public procurement law in Romania

by

Monica A. Rațiu* and Simona Gherghina**

1. Introduction

With a significant practice of private enforcement in the public procurement area, Romania has adopted national regulations that are transposing the European rules on remedies, yet several of such provisions may prove inefficient as their lack of clarity usually results in the limitation of claims that may aim to remedy breaches of public procurement rules. Moreover, a constant perspective adopted by the public authorities leads to perceiving the claims submitted against public contracts awards procedures as the main obstacle for the timely completion of public investment projects and, consequently, pleads for further restrictions applicable thereto.

Our analysis shall focus on several areas of uncertainty and incompleteness of the regulations concerning remedies in public procurement, especially their effects on private enforcement of public procurement rules and include an outline of some solutions that may contribute to the increased efficiency of such private enforcement mechanism under Romanian law. Chapter two outlines the national Remedies Law provisions under review, while chapter three covers key aspects of the remedies' framework and the effects of ambiguous legal rules. The fourth chapter provides an overview of the private enforcement cases at the level of the National Council for Solving Complaints, the jurisdictional body that reviews most of the claims pertaining to public award procedures, and the fifth and sixth chapters are evaluating the current legal framework of private

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enforcement in the public procurement domain and further propose certain solutions for increasing its efficiency.

2. Legislative framework

The two RemD have been incorporated into a dedicated law, respectively Law no. 101/2016 on remedies (hereinafter „the RoRemL"). In addition, separate laws have also been enacted in 2016 to transpose the classic directive[819], the utilities directive[820] and the concessions directive[821], without many significant additions meant to adapt their provisions to the national legal system.

Although providing a specific procedure for the claims aimed at enforcing remedies in public procurement, the provisions of the RoRemL are to be further completed by the law on administrative disputes, the RoCC[822] and theRoCPC[823], as a back-up by laws of general application that is applicable to all special regulations enacted in specific domains. The main particularity of the special review procedure of acts issued by the contracting authorities thus regulated by the RoRemL[824] resides in the choice permitted to any person having a legitimate interest for pursuing such procedure between submitting its claim to a special jurisdictional body, the National Council for Solving Complaints (NCSC), or to a court of law (tribunal). Nearly two decades of practice show most prefer the specialised jurisdiction due to its expertise in public procurement, faster procedures, and lower costs from no court fees.

However, despite a generally accurate transposition of the RemD principles and rules, the RoRemL continues to include several areas that prove to be incomplete or inadequately adapted to the overall legal system, thus leading to practical challenges and misapplication. Such areas include unclear rules pertaining to the possibility for the courts to declare a procurement contract as null

819 Law No. 98/2016 on Public Procurement, as amended, Official Monitor No. 390.

820 Law No. 99/2016 on Sectoral Public Procurement, as amended, Official Monitor No. 391.

821 Law no. 100/2016 on Concesion Contracts for Works and Services, as amended, Official Monitor No. 392.

822 Law No. 287/2009 Civil Code, as amended, Official Monitor No. 505.

823 Law No. 134/2010 Civil Procedure Code, Official Monitor No. 247.

824 Law No. 101/2016 on Remedies, as amended, Official Monitor No. 393 Article 68.

and void, as well as the statutes of limitation for such nullity claims, the provisions imposing to the contracting authorities to mandatorily sign the procurement contract once a claim submitted against the result of the award procedure is rejected by a first-instance ruling, the lack of specific rules concerning the evidences that may be accepted in litigation, or the practice of certain contracting authorities largely extending the domain of bid confidentiality thus severely limiting the bidders' capacity to seek effective remedies.

Aiming to cover all possible grounds for declaring the nullity of public procurement contracts, the RoRemL transpose the concept of ineffectiveness[825], to which it adds any other causes of absolute and relative nullity according to civil law[826]. However, the law fails to provide derogatory rules pertaining to the effects of contract nullity, especially in cases when the ground for nullity is a general one, regulated by the RoCC. The main consequence is that, for the most serious grounds that may result in absolute nullity, the RoRemL provides relatively short limitation periods for claims and allows for the possibility of partially maintaining the contract in force (in line with the framework set by the RemD), whilst for less grave situations, the national civil law regime is much more severe in case of contract nullity. Serious grounds of nullity, such as an illegal award or modification of a public contract, may be thus overpassed, leaving the public contract not affected, whilst more general grounds, common to all contracts, such as irregularities of the representation powers of a party, may trigger the nullity of the contract.[827]

Another stipulation of the RoRemL that may limit its practical application concerns the point in time from which the six-month period for submitting a claim to declare the contract null and void, in cases of direct illegal awards, is to be calculated. The moment indicated by Article 60, that is the publication date of the award notice, most likely will pass unnoticed or will even not occur at all, as the public authority may not issue such an announcement because it deems the contract as not having a public nature. The most serious breach of the public procurement rules may thus be easily left unsanctioned.

825 Article 58, 58 and 58.

826 Article 53 RoReml.

827 RAȚIU, Monica Amalia and Marian NICOLAE. Nulitatea contractului de achiziție publică mascat într-un alt tip de contract. In: *Actul juridic în Noul Cod civil*. București: Editura Solomon, 2020.; RAȚIU, Monica Amalia. *Dreptul achizitiilor publice. Curs pentru studentii anului 2*. București: Universul Juridic, 2025, p. 279. et seq.

To reduce procurement contract delays caused by claims against award decisions, the RoRemL was amended in 2021[828] to require contracting authorities to execute contracts once a first instance decision confirms the award (Article 9, paragraph (4)). However, this obligation seems to disregard the provisions of Article 34 of the same law, which entitle the Court of Appeal to overturn the first instance decision issued by the NCSC or the tribunal. This framework enables the possibility for such decision of a Court of Appel to cancel an already signed contract even if Article 582 seems to induce the conclusion that in such cases the claimant that lost in first instance may ask only for damages. Failure to correlate these provisions brings high uncertainty in practice, resulting in several cases of contracting authorities requiring the winning bidders to accept in the procurement contract (signed after a rejection by the NCSC of the challenge directed against the result of the award) a resolutory condition stating that the contract will be automatically terminated in case the Court of Appeal subsequently admits the challenge against the NCSC decision.

An ongoing issue preventing equitable decisions especially on technical elements of the bid arises from the long-standing practice of the NCSC to never accept expert reports and only rarely organise witness hearings. Such reluctance concerning these types of evidence is usually justified by the time constraints imposed by Article 24 of the RoRemL, which requires the NCSC to issue a decision within 20 days from receiving the complete public procurement file. Accordingly, NCSC generally relies on documents available upon registration of the claim against the award procedure. Furthermore, pursuant to Article 31 paragraph (3) of the same law, in case the decision issued by NCSC is challenged before the Court of Appeal, only the evidence presented before NCSC may be considered in this second stage. Consequently, a bidder challenging the outcome of the award procedure may be precluded in both first instance and in appeal from submitting expert opinions, witness testimony, or cross examination to contest the accuracy of technical aspects or other elements submitted by a competitor. This regulation is also inconsistent with the RoCPC, which allows the submission of new documents at any time provided they are relevant, and enables parties to present any evidence deemed useful to the case. A significant consequence of this limitation included in the RoRemL concerns the technical proposals submitted by third countries bidders, as failure to use laboratory or

[828] Amended by Government Ordinance No. 3/2021 for amending and supplementing certain normative acts in the field of public procurement, Official Monitor No. 821.

expert evaluations in respect of technical elements of the bid prevents other bidders from adequately proving that products or technologies from third countries may not meet EU standards.

One of the uncertainties nested by the RoRemL that has thwarted practical effects is the one related to the regime of confidential information. Article 19 provides only limited guidance on the general definition of confidential information and the responsibilities of bidders to identify confidential documents. Recent EU case law[829] addressing this sensitive subject has not been incorporated into the relevant legislation. Consequently, certain contracting authorities and the case law of both NCSC and national courts have established a practice against the intended objectives of European regulation on confidentiality. Specifically, once a bidder marks the entire bid, all submitted documents included, as being confidential, the contracting authority often accepts to treat them as such and further denies the other bidders access to any such documents, irrespective of the bidder's failure to substantiate such alleged confidentiality. Being denied any access to the details of the announced winning bid, the other bidders may only submit challenges "in blind", raising a variety of possible general objections. Upon review of such general claims, the NCSC or the court shall have access to the entire procurement file and may further identify a valid reason for dismissing the award and order a re-evaluation of the bids.

Another sensitive aspect concerns the manner in which contracting authorities interpret the role of the security deposit, the guarantee[830] that must be provided by the economic operator when submitting a claim to the NCSC[831]. The regulation of the security deposit was initially meant to discourage frivolous claims. Over time, however, various official statements indicate a broader objective of the public sector to reduce litigation about public procurement overall, not solely those cases initiated with vexatious intent. An examination of the explanatory memorandum,[832] accompanying the government ordinance[833] that

829 Judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C927/19, ECLI:EU-:C:2021:700; Judgment of 17 November 2022, *Antea Polska and Others*, C54/21, ECLI:EU-:C:2022:888.

830 The security deposit is determined according to the estimated value. For contracts involving substantial amounts, the deposit may be as high as 500,000 euros.

831 Article 61[1] of the RoRemL.

832 https://gov.ro/fisiere/subpagini_fisiere/NF_OUG_45-2018.pdf .

833 Emergency Government Ordinance No. 45 for amending and supplementing normative acts with an impact on the public procurement systém, Official Monitor No. 459.

introduced the most recent amendments concerning the security deposit reveals that the legislator generally deems challenges to the contract award report to be unjustified. The memorandum notes: "*At the same time, considering the high number of unfounded challenges submitted by interested economic operators (…) which have led to the extension or cancellation of certain award procedures (…)*". The perception that challenges resulting in the prolongation of the award process and the annulment of certain award reports should be discouraged through the implementation of substantial security deposit is frequently reflected in public discourse of senior government officials.[834] Such views often attribute shortcomings in the execution of public procurement procedures to economic operators exercising their right to remedies.

Following this approach, some contracting authorities decide to request the retention of the security deposit in all cases, in connection with all challenges, regardless of whether they were accepted or not, or whether the authority incurred any damages further to such challenges. However, the courts reject such requests in most cases. As an example, we can refer to a segment of Bucharest bypass works contract, whose award process took over four years due to repeated evaluation errors. Nevertheless, after awarding the contract, the contracting authority still delayed the execution of the contract, forcing the economic operator to seek a court order to compel the signing of the contract. Despite being obligated by the court to execute the contract, the authority opened a new court file claiming the retention of the security deposit. Both the tribunal and the court of appeal denied this request, ordering that the deposit be returned to the economic operator[835].

3. Types of private enforcement measures

3.1 Competent courts and types of claims

The RoRemL establishes a two-tiered system of jurisdiction in matters of public procurement.

834 https://agendaconstructiilor.ro/files/oportunitati-comunicate/achizitii-cautiune-de-2-din-valoarea-contractului-la-depunerea-contestatiilor.html.

835 RO: Tribunal in Bucharest, Decision 284/2024 of 7 February 2024, No. 29835/3/2023; Court of Appeal Bucharest, Decision 163/2025 of 14 March 2025.

The competent bodies to solve claims in first instance (depending on the choice of the claimant and the nature of the claim) are the NCSC and the tribunal[836]. The appeal against the decision issued by any of these jurisdictional or judicial bodies is to be reviewed by the Court of appeal[837]. In both tribunals and Court of Appeals, the competence belongs to the section of Administrative and Fiscal Disputes.

The provisions of RoRemL are further supplemented by the RoCPC[838]. Under this code, a limited number of extraordinary appeals may be lodged, mainly for specific procedural reasons.

Claims during the award procedure

During the public procurement award procedures, economic operators have the right to challenge administrative acts and ask for interim measures, before either the NCSC, which functions as an administrative-jurisdictional body, or before the tribunal, at the discretion of the claimant.

In addition, the law regarding administrative disputes[839] provides for an extraordinary means of appeal. Such an appeal is available only in cases where definitive decisions were made without applying the relevant EU rules or applicable EU case law. The Court of appeal is also competent to review this extraordinary appeal. Importantly, this form of appeal cannot be used to challenge the interpretation of EU law by the previous courts; it is limited solely to situations where no reference was made to EU regulations or the EU case law, and such rules are applicable to the case.

Claims during contract performance

The economic operators have the right to submit claims related to the contract's execution. These claims can be brought before either the arbitration court or the competent tribunal, depending on the contractual provisions in place. NCSC holds no competence in respect to such claims relating to the execution, interpretation, termination or nullity of public contracts.

836 Article 8, Article 49 (2), Article 53 RoRemL.

837 Article 32, Article 51(3)

838 Article 68

839 Law No. 554/2004 on Administrative disputes, as amended, Official Monitor No. 1 154, Article 21.

In case of application of an arbitral clause, any decision reached by the arbitration court may be challenged through an action for annulment under Article 608 of the RoCPC, but only for certain prescribed reasons. These include matters such as the validity of the arbitration agreement, the constitution of the tribunal, the proper summoning of the parties, or the failure to adjudicate certain claims.

Judgments delivered by the tribunal in first instance may be contested before the court of appeal. These judgments may also be subject to extraordinary means of appeal for a limited number of procedural reasons, as provided by the RoCPC.

Claims for damages by third parties

Any person proving a legitimate interest can submit to the tribunal a claim for declaring a public procurement contract as null and void and further claim damages. The Court of appeal handles appeals against such judgments, with the possibility of further extraordinary means of appeal under the general civil procedure law.

If an economic operator challenges the award procedure report (which designates the winning bidder) before the NCSC or the tribunal and the challenge is dismissed, the contracting authority must proceed to sign the contract, regardless of the initiation of other means of appeal. Should the court of appeal subsequently uphold the operator's complaint against the Council's or the tribunal's decision, the operator may further seek damages. Such claims for damages are made before the tribunal, with further appeal to the Court of appeal. Again, extraordinary means of appeal may be initiated, as provided for under the general civil procedure law.

3.2 Substantive law issues

Limitation periods

The time limit for challenging administrative acts issued during the award procedure is 10 days (if the estimated value exceeds the threshold) or 7 days (if the estimated value is below the threshold).

The standard limitation period for claims concerning damages arising from the award procedure is one year, while claims related to the execution of the contract are subject to a three-year limitation period[840].

The time limit for initiating proceedings to declare a contract null and void due to issues related to the transposition of the concept of ineffectiveness[841] is 6 months or 30 days from the publication of the award notice, depending on some conditions. Some issues that may trigger the nullity of the contract according to the local civil law are not subject of any statute of limitations or have a statute of limitation of 3 years.

Attributability of liability

According to the RoRemL, economic operators may claim damages from the contracting authority for losses incurred both during the award procedure and throughout the execution of the contract, without the special law outlining any exceptions to the general legal principles.

Pursuant to the general civil law rules, an economic operator who petitions for the annulment of a public contract concluded with another operator may also pursue compensation for damages, provided it can substantiate the existence of such damages.

Damage quantification

As a rule, the RoRemL does not contain provisions regarding the quantification of damages but only provides the general right to claim compensation in connection with the award and execution of the contract[842]. These aspects are regulated by the general rules of civil and administrative law.

By exception, Article 53(6) addresses a particular type of damage claim, respectively the compensation for losses incurred from costs related to preparing a tender and participating in an award procedure. The injured party must prove the existence of loss, a breach of the public procurement legislation and that a genuine opportunity to obtain the contract was adversely affected by such breach. Compensation for loss is restricted to the costs incurred in preparing the bid and taking part to the award process.

840 Article 53 (8).
841 Article 60.
842 Article 1 (2).

3.3 Procedural law issues

As previously mentioned, the RoRemL expressly regulates the right to compensation of any operator who obtains a decision from the Court of appeal establishing that the judgment of the first instance—by which the procedure outcome was upheld, and the signing of the contract was permitted—is not lawful.

A review of case law demonstrates a reluctance to pursue claims for damages arising from administrative actions during the contract award procedure. In some cases, parties seek reimbursement solely for attorney fees.

The situation is different in case of contract performance. In relation to the performance of complex works contracts, there is a constant practice of claiming and obtaining various types of compensation, especially before arbitration courts. Public procurement contracts that incorporate an arbitration clause are drafted similarly to FIDIC contracts models, enabling the pursuit of compensation and damages in accordance with international practice. There is also substantial case law addressing the recovery of damages in local courts under contracts that are less complex than FIDIC-type agreements. Judicial decisions are rendered in accordance with contractual provisions and general principles of civil law, including unjust enrichment.

As already mentioned, in instances where procurement contracts are disguised as other contractual forms and executed directly, it is generally improbable to pursue ineffectiveness due to a legislative ambiguity. The RoRemL specifies that such actions must be initiated within six months from the date of publication of the award notice. Nevertheless, in these cases, the contracting authority typically refrains from publishing an award notice because the contract is not acknowledged as a public procurement contract.[843]

There is no established case law regarding claims for damages resulting from the loss of an opportunity to conclude a public procurement contract. Economic operators avoid such claims due to several factors, including the challenges associated with demonstrating the interest and quantifying damages under the civil law principles, as well as the prohibitive court fees required to initiate these proceedings.

[843] GHERGHINA, Simona. Capcanele interpretării sau despre stabilirea competenței materiale a Consiliului Național de Soluționare a Contestațiilor în privința calificării contractelor publice. Comentariu la decizia CNSC nr. 824/2019. *Dreptul*. 2019, no. 8.

Article 1385 of the RoCC provides several dispositions regarding damages. As a rule, damage must be fully compensated, unless otherwise provided by law. It is possible to award compensation for future damage if its occurrence is certain. The compensation must cover the effective loss, the profit that could have been realised under normal circumstances and of which the person has been deprived, as well as the expenses incurred to avoid or limit the damage.

Article 1385, paragraph (4), specifically allows for compensation for damages arising from the loss of an opportunity to secure a benefit, stipulating that such compensation shall be proportional to the certainty of obtaining that advantage. Proving the certainty of such damage is not easy to achieve. For this type of damage to be considered certain multiple conditions must be met, including that the chance to sign the procurement contract must be real and serious, and the loss of the chance must be the direct consequence of the unlawful act. Under Romanian civil law, not any lost chance, regardless of its probability, automatically leads to the awarding of compensation.

4. Private enforcement cases

The most significant practice of private enforcement in the public procurement area is placed with the cases reviewed by the NCSC. Not only the number of cases submitted directly to courts is less significant, but also their identification in the public records is not so direct as in the case of NCSC.

As described by the Annual Reports published by the NCSC, the number of cases submitted to this jurisdictional body is fairly increasing on an annual basis, with 4,529 claims submitted in 2024 by various economic operators, a 23,47% increase compared to 2023. The total estimated value of the contract award procedures subject to these cases was 28.548.484.964 Euro.

This number is to be assessed against the 32,491 procurement procedures initiated in 2024 in the Electronic Public Procurement System (SEAP). According to SEAP, from these procedures were completed at the end of 2024, 25,359 procedures (78,05%), whilst 6,120 (18,84%) were annulled by NCSC or the courts.

From the 4,529 complaints submitted to NCSC, 25,48% (i.e. 1,154 complaints) were filed against award procedures financed from EU funds (amounting

to 11,953 procedures in 2024) and 74,5% (i.e. 3,375 complaints) were directed against procedures financed from national budgets. For the entire duration since its creation in September 2006 and up to the end of 2024, NCSC solved a total number of 85,189 cases, with a monthly average of approximatively 351 cases, which pictures a quite active private enforcement environment.

To speed up the procurement award procedures and especially the EU-funded investment projects, the RoRemL require a security deposit based on a percentage of the claim's value as a condition for submitting the claim to NCSC. Up to this moment, such security deposit continued to be the preferred legal tool for eventually reducing the number of challenges filed against the award procedures. However, its efficacity failed to be confirmed, as the number of such challenges submitted to NCSC continuously increased over the past 10 years. The reason for this inefficacy, that resulted also in a constant case-burden placed on NCSC, was identified by the 2024 NCSC Annual Report as being the failure of the contracting authorities to require compensation of damages caused by the claims, to be further awarded from the security deposit. As of 2025, an increasing practice emerged as the contracting authorities started to submit to NCSC substantiation of damages incurred due to the delay caused by the claim submitted by the economic operator/bidder and thus require their compensation from the security deposit that accompanied the claim.

According to the NCSC Annual Reports, a constant distribution of the complaints filed by the economic operators is maintained as concerns their object, with over 20% directed against the tender documentation and over 70% against the result of the award procedure (i.e. for 2024, 1,036 complaints, being 22,87%, against the award documentation and 3,493, that is 77,12%, against the result of the award). The complaints filed against the tender documentation are usually challenging restrictive qualification criteria, such as those concerning the professional capacities required for the bidder, its economic and financial situation, similar previous expertise, etc.) as well as the award criteria (deemed in several cases to be irrelevant or determined as a result of unclear or subjective algorithm) and the restrictive technical specifications (including here incomplete or unclear answers given by the contracting authority to clarification requests). Complaints are also filed in respect of inequitable or excessive contract provisions, failure to divide the contract into lots and other various elements[844].

[844] A more detailed breakdown of the elements in the award documentation that were challenged

Most of the complaints filed with NCSC against the result of the award procedure are challenging the decision of the contracting authority to reject a bid as nonconform or inacceptable or various issues concerning the bid guarantee. Other common reasons are related to the nonconformities attached to the bids submitted by the other bidders, the annulment without a legal reason of the award procedure, the rejection of bids without any attempt by the contracting authority to require clarifications, etc[845].

The geographical distribution of challenges is also constantly marking the capital city, Bucharest, as the source of the most complaints, followed by other major cities. Not only the larger budgets are allowing a larger number of public procurement procedures, but also in these cities are located the most important contracting authorities. Moreover, the complaints filed by the economic operators are evenly distributed among supply, services and works procurement contracts[846]. The rise in complaints about work procurement awards is directly related to the increased number of such procedures resulting from the national Recovery and Resilience Plan project implementation.

In addition, apart from filing complaints against the award procedures, economic operators are also referring to the provisions of the RoRemL, namely its article 17, and file voluntary intervention requests for the benefit of one of the parties of the principal claim. According to the 2024 NCSC Annual Report, 1,143 requests for voluntary interventions were filed in 2024. They mainly aimed to support the contracting authority's stance and preserve existing award documentation or its results.

It is not unusual that several claims are submitted against one contract award procedure, challenging the award criteria or other elements of the documentation, and also further challenging the result of the award. All complaints submitted by various economic operators against the same procedure are reunited in a single case and solved together by NCSC within a single decision.

NCSC maintains over the years a good ratio of its decisions upheld by the Courts of Appeal, with also a low proportion of its decisions being further challenged in Courts. For 2024, only 995 out of 3.683 NCSC decisions were challenged before the competent Courts of Appeal, and from these 995 challenges

as well as examples of decisions are described in NCSC 2024 Annual Report, pp. 23-31.

845 *Ibid*, pp. 32-41.

846 NCSC 2024 Annual Report, p. 21.

159 were submitted by contracting authorities. Most of these challenges – 679 were rejected by the courts, 104 were admitted in full and 110 admitted partially, mostly by recognising the right of the economic operator to be reimbursed judicial expenses, whilst for102 a court decision was not yet issued by the end of 2024[847]. Consequently, a very high ratio of 81,6% of NCSC decisions becoming definitive and irrevocable (that is, 3004 out of 3.683 decisions for 2024) was achieved, in line with those from the previous years.

From a more general perspective, encompassing the entire activity period of CNSC (2006-2024), only 2.139 decisions were annulled/modified or rejected in full by the Courts of Appeal, out of 74.754 decisions issued over this period, leading to 97,13% of NCSC decisions which were not challenged or, if challenged, not rejected in full by the courts.

5. Evaluation of the environment for private enforcement of public procurement law

As resulting from the NCSC Annual Reports, the number of complaints submitted against both the award documentations and the result of the award procedure is constantly increasing on an annual basis, especially since 2015. However, the highest number of decisions was attained in 2009 (7,360), with a slow annual decrease to 3.758 in 2014.

The result of such challenges is balanced between admission and rejection decisions, thus not supporting the recurring claim that the private enforcement procedures should restrained as most of the complaints are not grounded and are merely aiming at preventing the contracting authority to execute the contract with the winning bidder. In 2024, the 3,683 decisions issued by NCSC were divided into 1,563 decisions admitting the complaints (42,43%, having a total value of 12.310.080.491 Euro) and 2,120 decisions rejecting the complaint (57,56%, having a total value of 15.826.841.449 Euro), including in the latter those files where the complainant renounced its claim or the rejection was based on a procedural exception and not on merit.

[847] NCSC 2024 Annual Report, pp. 54-55.

Furthermore, it is to be noted that in most cases when the NCSC admits the complaint, the decision imposes remedies to the award procedure, that are to be implemented by the contracting authority. The award procedure is annulled by the NCSC only in a very limited number of cases[848]. From its annual reports, a constant interest may be noted for maintaining a fair balance between the legal requirements of private enforcement in public procurement and the concern for not hindering the award procedures, especially in times when recurrent political declarations blamed the failure to complete major investment projects or to obtain EU funding on the delays imposed by private enforcement of procurement rules.

Moreover, the last years have marked an increase in the number of complaints directed against the award documentation, which highlights a continuous failure of the contracting authorities to adapt their practices to the evolving interpretation of the relevant public procurement regulations, as developed by the jurisprudence of both NCSC and national courts.

Although NCSC has made constant efforts to relate to European jurisprudence in the reasoning of its decisions, the high ratio of its decisions that are upheld by the courts in case of challenge may be a result of the increased specialisation of the public procurement legal domain and the failure of the courts to keep up with its pace.

However, the persistence of unclear provisions in the RoRemL may serve as a ground for impending the claims against the various elements of a contract award procedure. As long as the bidders may be allowed by the contracting authorities to declare their entire bid as being confidential and thus to preclude the access of the other bidders in order to review its compatibility with the criteria in the award documentation, or the bidders challenging technical elements are not allowed to submit expert reports as evidence of their allegations, the law only provides a limited extent for the private enforcement of public procurement rules. The correction of such limitations, through additional details or guides of good practice may contribute to a better legal environment for the private enforcement and thus to an increased efficiency of public procurement rules.

[848] In 2024, out of 1,569 decisions that admitted the complaint, only 59 decided the annulment of the procedures, whilst 1,510 imposed remedy measures to the contracting authority.

6. The end of the concept of private enforcement as an abuse of law

In our opinion, in addition to the improvement of the unclear provisions in the RoRemL and the suppression of wrongful practice caused by misinterpretation of applicable European and national regulations concerning remedies, the most effective change that may contribute to a clarification of the national legal regime of public procurement and its private enforcement would have to concern the legislator.[849] Much too often, the possibility opened to the persons having a legitimate interest to challenge a public contract award procedure is not perceived as a specific application of the constitutional principle allowing the citizens to challenge in courts the acts issued by the authorities, but, on the contrary, as a form of abuse of rights aimed at disrupting the activity of the public administration.

However flawed this perspective may be, it is used as a reason for adopting legal provisions aimed at limiting the claims that may be filed against public contract award procedures or for similarly limiting practices of contracting authorities.

Nevertheless, in our opinion, the challenges brought by bidders to the award procedures and to their result are a useful tool allowing the contracting authorities to use bid documentations that are observing the applicable regulations, to make decisions that are both legal and efficient and to reduce the subjective grounds of such decisions. Instead of concentrating its efforts on the limitation of claims that may be filed against the public contract award procedures, the legislator should aim at the clarification and transparency of regulation and practice pf public procurement.

[849] For critical analyses of the Romanian public procurement regulation and practice, RAȚIU, Monica Amalia. *Contractul de achiziție publică: regimul juridic aplicabil atribuirii contractului*. București: Universul Juridic, 2022, pp. 30–36, 93, 115–118, 139–170, 175–187, 206, 238–252, 263–271, 289.

7. Summary

Romania's RoRemL transposes the European directives on public procurement remedies, supplemented by the Law on administrative disputes, Civil Code and Civil Procedure Code. It offers claimants a choice between the NCSC and tribunals, with most favouring the NCSC due to its expertise, speed, and lower costs. Appeals against such first-instance decisions are reviewed by the Courts of Appeal. Security deposits are required for claims, but their effectiveness in deterring frivolous challenges remains questionable.

Limitation periods for challenges and damages claims vary, with contract execution disputes often resolved through arbitration. Damages can be claimed for losses incurred during both the award and execution phases, though quantification follows general civil law principles. Compensation for loss of opportunity is possible but difficult to prove under Romanian law. Despite generally accurate transposition of EU principles, the law presents ambiguities and gaps – particularly regarding contract nullity, limitation periods, evidence admissibility, and confidentiality - which complicate enforcement and sometimes hinder effective redress.

Private enforcement in Romania is dominated by cases reviewed by the NCSC, which sees an increasing volume of complaints. Most NCSC decisions are upheld by the courts, demonstrating both the body's expertise and the stability of its rulings. The enforcement environment is marked by a growing number of complaints, especially against award documentation, reflecting a persistent gap between contracting authorities' practices and evolving procurement jurisprudence. While the NCSC strives to balance enforcement with procedural efficiency, unclear legal provisions continue to limit bidders' ability to challenge procurement procedures effectively. Improvements in legislative clarity and best practice guidance could enhance private enforcement and overall public procurement efficiency.

Finally, the perception of private enforcement as an abuse of law persists, leading to restrictive measures against claims. However, there are strong arguments that such challenges are not disruptive but rather essential for ensuring lawful, transparent, and efficient procurement processes, urging the legislator to focus on clarifying regulations instead of limiting access to remedies.

CHAPTER 13

Private Enforcement of Public Procurement Law in Slovenia: A Supplementary Mechanism in a Public-Law Dominated System

by

Katja Štemberger Brizani*

1. Introduction

Legal protection in the field of public procurement fulfils a dual function: it serves to protect the public interest, ensuring the efficient use of public funds, the transparency of procedures, and the preservation of fair competition, while also securing the rights of economic operators to lawful and equal treatment, as well as the protection of their legitimate economic interests. This contribution undertakes an examination of the Slovenian system of legal protection in public procurement, with particular emphasis on the function and potential of private enforcement as a complementary mechanism.

In this chapter, the analysis is structured into a series of thematic sections. It commences with an overview of the applicable legislative and institutional framework, continues with a detailed analysis of private enforcement instruments, their legal basis, and pertinent case law, and proceeds to examine selected judicial developments and the broader legal environment. The final section offers reflections on possible directions for reform.

By concentrating on the Slovenian legal context, this study seeks to identify jurisdiction-specific challenges and to assess the extent to which private enforcement may contribute to enhancing the effectiveness of legal protection in public procurement.

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2. Legislative Framework

The public procurement law framework is centred around the Public Procurement Act (*Zakon o javnem naročanju*, ZJN-3[851]), which transposes Directive 2014/24/EU[852] and Directive 2014/25/EU[853]. In the fields of defence and security, public procurement is governed by the Public Procurement in the Defence and Security Sector Act (*Zakon o javnem naročanju na področju obrambe in varnosti*, ZJNPOV[854]), which transposes Directive 2009/81/EC[855]. Together, these acts lay down the procedural rules governing the preparation and award of public procurement contracts and, to a limited extent, also regulate aspects of contract implementation, such as contract modifications, termination, and the involvement of subcontractors during performance.

In cases where the awarded contract qualifies as a public procurement-based public-private partnership, namely when a limited part of the operational risk is transferred to the private partner while the public partner retains the predominant share, the provisions of the Public-Private Partnership Act (*Zakon o javno-zasebnem partnerstvu*, ZJZP[856]) apply subsidiarily to the general procurement legislation.[857] This act sets out certain additional requirements in the contract award phase, such as a mandatory preliminary procedure,[858] and partially regulates issues related to contract implementation, including specific grounds for nullity[859] that apply exclusively to public-private partnership contracts. The interaction between ZJN-3 and ZJZP therefore requires careful legal

851 Act on Public Procurement Act, as amended, Official Gazette of the RS No. 91/15.

852 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65–242.

853 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, p. 243–374.

854 Act on Public Procurement in the Defence and Security Sector Act, as amended, Official Gazette of the RS No. 90/12.

855 Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ L 216, 20.8.2009, p. 76–136.

856 Act on Public-Private Partnership Act, Official Gazette of the RS No. 127/06.

857 See Arts. 3, 15, and 26 of the ZJZP.

858 Art. 31 et seq of the ZJZP.

859 Art. 69 of the ZJZP.

consideration in cases involving long-term cooperation and risk allocation between public and private partners.

The regulatory framework is supplemented by a set of implementing regulations that further specify certain obligations of contracting authorities. These include the Decree on Green Public Procurement (*Uredba o zelenem javnem naročanju*[860]), the Decree on Financial Guarantees in Public Procurement (*Uredba o finančnih zavarovanjih pri javnem naročanju*[861]), the Decree on Joint Public Procurement by the Government (*Uredba o skupnem javnem naročanju Vlade Republike Slovenije*[862]), the Decree on the Indicative List of Contracting Authorities and Required Information for Low-Value Contracts (*Uredba o informativnem seznamu naročnikov in obveznih informacijah v obvestilih za postopek naročila male vrednosti*[863]), the Rules on the Unified Public Procurement Information System (*Pravilnik o enotnem informacijskem sistemu na področju javnega naročanja*[864]), and the Rules on the Collection of Data for the Annual Procurement Statistics Report (*Pravilnik o vrstah in načinu zbiranja podatkov za letno statistično poročilo o oddanih javnih naročilih*[865]).

While the award phase is primarily governed by public law, the execution of public procurement contracts, which, by their nature, constitute civil law agreements, is subject to private law. As such, the Obligations Code (*Obligacijski zakonik*, OZ[866]) applies, unless otherwise regulated by specific procurement rules. Public procurement law thus operates as *lex specialis* during the award phase and in those aspects of contract execution where specific rules exist. In the absence of such rules, general private law applies.[867]

860 Decree on Green Public Procurement, as amended, Official Gazette of the RS No. 51/17.

861 Decree on Financial Guarantees in Public Procurement, Official Gazette of the RS No. 27/16 .

862 Decree on Joint Public Procurement by the Government, Official Gazette of the RS No. 27/16.

863 Decree on the Indicative List of Contracting Authorities and Required Information for Low--Value Contracts, Official Gazette of the RS No. 37/16.

864 Rules on the Unified Public Procurement Information System, Official Gazette of the RS No. 71/23.

865 Rules on the Collection of Data for the Annual Procurement Statistics Report, Official Gazette of the RS No. 39/16.

866 Act on Code of Obligations, as amended, Official gazette of the RS No. 83/01.

867 See e.g.: SKOK KLIMA, Urška. In: MATAS, Sašo and Urška SKOK KLIMA, eds. *Zakon o javnem naročanju (ZJN-3): s komentarjem*. Ljubljana: Uradni list Republike Slovenije, 2016. Cf. Supreme Court of the Republic of Slovenia, Case I Ips 7576/2010, 9 October 2015.

Legal protection in public procurement is governed by the Legal Protection in Public Procurement Procedures Act (*Zakon o pravnem varstvu v postopkih javnega naročanja*, ZPVPJN[868]), which transposes the EU Remedies Directives.[869] The act establishes a three-tiered system of legal remedies: a preliminary (pre-review) procedure before the contracting authority, a review procedure before the National Review Commission (*Državna revizijska komisija za revizijo postopkov oddaje javnih naročil*, DKom), and a judicial procedure before the competent civil court. In addition, where the contracting authority dismisses the request for review by way of a procedural decision, the act provides for an appellate procedure before DKom.

A party to the pre-review procedure may be an economic operator who files a request for review or the Advocate of the Public Interest (the Court of Audit, the Competition Protection Agency, or the Commission for the Prevention of Corruption). In later stages, party status may also be held by the contracting authority or any entity conducting or obliged to conduct a procurement procedure. The selected tenderer may participate in all three stages and, unless otherwise provided, enjoys equal procedural rights.[870] To have standing, an economic operator must show an actual or potential interest in the award and the possibility of suffering harm due to an alleged breach. By contrast, the Advocate of the Public Interest has standing ex lege and need not demonstrate individual harm or interest.[871]

DKom has a *sui generis*[872] institutional status and operates under its own procedural rules (as set out in the ZPVPJN), with the subsidiary application of the Civil Procedure Act (*Zakon o pravdnem postopku*, ZPP[873]) and, to a limited extent, the General Administrative Procedure Act (*Zakon o splošnem upravnem*

868 Act on Legal Protection in Public Procurement Procedures Act, as amended, Official Gazette of the RS No. 43/11.

869 Directive 2007/66/ec of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ L 335, 20/12/2007, p. 31–46.

870 Art. 3 of the ZPVPJN.

871 Art. 14 of the ZPVPJN.

872 It does not belong to either the judicial or the executive branch of power, but constitutes an independent state authority. Further on the legal status of DKom: STROJAN, Lucija. Pravni položaj Državne revizijske komisije : zakaj omejevati sodno varstvo zoper njene odločitve? *Pravnik*. 2023, vol. 78, no. 11/12, pp. 645–646.

873 Act on Civil Procedure, as amended, Official Gazette of the RS No. 26/99.

postopku, ZUP[874]). In Case C-6/22, *Medisanus*[875], the Court of Justice of the European Union (CJEU) confirmed that DKom qualifies as a "tribunal" within the meaning of EU law. Within its jurisdiction, DKom may adopt two types of decisions. First, it may issue cassatory decisions, annulling an unlawful act or decision of the contracting authority in whole or in part, while providing binding instructions for the renewed conduct of the annulled phase. Second, where the infringement can no longer be remedied, typically after the contract has already been concluded, DKom may issue declaratory decisions establishing that a breach of public procurement rules has occurred. Importantly, DKom does not have the power to substitute the contracting authority's decision with its own.[876] No appeal is available against DKom's decisions.

Although no further judicial remedy against such decisions is required under EU Remedies Directives,[877] the Slovenian legislature[878] nevertheless introduced, with the adoption of the Act Amending the Legal Protection in Public Procurement Procedures Act (ZPVPJN-C[879]) in 2019, the possibility of judicial review of certain DKom decisions before the Administrative Court in Ljubljana. This judicial protection, however, remains narrow in scope and largely ineffective in practice. It applies only to a limited subset of decisions, takes the form of a declaratory action, and does not suspend the legal effects of the contested

874 Act on General Administrative Procedure Act, Official Gazette of the RS No. 24/06.

875 Judgment of 8 June 2017, *Medisanus*, C-296/15, ECLI:EU:C:2017:431.

876 See, e.g., DKom Decision No. 018-150/2017-6 of 29 August 2017.

877 EU law allows two alternative models for organising legal protection in public procurement. The first relies entirely on bodies that are judicial in nature. The second allows for review by bodies that are not judicial in nature, provided that their decisions are subject to procedures enabling the correction of unlawful measures or errors by judicial bodies that are independent from both the contracting authority and the review body.

878 The draft amendment C35 expressly emphasised that the legal framework of the Republic of Slovenia was already compliant with both EU law and the Constitution prior to the proposed change. At the same time, it acknowledged that Slovenia was the only EU Member State in which legal protection in public procurement procedures did not extend to full judicial review, as proceedings concluded with a decision of the DKom. The additional objective of the proposed amendments was therefore to enhance legal certainty and to ensure a higher standard of rights protection, including the judicial development of legal standards. See Government of the Republic of Slovenia, *Draft Act Amending the Legal Protection in Public Procurement Procedures Act* https://imss.dz-rs.si/IMiS/ImisAdmin.nsf/ImisnetAgent?OpenAgent&2&DZ-MSS-01/c10b138da3412bbc00fccb25a56d1332a3cd0cd5d2bc001 72a46eb33aee66b15 accessed 15 July 2025.

879 Act on Amending the Legal Protection in Public Procurement Procedures Act, Official Gazette of the RS No. 72/19.

decision, nor does it permit the claimant to request interim relief. Additionally, damages cannot be claimed within this procedure and must instead be pursued through a separate civil action before the competent court.[880]

Judicial proceedings under the ZPVPJN are conducted before the District Court of Ljubljana, which has exclusive territorial jurisdiction according to Article 103 of the Courts Act (*Zakon o sodiščih, ZS*[881]). These proceedings do not constitute a continuation of the review process before the DKom but represent an independent legal remedy. They encompass two distinct issues: (1) the annulment of public procurement contracts and (2) the award of damages for breaches of procurement law. Judicial proceedings under the ZPVPJN are urgent and take priority in court decision-making.[882]

In addition to these two core remedies, economic operators may bring claims before civil courts for issues arising during the performance phase of public procurement contracts, typically non-payment, delays, or other contractual breaches, under the general rules of the OZ, with procedural matters governed by the ZPP. The same applies to defects in the contract not addressed by the ZPVPJN.

Where harm results from unlawful actions of the DKom, rather than the contracting authority, injured parties may pursue compensation from the State under Article 26 of the Constitution of the Republic of Slovenia (*Ustava Republike Slovenije*, URS[883]), with general civil law rules applying *mutatis mutandis*. This constitutes a form of public law tort liability,[884] governed by a hybrid regime of public and private law, and adjudicated by the competent civil courts.

Together, these remedies form a multi-layered private enforcement framework that complements the system of public oversight and control. A detailed analysis of these legal avenues follows in the next chapter.

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880 More on this: MAROVT, Eva Zala. Sodno varstvo zoper odločitve Državne revizijske komisije po uveljavitvi ZPVPJN-C. *Pravna praksa*. 2022, vol. 41, no. 3, pp. 19–21. and; ŠTEMBERGER BRIZANI, Katja. Legal Protection of Concession Contracts – At the Interface Between Public and Private Law and European and National Law. *Studia Iuridica Lublinensia* [online]. 2023, vol. 32, no. 1, pp. 346–347 [accessed 15.07.2025]. Available at: https://journals.umcs.pl/sil/article/view/15055

881 Act on Courts Act, as amended, Official Gazette of the RS No. 19/94.

882 Art. 47 of the ZPVPJN.

883 Constitution of the Republic of Slovenia, as amended, Official Gazette of the RS No. 33/91-I.

884 SI: Supreme Court, Judgment of 21. April 2022, No. II Ips 112/2021, ECLI:SI:VSRS:2022:II.IPS.112.2021.

3. Types of Private Enforcement Measures

3.1 Private Enforcement through Contract Invalidity

Contract Annulment under the ZPVPJN

The annulment of a contract awarded through a public procurement procedure constitutes an autonomous legal remedy under Slovenian public procurement law, which substantially departs from the general doctrine of contract annulment under the OZ. Regulated by Arts. 42 to 48 of the ZPVPJN, this *sui generis* mechanism is specifically tailored to public procurement and concession procedures, supplanting the invalidity regime applicable under the former version of the Act.[885]

In contrast to the civil law model of relative invalidity, where only contracting parties may challenge the validity of a contract, the ZPVPJN extends standing to third parties with a legal interest,[886] such as unsuccessful tenderers, as well as to the Advocate of the Public Interest (slo. zagovornik javnega interesa) in parentheses, which includes the Court of Audit, the Competition Protection Agency, and the Commission for the Prevention of Corruption. This expanded access to judicial review reflects the public dimension of procurement and the systemic importance of ensuring legality in the award of public procurement contracts. Jurisdiction is vested in the District Court of Ljubljana, with procedural rules laid down primarily in the ZPVPJN itself; in matters not expressly governed by this act, the general provisions of the ZPP apply. This hybrid framework ensures the application of procedural safeguards inherent in civil litigation while accommodating the specificities of procurement disputes.

The grounds for annulment are exhaustively enumerated in Art. 44 ZPVPJN and are confined to particularly serious violations of public procurement law. These include, *inter alia*, the conclusion of a contract without a mandatory procurement procedure, substantial deviation from the terms of the tender, or failure to observe the statutory standstill period. Certain grounds may also pertain to the contract implementation phase, such as unlawful and substantial

885 MOŽINA, Damjan. Odškodninska odgovornost v zvezi s postopki javnega naročanja. *Podjetje in delo*. 2018, vol. 44, no. 1, p. 11.

886 Legal interest is granted to individuals or entities who had or still have an interest in being awarded the contract or order and who suffered or could suffer damage due to the alleged violation.

modifications.[887] For all other irregularities, irrespective of their materiality under civil law, annulment proceedings under the ZPVPJN are inadmissible.[888] In such instances, alternative remedies, if available, must be pursued through other (civil) legal avenues.

Annulment actions are subject to strict limitation periods, which are shorter than those applicable in civil law. As a rule, they must be brought within six months of the publication of the relevant notice (e.g., a contract award or modification notice) on the Public Procurement Portal. In the absence of such publication, the limitation period commences when the claimant knew or ought to have known of the alleged breach. In any case, no action may be brought more than twelve months after the conclusion or modification of the contract. Lapse of these deadlines results in the confirmation of the contract's validity.[889]

Art. 43 of the ZPVPJN governs interim relief in proceedings for annulment of public contracts or individual orders. A claimant, either an economic operator with legal interest or the public interest advocate, may request the suspension of contract performance or the imposition of a provisional arrangement concerning the disputed contract or order. The court may prohibit performance until the final decision is issued if continuing the performance would cause harm to the claimant, another interested party, or the public interest. In such cases, the court must assess proportionality, taking into account the interests of the contracting authority, the selected tenderer, and the public. Where necessary to prevent serious and hardly reparable damage, particularly in contracts of a continuing nature, the court may also impose a temporary arrangement.

Where a public contract is found to be tainted by serious breaches of public procurement law, the court may annul the contract or individual order, either retroactively from its conclusion (*ex tunc*) or prospectively (*ex nunc*). Alternatively, it may exceptionally decide to preserve its legal effects, either fully or in part, if overriding reasons relating to public, defence, or security interests so require. These reasons may include, in exceptional cases, economic considerations, such as avoiding disproportionate consequences for the contracting authority or the state, but not the mere interest in performing the contract. The court is not bound by the claimant's request and must assess all relevant

887 Cf. ŠTEMBERGER BRIZANI, Katja. Sodno varstvo v sporih iz koncesijskih pogodb. *Javna uprava*. 2023, vol. 59, no. 1/2, pp. 91–92.

888 MOŽINA, Damjan. *Odškodninska odgovornost v zvezi s postopki javnega naročanja*, pp. 11–12.

889 Art. 42 of the ZPVPJN.

circumstances, including the nature and scope of the contract, the extent of performance already rendered, and the gravity of the breach.[890]

Contract Nullity under the OZ and the ZJZP

The ZPVPJN does not exclude the possibility of invoking remedies based on the general rules of civil law (i.e., claims for annulment or nullity of the contract, depending on the nature of the defect under the OZ) or other regulations. However, due to the specific regulatory framework governing public procurement contracts, including formal and procedural constraints, many provisions of the OZ are not directly applicable. For instance, rules concerning unilateral prohibitions (Art. 86(2) of the OZ) or contract conversion (Art. 89 of the OZ) are generally incompatible with public procurement law.[891]

In this respect, the ZJZP assumes particular significance, as it expressly provides for specific grounds of nullity tailored to the nature of contractual public-private partnerships. A contract is deemed null and void if it is concluded with a party other than the one designated in the award decision, except in prescribed cases.[892] A contract is likewise null and void if it is concluded without adherence to public notice requirements, without conducting the prescribed selection procedure, or in the absence of a valid award decision. For such infringements, however, the ZPVPJN provides for the remedy of annulment, a less severe legal consequence aligned with EU law. In such cases, the remedy of annulment under the ZPVPJN prevails over the nullity regime under the ZJZP, per the principle of primacy of EU law and its objective of ensuring effective yet proportionate remedies in public procurement. Another ground for nullity under the ZJZP arises where a public partner concludes a contract without obtaining prior approval from its founding authority. A contract is likewise null and void where a final and binding judgment subsequently annuls the award decision, and another provider is selected. Lastly, a contract is null and void if it is not concluded in written form, including any amendments or supplements, per the formal requirements laid down in the ZJZP.[893]

890 Arts. 45 and 46 of the ZPVPJN.

891 PLAUŠTAJNER, Konrad. Commentary on Art. 69 of the Public-Private Partnership Act (ZJZP). In: KRANJC, Vesna, ed. *Zakon o javno-zasebnem partnerstvu (ZJZP) s komentarjem*. GV Založba, 2009, p. 208.

892 See Art. 38 ZJZP.

893 *Ibid.* 208–211.

3.2 Private Enforcement through Damages Claims

Civil Liability of the Contracting Authority

The liability of the contracting authority is governed by Art. 49 of the ZPVPJN, which provides that compensation for damage resulting from the contestability of a contract or breaches of public procurement rules is subject to the principles of strict (no-fault) liability, as laid down in the general rules of the law of obligations. A harmed party may bring a claim where unlawful conduct occurred during the procurement process, including situations in which the authority failed to conduct a public procurement procedure despite a legal obligation to do so, in which case damages may also be sought through an action for a declaration of contestability under Article 42 of the same Act.

Although Art. 49(1) formally refers to the strict liability regime under the general law of obligations, this reference, by implication, to Art. 131 of the OZ, which governs liability for damage caused by dangerous objects or activities, raises conceptual and doctrinal concerns. In Slovenian civil law, strict liability typically applies to cases involving increased risks of harm, where unlawfulness is not a prerequisite and causation is presumed. By contrast, liability for breaches of public procurement rules inherently presupposes the establishment of unlawful conduct on the part of the contracting authority.

Accordingly, Art. 49 must be interpreted as requiring the cumulative satisfaction of the traditional elements of subjective liability: unlawful conduct;[894] damage; and a causal link between the two. Fault, however, is presumed once these conditions are met, and the burden of proof shifts to the contracting authority to rebut that presumption.

Moreover, in assessing whether a breach of procurement rules occurred, the civil court is not bound by any prior determination of the DKom. Its decisions do not constitute *res judicata* or a prejudicial question in subsequent litigation. The reference to strict liability should therefore be understood functionally: it precludes the contracting authority from escaping liability merely by invoking the absence of fault, for instance, by relying on the fact that DKom confirmed the legality of its conduct. In substance, the liability regime under

[894] SI: Higher Court in Ljubljana, Decision of 14 April 2021, No. I Cpg 148/2021, ECLI:SI:VSLJ:2021:I.CPG.148.2021.

Art. 49 reflects a modified form of fault-based liability, adapted to the objectives of effective judicial protection in the field of public procurement.[895]

State Liability for Unlawful Acts of the DKom

Art. 26 of the URS establishes the right to compensation for damage caused by the unlawful conduct of a state authority, a local self-government body, or a holder of public authority in connection with the exercise of their official functions. It provides the basis for the State's direct liability for harm resulting from unlawful acts committed in the exercise of public powers (*acta iure imperii*), while excluding acts of a private-law nature (*acta iure gestionis*). In such cases, liability is attributed directly to the State (or another public entity – a local self-government or a holder of public authority[896]), whereas the individual authority or official is, in principle, exempt from liability, unless otherwise provided by law.

However, due to the limited scope of this constitutional provision, courts must supplement it with general tort law principles laid down in the OZ, particularly those governing fault-based liability for the conduct of others. In applying these rules, courts must take into account the specific features of the vertical legal relationship between the State and the individual.[897] As a result, the doctrine of State liability has largely evolved through case law, which continues to shape its contours and refine the applicable standards.

This framework also extends to decisions of the DKom. Although such decisions are not classified as administrative acts under prevailing case law[898] (but a supervisory act through which the DKom oversees the lawfulness of the public procurement procedure[899]), it is nonetheless recognised that the State may incur liability for damage resulting from their unlawful adoption.[900] To establish

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895 MOŽINA, Damjan. *Odškodninska odgovornost v zvezi s postopki javnega naročanja*, pp. 15–16.

896 SI: Higher Court in Ljubljana, Judgment of 7 April 2021, No. I Cpg 456/2020, ECLI:SI:VSLJ:2021:I.CPG.456.2020.

897 SI: Supreme Court, Judgment of 21 April 2022, No. II Ips 112/2021, ECLI:SI:VSRS:2022:II.IPS.112.2021.

898 E.g., SI: Constitutional Court, Decision of 14 November 2002, No. U-I-169/00_2, ECLI:SI:USRS:2002:U.I.169.00; Supreme Court, Judgment of 20 January 2016, No. I Up 4/2014, ECLI:SI:VSRS:2016:I.UP.4.2014 and Administrative Court, Order of 1 September 2021, No. UPRS Sklep I U 855/2021-17, ECLI:SI:UPRS:2021:I.U.855.2021.17.

899 SI: Supreme Court, Order of 14 April 2021, No. I Up 164/2020, ECLI:SI:VSRS:2021:I.UP.164.2020.

900 SI: Higher Court in Ljubljana, Judgment of 14 June 2016, No. I Cpg 407/2016, ECLI:SI:VSLJ:2016:I.CPG.407.2016.

such liability, the injured party must demonstrate: that the act was performed in the exercise of public powers; that it was unlawful in the sense of qualified or manifest unlawfulness; actual damage; and a causal link between the act and the damage.

The requirement of qualified unlawfulness introduces a particularly demanding threshold. It is not sufficient to show a mere breach of law; rather, the conduct must amount to a serious and evident departure from legal and professional standards. This may occur, for instance, where DKom disregards clear legal provisions or established case law without justification, applies the law in a manifestly biased or arbitrary manner, gravely infringes procedural safeguards, or acts wholly outside the bounds of the legal framework. In essence, not every illegality suffices; only breaches that clearly deviate from accepted standards of lawful conduct may meet the threshold.[901] Accordingly, even when the Administrative Court declares a decision of the DKom unlawful, such a finding does not, in itself, satisfy the threshold of unlawfulness required under Art. 26 of the Constitution. Therefore, the declaration of unlawfulness constitutes a necessary, but not sufficient, condition for establishing liability for damages.[902]

Since Art. 26 does not explicitly refer to fault as a condition for liability, the question of whether fault is required has been the subject of diverging interpretations in legal doctrine. Civil law scholars[903] tend to introduce the element of fault by way of analogy with the general delictual liability regime under the OZ, whereas administrative law theorists[904] often argue that the constitutional provision establishes a regime of objective liability. Despite these divergent views, it may nonetheless be concluded that the requirement of manifest unlawfulness functionally incorporates an assessment of the official's conduct and state of mind to the harm caused, thereby embedding an element of fault within the very concept of qualified unlawfulness.[905]

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901 SI: Higher Court in Ljubljana, Judgment of 21 January 2015, No. I Cpg 82/2014, ECLI:SI:VSLJ:2015:I.CPG.82.2014 and Higher Court in Ljubljana, Judgment of 7 March 2018, No. I Cpg 1025/2016, ECLI:SI:VSLJ:2018:I.CPG.1025.2016.

902 KERŠEVAN, Erik. Odškodninska odgovornost za odločanje v upravnem postopku. In: MOŽINA, Damjan, ed. *Odškodninska odgovornost države*. GV Založba, 2015, pp. 164–165.

903 E.g. MOŽINA, Damjan. Odškodninska odgovornost države. *Pravni letopis*. 2013, no. 1, p. 144.

904 VIRANT, Gregor. Odškodninska odgovornost države v zvezi z ravnanji javne uprave. *Dnevi javnega prava, Inštitut za javno upravo*. 2000, vol. 36, no. 4, p. 151.

905 SI: Supreme Court, Judgment of 21 April 2022, No. II Ips 112/2021, ECLI:SI:VSRS:2022:II.IPS.112.2021.

4. Case law relevant for private enforcement of public procurement law

Slovenian case law has gradually evolved in the area of damages claims related to public procurement procedures, particularly concerning the interpretation of Art. 49 of the ZPVPJN.

In 2024 the Higher Court in Ljubljana[906] addressed the legal issue of whether a supplier may seek payment from a public contracting authority for goods supplied without a prior public procurement procedure and in the absence of a concluded contract, by invoking the rules on unjust enrichment. The court affirmed that the mandatory provisions of public procurement law do not exclude the application of unjust enrichment as an autonomous legal basis for civil liability, provided that the statutory conditions for such a claim are met.

The Higher Court confirmed[907] that an unsuccessful tenderer may seek compensation not only where the public procurement contract is challengeable under Art. 44 ZPVPJN, but also in cases involving other infringements of procurement rules. The Court stressed that the two grounds – contract annulment and breach of procurement rules – are alternative and distinct. Importantly, Art. 49 of the ZPVPJN does not impose any statutory time limit for initiating damages claims. The limitation period applicable to actions for contestability under Art. 42 does not extend to claims based on breaches of other public procurement rules. Moreover, the filing of an annulment action is not a procedural precondition for seeking compensation.

Building on this doctrinal approach, the Supreme Court[908] addressed the long-standing question[909] of whether the submission of a request for review by an unsuccessful tenderer constitutes a procedural prerequisite for pursuing damages claim. The Court held that Art. 49 ZPVPJN contains no such procedural

906 SI: Higher Court in Ljubljana, Order of 25 April 2024, No. I Cpg 315/2023, ECLI:SI:VSLJ:2024:I.CPG.315.2023.

907 SI: Higher Court in Ljublana, Order of 25 August 2021, No. I Cpg 659/2020, ECLI:SI:VSLJ:2021:I.CPG.659.2020.

908 SI: Supreme Court, Order of 11 February 2025, No. III Ips 19/2023, ECLI:SI:VSRS:2023:III.IPS.19.2023.

909 Cf. SI: Higher Court in Ljubljana, Judgment of 19 April 2023, No. I Cpg 515/2022, ECLI:SI:VSLJ:2023:I.CPG.515.2022; and SI: Higher Court in Ljubljana, Order of 13 April 2016, No. V Cpg 163/2016, ECLI:SI:VSLJ:2016:V.CPG.163.2016.

requirement and explicitly noted that an earlier legislative proposal introducing this condition was rejected during the parliamentary process due to concerns about its constitutionality. At the same time, the Court introduced a significant qualification: where a request for review could have effectively protected the claimant's rights, the failure to pursue such remedy interrupts the causal link between the unlawful conduct and the damage claimed. Consequently, harm is no longer legally attributable to the contracting authority. Moreover, a request filed by an advocate of the public interest (slo. *zagovornik javnega interes*a)[910] does not substitute the tenderer's obligation to protect their own private interests.

The Higher Court of Ljubljana clarified[911] that, in proceedings brought under Art. 49 of the ZPVPJN, the court is not bound by prior assessments made either by the contracting authority or by the DKom regarding the lawfulness of conduct in the public procurement procedure. The court emphasised that it must conduct an autonomous and comprehensive assessment of all elements relevant to liability, including the existence of a breach of procurement rules. This applies irrespective of whether DKom or the contracting authority had previously determined, for instance, that the claimant's tender was inadmissible.[912] To hold otherwise would undermine the very function of civil proceedings, which are designed to allow independent judicial review of allegedly unlawful conduct. Accordingly, there is no legal foundation for the proposition that the court must follow earlier determinations made within the procurement process, as these are themselves subject to judicial scrutiny in the context of a damages claim. Nevertheless, where the Administrative Court has issued a declaratory judgment establishing the unlawfulness of DKom's decision to reject a review request, the claimant may rely on that judgment in civil proceedings as persuasive evidence of an underlying breach of public procurement rules by the contracting authority. Such a judgment thus facilitates the claimant's burden of

[910] For clarification, this is not the name of an institution but a category of entities that may file review requests in the public interest, namely the Court of Audit, the Competition Protection Agency, and the Commission for the Prevention of Corruption.

[911] SI: Higher Court in Ljubljana, Judgment of 19 April 2023, No. I Cpg 515/2022, ECLI:SI:VSLJ:2023:I.CPG.515.2022.

[912] However, the right to claim damages under Art. 49 of the ZPVPJN does not entail a full jurisdiction review that would allow the court to annul DKom's contested decision. It therefore does not provide judicial protection equivalent to an appeal against DKom's determinations. More on this: SMRDEL, Borut et al. *Zakon o pravnem varstvu v postopkih javnega naročanja (ZPVPJN) s komentarjem*. Sašo MATAS, ed.. Uradni list Republike Slovenije, 2018, p. 225.

proving unlawfulness in a subsequent damages action.[913] Conversely, a reverse scenario is also conceivable: DKom may uphold a request for review, finding that the contracting authority acted unlawfully, thereby opening the door to a possible damages claim. In such cases, the contracting authority may bring administrative proceedings seeking a declaratory judgment that DKom's decision was itself unlawful. If the Administrative Court finds in favour of the authority, this may serve to rebut the presumption of unlawful conduct and preclude liability for damages.[914]

This nuanced approach reflects a broader principle of State liability law: claimants are generally required to exhaust available and effective legal remedies. This requirement is not merely procedural but serves as a means of assessing the causal relationship between the unlawful conduct of the authority and the claimant's failure to act. However, the obligation to exhaust remedies is not absolute. If the remedies in question do not meet the standard of effectiveness, insisting on their use would impose a disproportionate burden and unjustifiably restrict the right to compensation under Art. 26 of the URS.[915] Where the harm could have been prevented by an effective remedy, compensation is limited to the damage that could not reasonably have been avoided. Conversely, a failure to avail oneself of such a remedy may break the causal link between the authority's conduct and the harm suffered.[916]

Traditionally, Slovenian courts[917] have adopted a restrictive approach to recoverable damages in public procurement cases. Until recently, they recognised only negative contractual interest, even where a breach of the ZJN-3 was established. Compensation was limited to the costs incurred in preparing and submitting the tender, based on an analogy with pre-contractual liability under Art. 20 of the OZ. Under this regime, tenderers could be restored to their pre-procedure position, but not compensated for the potential gain had the contract

913 Cf. SI: Supreme Court, Order of 12 January 2022, No. I Up 234/2021, ECLI:SI:VSRS:2022:I.UP.234.2021.

914 LESKOVEC, Borut and Gregor KOVAČIČ. Sodno varstvo zoper odločitve Državne revizijske komisije. *Pravna praksa*. 2019, vol. 38, no. 32, p. 9.

915 SI: Supreme Court, Judgment of 19 February 2019, No. II Ips 198/2018, ECLI:SI:VSRS:2019:II.IPS.198.2018.

916 SI: Supreme Court, Judgement of 4 July 2022, No. II Ips 117/2021, ECLI:SI:VSRS:2022:II.IPS.117.2021.

917 E.g., SI: Higher Court in Ljubljana, Judgment and Order of 16 September 2015, No. I Cpg 1731/2013.

been awarded and performed. Courts consistently rejected claims for lost profit, holding that submission of a tender did not create a legitimate expectation of contract award and thus did not give rise to enforceable rights prior to contract conclusion.

However, recent national and EU jurisprudence has signalled a departure from this conservative stance. The Higher Court of Ljubljana[918] upheld a damages claim brought under Article 49 ZPVPJN by an unsuccessful tenderer whose offer had been unlawfully excluded while the contract was awarded to a competitor who should likewise have been disqualified. The court stressed, first, that in such proceedings the civil court is not bound by earlier assessments of the contracting authority or the DKom regarding the lawfulness of the procurement procedure, but must autonomously determine whether procurement rules have been breached; and, secondly, that where it is established that the claimant's bid was admissible, economically the most advantageous and would have been awarded but for the illegality, the resulting loss of profit constitutes recoverable damage. On that basis, the court confirmed an award of approximately EUR 331,567.00 in favour of the claimant, corresponding to the profit that would have been generated under the contract after deduction of performance costs. This aligns with the reasoning of the CJEU in Case C-547/22, *INGSTEEL spol. s r.o. v. Úrad pre verejné obstarávanie*.[919]

5. Private enforcement cases

Despite the formal existence of a multi-tiered private enforcement system under Slovenian public procurement law, judicial practice in this area remains sparse and fragmented. Most published decisions concern damages claims under Art. 49 of the ZPVPJN, while actions for annulment of contracts or interim measures under Arts. 42 to 48 are rarely pursued. Available statistics are limited, and a comprehensive overview of the caseload is hindered by the fact that judgments of the District Court of Ljubljana, which has exclusive jurisdiction over such cases, are not published in publicly accessible databases. Consequently, the

[918] SI: Higher Court of Ljubljana, Judgment of 19 April 2023, No. I Cpg 515/2022, ECLI:SI:VSLJ:2023:I.CPG.515.2022.

[919] Judgement of 6 June 2024, *INGSTEEL*, C547/22, ECLI:EU:C:2024:478.

picture of judicial practice relies heavily on decisions of appellate courts and the Supreme Court, which represent only a subset of the overall caseload. The majority of recent case law involves claims for damages by unsuccessful tenderers, including questions of causal link, recoverability of lost profit, and the evidentiary weight of findings made by DKom or administrative courts. Notably, courts have also addressed ancillary public-law issues, such as the admissibility of judicial review against decisions of the DKom, consistently confirming their sui generis character and rejecting their classification as administrative acts. Overall, the use of private enforcement remains limited both quantitatively and substantively, and its development has largely been driven by isolated cases rather than systematic application. This evidences a residual reliance on public enforcement and underlines the continued marginalisation of private remedies in Slovenian procurement litigation.[920]

6. Evaluation of the environment for private enforcement of public procurement law

Private enforcement of public procurement law in Slovenia remains underutilised and structurally marginalised. Despite a legal framework that nominally allows for remedies such as contract annulment and damages, these mechanisms function more as theoretical possibilities than practical tools. The dominant enforcement paradigm remains public, centred on the procedures before the DKom. Consequently, private enforcement has evolved as a peripheral and reactive instrument, invoked only when public law avenues are exhausted or inadequate.

While recent jurisprudence has clarified some important aspects, such as the non-necessity of a prior review request and the possibility of awarding compensation for lost profit, these developments are incremental rather than transformative. The courts continue to grapple with key legal concepts, including the scope of strict liability under Art. 49 ZPVPJN, the evidentiary burden in

[920] This analysis was conducted by reviewing published court decisions available on the IUS-INFO legal portal (www.iusinfo.si), using article-by-article searches based on the provisions of the ZPVPJN (Arts. 42–49). Only publicly accessible Supreme Court, Higher Court, and selected Administrative Court decisions were included.

damages claims, and the interaction between public and private law determinations. Fragmentation across procedural tracks, review, annulment, declaratory relief, and damages further undermines coherence and efficiency. There is no meaningful procedural integration or coordination between administrative and civil proceedings, nor is there a mechanism for cross-fertilisation of findings.

Institutional inertia compounds these challenges. Economic operators are generally reluctant to pursue civil litigation against contracting authorities, not only because of resource constraints and perceived risks, but also due to the limited precedent and unpredictability of outcomes. Courts have traditionally shown restraint in awarding compensation, particularly beyond negative interest, and only recently have begun to shift toward a more substantive understanding of economic harm.

From a systemic perspective, Slovenian law treats private enforcement as a supplementary mechanism, not as a coequal form of legal redress. This reflects a deeper normative orientation: that violations of procurement rules are primarily matters of public control, not private harm. Yet EU law demands more. It requires effective judicial protection and full reparation for affected bidders, which includes recognising economic loss as a compensable injury, not merely as a procedural irregularity. Whether Slovenian practice will adapt meaningfully to this requirement remains an open question. For now, private enforcement continues to exist at the margins of procurement law, constrained by doctrine, procedure, and institutional culture.

7. Suggestions for further development

To enhance the role of private enforcement in Slovenian public procurement law, several complementary reforms should be considered. First, the current separation between administrative and civil procedures should be addressed. Public enforcement before the DKom and private claims before civil courts operate in parallel but disconnected tracks, which leads to fragmented decision-making and inefficiencies. Establishing procedural links, such as coordinated case management or recognition of findings, would improve consistency and legal certainty.

Second, transparency and access to judicial decisions must be improved. Decisions of the District Court of Ljubljana, which has exclusive jurisdiction over procurement-related civil litigation, are not publicly available. A centralised database of anonymised rulings would promote doctrinal development and inform practice, while also supporting legal predictability for economic operators.

Third, further clarification is needed regarding the statutory regime for damages under Art. 49 ZPVPJN. Although the article refers to strict liability, its meaning remains contested. Clearer legislative or interpretative guidance on the required elements of liability, particularly concerning fault, causation, and the recoverability of lost profits, would align national practice more closely with the EU principle of effective judicial protection. Courts should move beyond a restrictive approach focused solely on negative interest and recognise lost profit as compensable economic harm, consistent with recent domestic and EU case law.

Fourth, judicial capacity should be strengthened. Given the complexity of procurement-related disputes and the exclusive jurisdiction of the District Court of Ljubljana, targeted training or the establishment of specialised chambers would support consistent and well-reasoned adjudication.

Finally, the systemic marginalisation of private enforcement must be addressed through a cultural and institutional shift. Contracting authorities should internalise the possibility of civil liability as a real accountability tool, and economic operators need better incentives and support to pursue claims. Procedural innovations such as legal aid, cost limits, or representative actions could help lower access barriers. Further empirical and doctrinal research would also be useful in identifying and addressing the practical obstacles that currently inhibit the use of private enforcement.

8. Summary

Private enforcement of public procurement law in Slovenia remains limited in practice, despite a formal legal framework that allows for actions such as contract annulment and damages claims. Civil courts rarely award compensation beyond preparation costs, and economic operators are generally hesitant to litigate against contracting authorities. Recent case law, including from the

Supreme Court and Higher Court of Ljubljana, has clarified key aspects, such as the non-binding nature of prior review findings and the potential for claiming lost profit, which align Slovenian practice with EU standards. However, significant obstacles persist, including fragmented procedures, doctrinal ambiguities, and institutional reluctance. Strengthening doctrinal clarity, improving procedural coordination, and fostering judicial openness to broader compensation remain essential steps for the development of effective private enforcement.

CHAPTER 14

Private enforcement of public procurement law in Slovakia – Another ornamental law?

by

Hana Kováčiková*+

1. Introduction

The public procurement directives[923] oblige Member States and their contracting authorities to correctly and effectively apply Union rules in public procurement processes for contracts above the threshold or contracts with a clear cross-border dimension. This obligation aligns with the right of tenderers to access effective and efficient remedies whenever contracting authorities' conduct violates these rules anywhere within the Union. Article 2(1)c) RemD is worded in broad terms, that is that Member States are to ensure that damages are awarded to persons harmed by an infringement of EU law on the award of public contracts, which, in the absence of any indication to distinguish different categories of damage, may cover any type of damage suffered by those persons, including that arising from the loss of the opportunity to participate in the procedure for the award of a contract. However, the RemD does not contain specific provisions establishing uniform substantial or procedural standards for awarding damages, such as criteria on the basis of which damage must be

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+ This paper was prepared within the project VEGA 1/0710/23 "Damages in competition law and public procurement – limits and challenges to effective enforcement of the European Union Law".

923 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28. 3. 2014, pp. 1-64), Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28. 3. 2014, pp. 65-242), Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28. 3. 2014, pp. 243-374).

determined and estimated of limitation periods, apart from the requirement, that such damages must be effective. The exercise of this provision is therefore subject to the procedural autonomy of the [924] Yet, as emphasized by the CJEU in *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others,*[925] Member States have to ensure an effective remedy for damage that may result in State liability for losses and damage suffered by individuals due to breaches of the RemD. Member States[926] to ensure an effective remedy for damage may result in State liability for losses and damage suffered by individuals due to breaches of the RemD. Member States to ensure an effective remedy for damage may result in State liability for losses and damage suffered by individuals due to breaches of the RemD.

The effectiveness of the European Union's public procurement directives relies heavily on the ability of both Member States and their contracting authorities to ensure respect for Union rules and to provide *effective remedies* in cases where these rules are breached. A critical aspect of this remedial system is the right of tenderers and participants to claim damages for infringements of procurement law.

In this context, the central research question arises: Does Slovak law provide an accessible, effective, and predictable environment for private parties seeking damages for breaches of public procurement law? A secondary, but highly relevant, question is: What are the principal barriers, both procedural and substantive, that hinder successful private enforcement of public procurement rules in Slovakia?

While much progress has been made in the field of public enforcement, primarily through the activities of the Public Procurement Office (SkPPO) and administrative judiciary, the private enforcement route, especially claims for damages, remains shrouded in doctrinal ambiguity and procedural complexity. Alike some other areas (e.g., competition law damages), Slovakia lacks a unified legislative regime for procurement damages. This chapter therefore seeks to *critically evaluate the Slovak legal framework and judicial practice concerning private*

[924] Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30. 12. 1998, p. 33-35). Consolidated Version.

[925] Judgment of 6 June 2024, *INGSTEEL*, C-547/22, EU:C:2024:478, para. 33

[926] Judgment of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others*, C-568/08, EU:C:2010:751, paras. 87, 90.

enforcement mechanisms, with a particular focus on actions for damages, and to determine the extent to which they comply with EU effectiveness requirements and deliver on their compensatory, deterrent and corrective functions.

Regarding the methodology, author used a *doctrinal and empirical approach*, combining legal analysis with an in-depth examination of the published Slovak case law on private enforcement in public procurement. The analysis utilises case law analysis (judicial decisions from the Supreme Court, the Constitutional Court, and lower courts are reviewed to map current trends, identify recurring obstacles, and distil standards applied by Slovak courts), Desk research, literature and court data (the research is built on prior academic works, key commentaries, reports, and data obtained directly from first-instance courts on the number and type of cases adjudicated since 2001), Critical evaluation (the chapter assesses not only what the law "is" but how it "works" in practice, evaluating the real-world intensity, success rate, and practical obstacles to claiming damages). This study builds on the author's previous research of on this topic.[927]

Overall, the chapter aims to provide both a *diagnosis* of current weaknesses and *practical recommendations* for legislative and judicial development, oriented towards alignment with the principle of effective protection as set down by the CJEU and EU law more broadly.

2. Legislative framework

Damage in public procurement can occur, for example, in case of breaches of statutory duties by contracting authority in the procurement process that cause loss or by an unlawful decision or maladministration by a surveillance public authority. In Slovakia, the public procurement is regulated by Act on Public Procurement[928] (SkPPA). However, this law does not provide a specific provision dedicated to damage claims under public procurement law. Considering the source of the loss, the private enforcement mechanism and claims for damages must be considered under general legal framework. The public enforcement of

[927] KOVÁČIKOVÁ, Hana. Náhrada škody vo verejnom obstarávaní. In: BLAŽO, Ondrej et al. *Hospodárska súťaž – verejné obstarávanie – etablovanie: Úniové pravidlá versus slovenské*. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2021, p. 39 et seq.

[928] Act No. 343/2015 Coll. on Public Procurement and on amendments of certain acts.

the PP rules is[929] entrusted to the SkPPO which supervises contracting authorities for compliance with the APP and other applicable regulations.[930] For this purpose, the SkPPO has wide investigatory powers, including on-site inspections at the premises of contracting authorities[931] and requests for cooperation from the police,[932] the financial administration,[933] and the Antimonopoly Office of the Slovak republic.[934] If a violation had or could have had an effect on the outcome of a public procurement, the SkPPO may issue a decision (1) ordering the elimination of the unlawful situation in relation to a contract or concession; (2) cancelling the procedure used for awarding a contract or concession; (3) imposing fines.[935]A decision of the SkPPO may be reviewed by an administrative court, and an action for review must be filed with the court within 30 days of delivery of the decision of the SkPPO. Procedural rules for proceedings before the court are governed by the Code of Administrative Judicial Procedure[936] (SkCAJP). The action is filed with the Administrative Court in Bratislava,[937] as local jurisdiction is determined by the seat of the authority that issued the first-instance decision. If the administrative court, after reviewing the decision of the SkPPO (defendant) concludes that action is unfounded, it will dismiss it by the judgment.[938] Otherwise, the administrative court will annul the decision of the SkPPO and it may remit it with binding legal instructions for renewed proceedings.[939] The administrative court has the full discretion to revise the sanctions.[940] A cassation complaint is admissible to the Supreme Administrative Court of the Slovak Republic against the decision of the administrative court.[941]In relation to private enforcement of PP rules, Slovakia has no spe-

929 *Ibid*. Section 167.

930 For the purposes of this chapter, the term „contracting authority" includes also the „controlled subject" according to the Section 8 and the „procurer" according to the Section 9 of the SkPPA.

931 Section 167(8) SkPPA.

932 Section 167(4) SkPPA.

933 Section 167(5) SkPPA.

934 Section 167(7) SkPPA.

935 Section 175 SkPAA.

936 Act No. 162/2015 Coll. Administrative Court Procedure.

937 The substantive jurisdiction is determined in Section 10 SkCAJP and territorial jurisdiction is determined in Section 13 SkCAJP.

938 Section 190 SkCAJP.

939 Section 191 SkCAJP.

940 Section 198 SkCAJP.

941 Section 11 SkCAJP.

cific legislation dedicated for this purpose. Accordingly, general provisions on liability apply. Like in the case of competition-law private enforcement, liability is channelled through three distinct regimes, with no clear demarcation between them.Those regimes include the Civil Code[942] (SkCC), the Commercial Code[943] (SkComC) and the Act on State Liability for Damage[944] (SkASLD) caused in the exercise of public authority. Slovak scholars (e. g. Csach, Ovečková, Kováčiková) advance two views on limitation of claims for damage arising from breaches of obligations set public procurement rules. Csach[945] and Kováčiková[946] argue that the Section 757 of the SkComC limits recourse to the general provisions in Part Three for tortious relationships, so the SkCC regime must apply. By contrast, Ovečková[947] contends that the commercial law limitation regime may govern tortious damages claims whenever the conditions in section 261 are met, regardless of Section 757, because the decisive criterion is whether a commercial obligation relationship exists, not why it arose. As the Constitutional Court of the Slovak Republic[948] (CCSR) has noted, there is currently no dominant doctrinal position, and the case law in not settled. Such a dichotomy causes legal uncertainty with serious consequences, most important of which relates to limitation periods.

Complicating matters further, the SkASLD must also be considered. Public procurement, as such, is not an exercise of public authority because the procedure culminates a private-law commercial contract and does not involve authoritative decisions by the contracting authority determining others' rights or obligations (Kováčiková, 2021, p. 43-44). However, if damage arose from unlawful action by the SkPPO in supervision,[949] or from a breach of the RemD

942 Act No. 40/1964 Coll. The Civil Code.

943 Act No. 513/1991 Coll. The Commercial Code.

944 Act No. 514/2003 Coll. on liability for damage caused in the exercise of public authority and on amendments to certain laws.

945 CSACH, Kristián. Súkromnoprávne následky porušenia zákona o verejnom obstarávaní. *Justičná revue*. 2008, vol. 60, no. 4, pp. 563–572.

946 KOVÁČIKOVÁ, Hana. *Náhrada škody vo verejnom obstarávaní*, p. 43.

947 OVEČKOVÁ, Oľga. *Premlčanie v obchodnom práve*. Bratislava: Wolters Kluwer, 2015, p. 123.

948 SK: Constitutional Court Ruling of 24 February 2016, No. II. ÚS 637/2015, *MIHO,* ECLI:SK:-USSR:2016:2US.637:2015.1., para. 25.

949 See to this regard arguments provided by: BLAŽO, Ondrej. § 757 [Zodpovednosť za škodu]. In: LUKÁČKA, Peter et al. *Obchodný zákonník. Komentár*. Bratislava: C. H. Beck, 2025, p. 1775.

obligation to ensure an effective remedy, the SkASLD's specific substantive liability regime applies.

2.1 The civil-law regime

The SkCC imposes a general prevention duty on everyone to act so as to avoid causing damages to health, property, nature and the environment.[950]

To recover procurement-related damages under the SkCC, the claimant (injured party) must establish: unlawful act (which may consist in breach of the statutory or contractual duty, including the general prevention duty), the existence of damage, a causal link between unlawful action and the damage, and culpability (intent or negligence).

With respect to the unlawful action, the applicable law does not distinguish between the breach of legal duty arising from the law or contract. It also includes the breach of the general preventive duty. Insofar as the injured party can prove that the infringer breaches any of his/her/its legal duties, the first condition shall be deemed to be fulfilled.

The type of damage defined by SkCC includes the actual loss and lost profit. That means that damage shall be understood as a harm that occurred in the property sphere of the injured party and is objectively expressible in money. Moreover, if the injured party requests it and if it is possible and reasonable, the injured party can also claim restoration to the original state.[951] As far as the scope of damages is concerned, the court considers also the possible breach of the general prevention duty. That means that if the damage was caused also by the fault of the injured party, such party shall bear the damage proportionately.[952]

The causation must be shown, the damage mut have been caused by the defendant's unlawful act, and that act must be culpable.

However, with the legal requirement to prove culpability, Slovak law does not comply with the EU rules and principle of equality and effectivity required by the RemD. As pointed by the CJEU in *Strabag and others*[953] "Directive 89/665 must be interpreted as precluding national legislation which makes the right

950 Section 415 SkCC.

951 Section 442(1) SkCC

952 Section 441 SkCC.

953 Judgment of 30 September 2010, *Strabag and others*, C-314/09, EU:C:2010:567, para. 45.

to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable." Therefore, the principle of supremacy of the EU law must apply and contravening national law requiring the proving of culpability must disapply or be set aside.[954]

The SkCC recognises subjective and objective limitation periods. A claim for procurement-related damages is time-barred two years after the claimant (injured party) learns of the damage and the liable person. In any event, it is time-barred no later than three years, and for intentional harm, ten years from the event that caused the damage.[955] If the objective limitation period is missed, the right becomes a natural obligation, so a properly raised limitation defence must be upheld by the court. The limitation period starts when the right could first have been exercised,[956] i.e. when the claimant was able to file an action[957] before the court. The limitation period is suspended once the claimant brings the action and properly continues the proceedings. The limitation period does not run for the duration of the case.[958]

2.2 The commercial-law regime

In commercial relations, liability for damages is objective. The legal basis for the claims for damages according the SkComC is not clear, however, as far as the courts accepts such claims (II. ÚS 637/2015), non-contractual liability via Section 757 SkComC applies in these cases.

The claimant must prove the breach of the duty, damage and causation. The standards relating to these aspects mirrors the requirements relating the civil claims above.

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954 See KIŠŠOVÁ, Sára. Prednosť práva EÚ. In: PATAKYOVÁ, Mária T. et al. *Právo EÚ: Inštitucionálny systém a systém práva.* Bratislava: Wolters Kluwer SR, s.r.o., 2025, p. 568.

955 Section 106(1-2) SkCC.

956 Section 101 SkCC.

957 According to Section 132 of Act No. 160/2015 Coll. Civil Dispute Procedure, the action shall contain (…) a true and complete description of the decisive facts, a description of the evidence to prove them, and a statement of claim, which must be clear and enforceable. Moreover, the claimant shall attach to the action all evidence except that which he cannot attach through no fault of his own.

958 Section 112 SkCC.

The SkComC establishes a four-year[959] limitation period, which runs from the date on which injured party knew or ought to have known of the damage and the liable person.[960] In any event, the claim is time-barred ten years from the date of the infringer's unlawful act. If the claim is brought in time, but the dispute has not yet been decided, time continues to run, although a limitation defence cannot be raised in those proceedings. Where judgment awarding damages is given less than three months before or within three months after expiry of the limitation period, the court may enforce the judgment if enforcement proceedings are commenced within three months of the date on which enforcement could first be initiated.[961]

2.3 State liability for damages claims regime.

Liability of the State for damages caused by exercising of public authority pursuant to SkASLD is objective. The claimant must prove the unlawful decision or improper procedure, the existence and amount of damage and causal link.

Like the SkCC and SkComC, also SkASLD combines a knowledge-based limitation period. Subjective period of three years starts from the date the claimant became aware of the damage. If the annulment or amendment of a final decision is required, the period runs from the delivery of such decision. The claim is time-barred at latest ten years from service of the decision that caused the damage [962] The limitation period does not run while the claim is being preliminarily handled,[963] the suspension lasts from filling the request until completion of handling, for a maximum of six months.

When considering the public/private enforcement interplay, various conclusions seem to be relevant. The RemD requires review bodies to be able to award damages, but it does not harmonise detailed substantive or procedural standards, which remain within Member States procedural autonomy.

959 Section 397 SkComC..
960 Section 398 SkComC.
961 Section 408 SkComC.
962 Section 19 SkASLD.
963 Section 15 SkASLD.

Slovakia relies on a dual system where public enforcement of procurement rules is caried out by the SkPPO and reviewed by administrative courts, while private damage claims are pursued under general civil/commercial regimes and the state-liability statute rather than a bespoke procurement-damage law. Public enforcement mechanism provides robust framework complying with the requirements of the RemD and offering the corrective pathways.

Contrary to this, private enforcement remains fragmented, leaving quantification criteria, causation thresholds and limitation periods causes legal uncertainty for harmed tenderers.

In this context, it appears that effective public enforcement of the PP rules will be fundamental prerequisite for ensuring that the claimant has at least a theoretical chance of success in the face of unclear rules for compensation for damages.

3. Types of private enforcement measures

Under Slovak law, private enforcement, generally, is available through several mechanisms. The principal ones are actions for damages, supplemented with interim measures, and actions for the protection of personality, including reputation and good name. This toolkit is already described in chapter on private enforcement of competition law in Slovakia and applies, with the reservation towards class actions and restitutions (that is not the case for their use), equally to private enforcement in public procurement. Procedural rules are governed by the Civil Dispute Code (SkCDP)[964] that is for the case of state liability for damages' actions supplemented by the ASDL.

This part provides a brief overview on the toolkit that the harmed party has at its disposal when considering the mitigation of damages, what are the competent courts where such claims can be filed, what pre-litigation requirements must be met, and comments on damage issues (extent, quantification, proving of fault of the infringer).

[964] Act No. 160/2015 Coll. Civil Dispute Code.

3.1 What tools can be used?

For actions for damages, a claimant faces a choice between a follow-on action, brought after a final illegality finding in the procurement review proceedings, and a standalone action. [965] As regards the latter, there is, as yet, no court decision which, as in competition cases, would preclude the use of standalone actions. However, the similarity of the enforcement setting suggests that injured parties rarely bring standalone actions. In follow-on cases, there is a risk that a final review outcome will not be issued before the objective limitation period expires; but without such an outcome, proving the infringement and quantifying loss is substantially harder. In standalone actions, the claimant bears the full burden of proof, including establishing and unlawful breach of procurement rules, causation and loss. The statement of claim must set out decisive facts, proposed evidence and clear, enforceable claim and annex available evidence.[966]

Court fees as calculated on the amount claimed, subject to statutory caps: 6% of the claim value, capped at EUR 25,000[967] in civil cases and EUR 50,000 in commercial cases, and a flat EUR 28 fee for claims for damages governed by the SkASLD.[968]

The purpose of an interim measure is to avert or mitigate adverse consequences that may arise during a civil dispute. An interim measure therefore provides swift protection of rights that have been violated or are at risk, on the application of the party seeking the order. Given its function, the principles of adversarial procedure and equality of arms are applied less strictly at the stage of seeking and deciding on an interim measure than at trial on the merits. The court need not insist on full formal proof as it would for evidential findings at trial; it is sufficient that the material facts and the asserted right are shown to

965 Section 194(1) of SkCDP: "A question that is within the jurisdiction of a public authority other than the authority under Article 193 may be considered by the court itself, but it may not decide on it.

966 Section 132 of the SkCDP.

967 Annex 1of the Act No 71/1992 Coll. on Court Fees and Fee for Extract from Criminal Records.

968 Annex 1of the Act No 71/1992 Coll. on Court Fees and Fee for Extract from Criminal Records items I.1.a) and I.7a. Fee for the action according the SkASLD is a specially determined flat rate, different from the general 6% rate of claimed amount, which applies to regular monetary claims.

be highly probable in the circumstances. This standard applies both at first instance and on appeal.[969]

To secure the future enforcement of a damages judgment, where there is a risk that defendant (infringer that is the private (non-public) entity) may evade liability (for example, by transferring assets, winding up and restarting under a new entity, or creating artificial obligations), a claimant may apply for an interim measure under Section 325 et seq. of SkCDP. Upon such application, before a final judgment, the court may order the defendant to deposit a sum of money for safekeeping, prohibit the disposal of specified assets or rights, or require, require or restrain certain acts, or order tolerance of specified conduct. The purpose is to prevent imminent harm, preserve evidence, or maintain the status quo during litigation. Slovak courts have applied these measures restrictively: the claimant must set out the decisive facts demonstrating the urgency and credibly substantiate the existence and duration of the right to be protected. In procurement disputes this can be demanding, as bidders may lack full information during or shortly after procurement process.

Actions for the protection of a good reputation (Section 19b(3) SkCC) may be engaged in public-procurement settings, where, for example, statements made by contracting authorities, competitors, or the media allege collusion, bid rigging, unfair practices, or integrity concerns, that damage a bidder's or contractor's reputation. Intent need not to be proved as liability is strict.

The court will then balance the right to the reputation with the right to free expression. In case *CHEMES*,[970] the Supreme Court of the Slovak Republic confirmed that protection extends to any unauthorized interference with reputation, including threats to violation, not only direct violations. The defendant bears the burden of proof that is, the defendant must establish the truth of the assertions, and the claimant does not need to prove falsity. Where a private undertaking seeks public funds or public contracts, it enters the public sphere and public interest. The public may reasonably discuss and investigate how public funds will be used, in what amount and under what conditions, and whether the recipient is reliable and responsible. Applicant must therefore tolerate

969 SK: Constitutional Court, Ruling of 4 August 2020, No. III. ÚS 294/2020, ECLI:SK:USSR:2020:3.US.294.2020.1, Para. 26.

970 SK: Supreme Court, Decision of 30 January 2019, No. 1Cdo/144/2018, *CHEMES, a. s. v B.V.O. on protection of good reputation of legal entity*, ECLI:SK:NSSR:2019:8310211009.2, paras. 34, 29.

a reasonable degree of criticism, probing questions, and evaluation by experts, politicians, and the general public.

A legal entity is presumed to have a good reputation from incorporation. The reputation is assessed in case by case on actual conduct in the business relationships. If a legal person fails to meet obligations properly and on time, it cannot be regarded as enjoying a good reputation. Publication of false information that adversely affects the reputation of a legal person generally constitutes an infringement, but not every falsehood suffices: an infringement arises only where the falsehood reaches a seriousness that is no longer tolerable in a democratic society. Because these standards are fact-sensitive and require case-by-case assessment, claimants may be cautious about relying on this remedy in procurement disputes and their motivation to use this tool may remain low.

3.2 Where to claim (competent courts)?

All measures above need to be exercised before causally and territorially competent courts. The jurisdiction of the court and the procedural steps of the claimant vary depending on the legal basis of the claim.

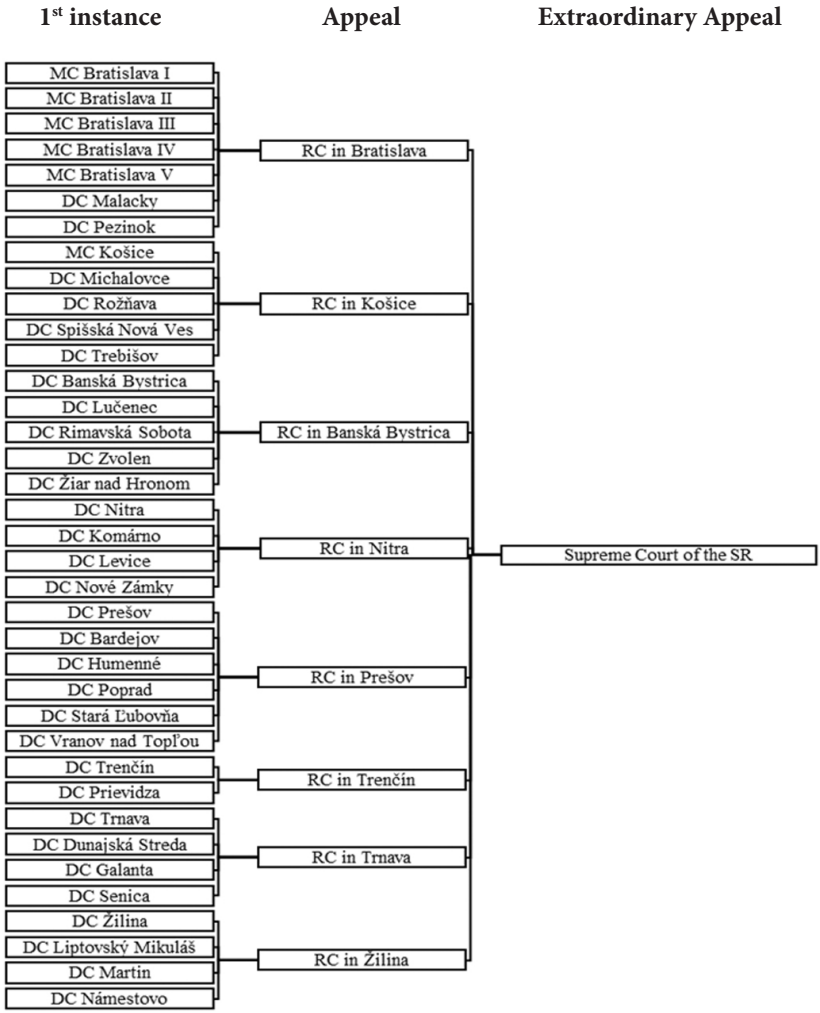
Civil-law claims:

When the claimant bases the claim according to provisions of the SkCC, the competent is the court in whose district the defendant (infringer) has its registered office address.[971] In addition to this defendant's general court (Figure 14.1), a claim can be filed also to the court, in whose district the event giving rise to the right to compensation for damage occurred.[972]

[971] Sections 13 and 15 of the SkCDP.

[972] Section 19 of the SkCDP. Section 22 of the SkCDP.

Figure 14.1: System of procedure according to SkCDP in Slovakia in competition (state aid) damages cases if the general competence of the defendant's residual court is applied.



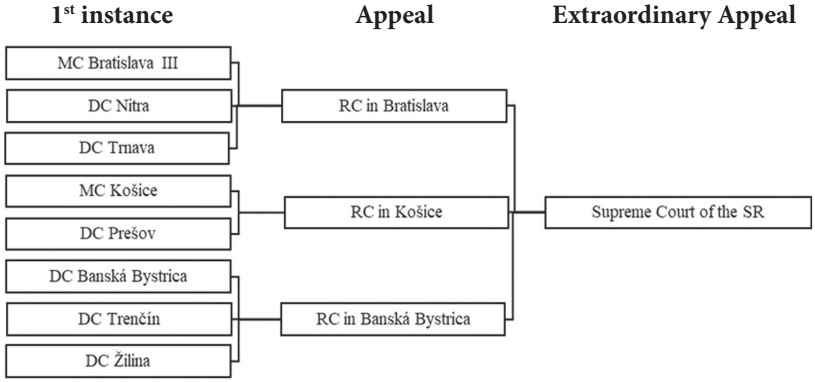
Source: processed by author according to Art. 3 of Act 371/2004 Coll.[973]

[973] Act No 371/2004 Coll. on the Seats and Districts of Court of the Slovak Republic and on the Amendment of Act No 99/1963 Coll. Civil Procedure Code, as amended.

Commercial-law claims**:**

If the claim is legally based in provisions of SkComC, the competent court for proceedings in commercial disputes is one of the eight specialised commercial courts[974] (Figure 14.2) defined in Section 22 of the SkCDP in whose district the defendant (infringer) has its registered office address.

Figure 14. 2: System of procedure according to SkCDP in Slovakia in competition damages cases if the competence of the defendant's residual commercial court is applied.



Processed by the author. RC = regional court, MC = municipal court, DC = district court.

State liability for damages claims**:**

The process relating to claim for damages according to SkASLD differs from civil and commercial regimes by requiring the mandatory pre-litigation phase.[975] Before filing the action to the court, the claimant must file a written request for compensation with the SkPPO, which will be the competent authority

[974] Section 22 of the SkCDP: The competent courts for proceedings in commercial disputes are: a) Bratislava III Municipal Court for the district of the Regional Court in Bratislava, b) Košice Municipal Court for the district of the Regional Court in Košice, c) Banská Bystrica District Court for the district of the Regional Court in Banská Bystrica, d) Nitra District Court for the district of the Regional Court in Nitra, e) Prešov District Court for the district of the Regional Court in Prešov, f) Trenčín District Court for the district of the Regional Court in Trenčín, g) Trnava District Court for the district of the Regional Court in Trnava, h) Žilina District Court for the district of the Regional Court in Žilina. Appeal in commercial disputes are decided by specialised regional courts pursuant to Section 34 of the SkCDP.

[975] Section 15 SkASLD.

representing the State in these case.[976] If the SkPPO does not satisfy the claim within six months or receipt, the claim might be brought before a civil court. The jurisdiction of the court is governed by the Section 17 of the SkCDC[977] and follows the general court of the defendant.

3.3 What damage can be claimed?

Under the SkCC,[978] the SkComC[979] and the SkASLD,[980] compensable pecuniary loss comprises actual loss and lost profit. However, as the CJEU explained in *INGSTEEL*[981, 982] "article 2(1)(c) of Directive 89/665 must be interpreted as meaning that the damages which persons harmed by an infringement of EU public procurement law may claim under that provision may cover [also] the loss or damage suffered because of the loss of opportunity."

Indeed, there are serious implications for Slovakia. Slovak court should give serious consideration also to claims for loss of opportunity in procurement damages actions, even though national provisions enumerate actual loss and lost profit, so as to ensure effectiveness of Article 2(1)(c) RemD. A failure to entertain such claims may expose the Slovak Republic to secondary liability for breach of EU law (effectiveness and equivalence principles under the RemD).[983]

Even if the extend of the damages is established, awareness of the injured party of the possibility to claim the loss of opportunity requires the specific knowledge on EU law and principle of supremacy of the EU law. Furthermore, the Slovak law provides no guidelines on how to quantify and calculate damages,

976 Section 4 (1) d) SkASLD.

977 The general court of the State is the court in whose district the fact that established the applied law occurred. This provision is supplemented by the provision of Section 4 ASLD, which specifies the institution which will represent the Slovak Republic in such procedure. As the damages in the context of public procurement is usually caused by the unlawful decision/measure (that is issued at the seat of the institution), the competent court in these cases will be the general court of the defendant (PP Office), i.e. Bratislava IV Municipal Court.

978 Section 442 SkCC.

979 Section 379 SkComC.

980 Section 17 SkASLD.

981 Judgment of 6 June 2024, *INGSTEEL*, C-547/22, EU:C:2024:478, para 44.

982 The case relates to the follow-on case after SK: Supreme Court, Judgment of 17 October 2017, No. 1Sžf/67/2015, ECLI:SK:NSSR:2017:1014201280.1. However, the outcome in subsequent damages case is not known at the moment of writing this chapter.

983 *Ibid*. paras. 35-37.

and unlike in the case of Antitrust Damages Actions, the whole responsibility remains with the claimant.

Fragmentation (Figure 14.3) and complexity of damages procedures in public procurement remain the main obstacles for injured parties when deciding whether to claim damages in this regard or not.

Figure 14.3: Comparison of regimes of the SkCC, SkComC and the SkASLD

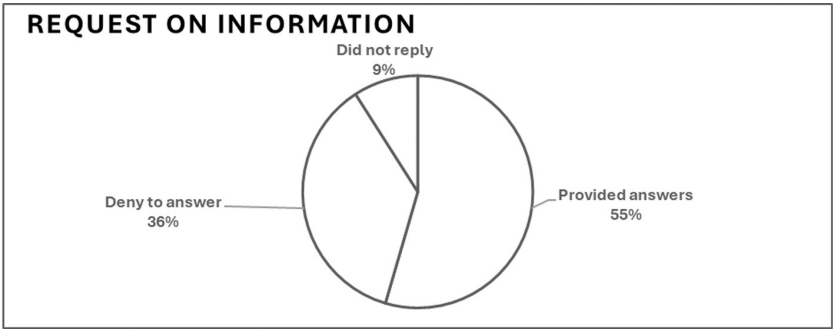
	SkCC	SkComC	SkASLD
Limitation periods Subjective	2y	4y	3y
Objective	3y	10y	10y
Competent Court	the court of defendant's residence	the commercial court of defendant's residence	the court of defendant's residence
Information asymmetry	Problem of the claimant	Problem of the claimant	Problem of the claimant
Quantification of harm	claimant	claimant	claimant
Presumption of harm	Not applicable	Not applicable	Not applicable
Liability	Strict Precedency of EU Law National law shall not apply	Strict	Strict
Court fees	6%, max. EUR 25,000	6%, max EUR 50,000	EUR 28
Default interest rate	ECB+5% from the day of request	ECB+8% /ECB+ 9% from the day of request	ECB+5% from the day of request

Source: Processed by the author.

4. Private enforcement cases

The author contacted all 32 first-instanced courts, which may have competence to decide on private enforcement cases with a request for information on how many actions for damages arising from violation of public procurement rules they handled since 2001[984]. 29 courts delivered their responses, of which 17 replied that they did not decide on such cases. Three courts did not respond at all. The rest of the courts dismissed the request and denied providing an answer arguing that they cannot find this information (Figure 14.6).

Figure 14.6: Visualisation of courts' reaction



Source: Processed by author.

The author therefore realised desk-research based on a manual search of both public and private databases containing the judgments of Slovak courts, using philtres such as "claim for damages", "public procurement", "directive 665/89", etc. Publications related to private enforcement of public procurement law in Slovakia were used, as well.

4.1 MIHO saga

The key legal issues in this case dealt with considerations, under which legal regime (civil or commercial) should damages claims for unlawful cancellation

[984] The request for information was formulated as follows: How many claims for compensation for damage caused by a violation of public procurement rules under Act No. 25/2006 on public procurement and on amendments and supplements to certain acts / Act No. 343/2015 Coll. on public procurement and on amendments and supplements to certain acts have been filed since 2006? If such claims have been filed, how many of them have been decided on the merits?

of a tender be assessed, and what limitation period applies? Does a statutory breach during procurement confer direct contractual or commercial liability, or only civil liability?

In 2004, the municipality of Šelpice ran a tender for the construction of 96 flats. A claimant MIHO submitted what was assessed as the best offer. The municipality first notified MIHO of acceptance, then abruptly cancelled the tender and ran a new one. MIHO, having incurred preparation costs and missed expected profit due to only 45 flats being built in the municipality, claimed for damages and lost profit. MIHO firstly challenged the cancellation before the SkPPO, which confirmed the municipality's cancellation was unlawful and stated the municipality had a statutory obligation to contract with MIHO. MIHO therefore claimed for damages. First-instance District Court Trnava (2010) held, that public procurement is *not* an exercise of public authority for State liability under SKComC. and saw the dispute as private law (civil/contractual, not commercial). It applied SkCC tort (culpa in contrahendo) and limitation rules. The court held MIHO's claim time-barred, using the SkCC's two-year subjective period, since the claim was not filed until 2008, despite contractual opportunities and knowledge from 2004. The Regional Court in Trnava (2011) upheld first-instance court decision, fully endorsing its facts and reasoning on limitation. The appeal court highlighted, with reference to prevailing doctrine, that unless a procurement process results in a concluded contract or is specifically cross-referenced, it is governed by civil law; commercial law applies only to completed contractual relationships or if the procurement statute so stipulates.

These judgments were contested before the Supreme Court of the Slovak republic by extraordinary Appeal by Prosecutor General (2012). Prosecutor General argued that, as the procurement involved public contracting by a municipality and a business, the right legal regime should be the SkComC, including its longer limitation periods, via Section 261(2) and relevant provisions, rather than the SkCC. If that would be the case, MIHO's claim was not yet time-barred.

The Supreme Court of the SR (27 April 2015)[985] dismissed the extraordinary appeal, affirming that the relationship was not a commercial contractual one under the SkComC, but governed by the SkCC's general liability regime and limitation periods. The court held that even an administrative breach of

[985] SK: Supreme Court, Judgment of 27 April 2015, No. 3Mcdo/40/2012, *MIHO a spol. v Obec Šelpice*, ECLI:SK:NSSR:2015:2108220433.1.

procurement duties (found by SkPPO) does not in itself create a commercial contractual relationship; damages from "pre-contractual" misconduct must be therefore assessed under civil law.

MIHO subsequently challenged the decisions on constitutional grounds, arguing violation of the right to court protection and property due to inconsistent and arbitrary reasoning, particularly the lack of clarity about the relationship between civil and commercial codes for limitation purposes.

The Constitutional Court of the SR[986] (24 Feb 2016) found no breach of constitutional rights: while it acknowledged ambiguities in delimiting civil versus commercial relationships, it confirmed that the Supreme Court's legal analysis was compatible with the constitution, given current legislative ambiguity and the latitude for judicial interpretation in the absence of legislative clarity.

MIHO lost at all levels; all courts ultimately held the claim time-barred, with the civil regime applied. The constitutional challenge failed too, as the Supreme Court's analysis was held to meet the requirements for judicial reasoning and constitutional rights.

The most important outcome of this judgment can be summarised as:

- Public procurement up to contract formation is market conduct, not the exercise of public authority.
- The absence of a contract or explicit statutory "blanket" means civil code delict rules and limitations apply.
- The SkComC governs procurement disputes only when acknowledged by statute or arising from a concluded contract.
- An administrative finding against the contracting authority does not establish a commercial contract or an enforceable right to damages under commercial law.

The *MIHO* saga illustrates persistent Slovak judicial uncertainty about the interface of civil and commercial regimes in procurement pre-contractual disputes. While all courts recognised the wrongful cancellation of the tender, recovery was foreclosed by the prevailing view on legal characterisation and limitation. Legislative clarification remains desirable, but the courts' decisions reflect measured application of current law, even though doctrinal tensions persist.

[986] SK: Constitutional Court, Ruling of 24 February 2016, No. II. ÚS 637/2015, *MIHO*, ECLI:SK:USSR:2016:2US.637:2015.1.

4.2 ANTES PLUS v Slovak Republic[987]

A bidder ANTES PLUS sought damages against the Slovak Republic (represented by the SkPPO) after the PP Office ordered reinclusion of a previously excluded competitor (EUROBUILDING) and the contracting authority later cancelled the procurement. The claimant contested that the contracting authority failed to reinstate the previously excluded bidder as ordered, continued the procedure, and ultimately cancelled the procurement; the claimant maintained that, absent these steps and the SkPPO's intervention, it would have been awarded the contract. The claimant alleged lost profit from not being awarded the contract. The claimant based its claim on state liability for damage caused by an unlawful decision under SKComC (Sections 3, 5, 6, 17), asserted in a publicprocurement context. The first-instance court (District Court of Bratislava I) dismissed the action for lack of causation. Even treating the SkPPO's decision as an unlawful decision under Section 6 SkASLD, causation was not proved because reevaluation had to resume with all offers, further contingencies remained, and the procurement was later cancelled; the court therefore declined further evidence and did not assess quantum. The appeal court (Regional Court in Bratislava) affirmed the judgment. It agreed that causation was not established and that additional evidence was unnecessary and uneconomical in light of the dispositive causation failure. The claimant then lodged an extraordinary appeal alleging denial of a fair trial because the lower courts did not sufficiently reason their decisions and declined to take proposed evidence.

The claimant challenged those judgments by an extraordinary appeal submitted to the Supreme Court of the SR. The key issue to assess was whether a direct, unbroken causal link existed between the alleged unlawful decision and the claimed loss in a procedure subject to reevaluation and later cancellation. The Supreme court dismissed the extraordinary appeal, helding that lost profit was hypothetical (as said by lower courts). The court confirmed, that annulment or qualification of a decision in the review track and subsequent procedural steps (including reevaluation and cancellation) generally break the causal chain for lostprofit claims; lost profit must be proved with certainty, not inference. Moreover, courts may decline additional evidence where a dispositive element (such as causation) is not made out; economic risks and expectations in

[987] SK: Supreme Court, Judgment of 13 December 2022, No. 9CdO/5/2021, ECLI:SK:NSSR:2022:1215218004.1

tendering do not create an enforceable right to contract or to lostprofit recovery in the absence of a direct, unbroken causal nexus.

4.3 I v Slovak Republic (Regional Forestry Office in Trnava tender)[988]

The plaintiff (bidder "I.") claimed damages (lost profit) from the Slovak Republic for alleged improper official procedure by the Regional Forestry Office in Trnava in a lowvalue procurement for a forest management plan. The contracting authority awarded the contract to a competitor although the claimant asserted the lowest price. The claimant characterised the evaluation and award of the tender resulting in conclusion of a contract with another bidder despite the claimant's lower price as an improper official procedure, which make rise the state liability caused in the exercise of public authority according the SkASLD. The firstinstance court (District Court of Bratislava I) awarded damages – lost profit, finding the authority's conduct contrary to tender rules and procurement law and causative of the claimant's loss. The appellate court (Regional Court in Bratislava) reversed and dismissed the claim, relying on a control report that found no breach of the SkPPA or internal rules. Therefore, no improper official procedure and no State liability occurred. The claimant filed an extraordinary appeal with key legal issue to be considered, whether the authority's conduct amounted to "improper official procedure" within the meaning of SkComC and, if not, whether the cumulative elements of State liability (unlawfulness, damage, causal nexus) were met.

The Supreme Court of SR dismissed the extraordinary appeal dismissed. The court reminded that the procurement conduct had been reviewed by the competent control body at the claimant's request; and the review found no violations. On that basis, the appellate court concluded that the award and contract could not be characterised as improper official procedure. AS the prerequisite element of "improper official procedure" was absent, State liability could not arise irrespective of the claimant's assertions on loss and causation. The key findings of this case include:

– A control finding of compliance with procurement law and internal rules militates against characterising an award decision as "improper official procedure," defeating a necessary element of State liability.

[988] SK: Supreme Court, Judgment of 21 June 2011, No. 2Cdo/121/2010, *I. s.r.o. v Slovak republic*.

– Without establishing the unlawful act/official fault element, claims for lost profit in procurement cannot succeed, even where a bidder alleges it offered the lowest price.

Interesting is that the Supreme Court, unlike in *MIHO* case, accepted public procurement as an activity falling to the scope of the SkASLD.[989]

4.4 RELCO[990]

The claimant (RELCO s.r.o.) was excluded from a public tender for deicing materials (industrial salt and a magnesiumchloride agent) for failing to submit balance sheets for 2007–2009. The SkPPO rejected the claimant's objections by a decision of 11 March 2011; that decision was later quashed by the administrative courts, while a subsequent SkPPO decision of 14 May 2012 cancelled the tender and was upheld in separate administrative litigation. The claimant contested its exclusion from the competition for nonfulfilment of participation requirements (missing balance sheets) by the contracting authority (*Banskobystrická regionálna správa ciest, a.s.*) which the reviewtrack later found unlawful.

The claimant grounded legal basis of the claim as State liability under SkComC. (Sections 3, 5, 6, 17): damages caused by an unlawful decision of a public authority; heads of damage pleaded were actual loss (a contractual penalty and overdraft interest) and lost profit.

The first-instance court (District Court of Bratislava I) dismissed the claim for lack of causation; even if the SkPPO decision was unlawful and quashed,

989 *„Although the cited law does not explicitly define the term "maladministration" by a public authority, it may be inferred to mean an official act or procedure which is defective and not in accordance with the relevant legal regulation—that is, an official procedure in which the rules laid down in statutory instruments governing the conduct of public authorities are breached, or the order arising from the nature, function, or objectives of that activity is disregarded, i.e. an unlawful procedure. The fact that it involves an improper official procedure also necessitates that it must be directly related to the exercise of the powers of a public authority. Improper official procedure includes not only cases where the public authority acts directly (in its decision-making activities), but also situations where it fails to fulfil its obligation to perform an act or issue a decision within the legally prescribed time limit; where there is inaction in the exercise of public functions; where unnecessary delay occurs in the proceedings; or where there is any other unlawful interference with the rights and legally protected interests of natural or legal persons.*" (page 10 of the judgment).

990 SK: Supreme Court, Judgement of 26 April 2018, No. 2Cdo/72/2017, *RELCO s.r.o v Slovenská republika*, ECLI:SK:NSSR:2018:1112227495.1

readmission would not have guaranteed award. The appeal court (Regional Court in Bratislava) reversed the judgment and awarded compensation of EUR 2,446,000 reasoning that the unlawful decision directly caused the claimant's loss because price was the sole criterion and the claimant bid the lowest price.

A defendant challenged the judgment of appeal court by submitting the extraordinary appeal to the Supreme Court of the SR, seeking consideration of legal question whether there was a direct, unbroken causal link between the unlawful SkPPO decision and the alleged loss (actual loss and lost profit), in light of the procurement stages, the contracting authority's discretion, and the later cancellation of the tender.

The Supreme Court quashed the appellate judgment and case remanded as the appellate court's findings on causation and quantum could not stand. The Supreme court reasoned that Actual loss (contractual penalty and overdraft interest) stemmed from the claimant's own commercial decisions made before the procurement was concluded and before the SkPPO's unlawful decision; such private law penalties and financing costs cannot be shifted to the State absent a direct causal nexus. Furthermore, a publiclaw review decision cannot be "transposed" into private contractual obligations (e.g., a contractual penalty premised on a hoped for award); and damages cannot be grounded on a private arrangement tied to outcomes of public law proceedings. Regarding the lost profit, the court held that the claim was hypothetical and uncertain. The claimant did not satisfy qualification requirements; even the lowest price does not ensure award; the contracting authority retains discretion, and the tender can be cancelled before contract signature (as occurred), breaking causation. Finally, causation must be proved with certainty, not on probability or assumption. The claimant failed to discharge the burden of proof on both existence and amount of damage.

The other important findings of this case include:

- Annulment of an unlawful review decision does not, by itself, establish entitlement to award or to lostprofit damages; procurement contingencies and cancellation will typically defeat causation.
- Economic risks inherent in tendering (including preaward supply arrangements and financing) lie with market participants; there is no advance legal right to contract, even for the bidder with the lowest price.

– Private law penalties linked to anticipated public procurement outcomes are not recoverable from the State under the public authority liability regime absent a direct, unbroken causal link.

The court applied the SkASLD without assessment, whether the public procurement is or is not the exercising of public authority.

4.5 ANITRAM EXPOS[991]

The claimant (ANITRAM EXPOS) sought damages for lost profit after being excluded from a public tender. The SkPPO rejected its objections, but the administrative court later quashed that SkPPO decision. The claimant sued the contracting entities (as successors to the procurer) in tort and sued the State (via the SkPPO) for liability arising from the quashed administrative decision. The claimant contested the exclusion of the claimant from the tender and continuation of the procedure, followed by review steps before the SkPPO and eventual cancellation of the tender. The claimant asserted that, but for the unlawful decision, it would have been awarded the contract.

The claimant grounded its claim on two legal bases: general delictual liability under SkCC (Section 420) against the contracting entities, and state liability for damages under SkASLD (then applicable) against the State.

The firstinstance court (District Court Bratislava II) dismissed the claim. It held that the contracting entities did not take the exclusion decision (this was done by the SkPPO), and that even quashing of the SkPPO's decision did not mean the claimant would automatically be awarded the contract – causation for lost profit was not established. It added that timely objections to the tender conditions or an application for a stay could have mitigated the alleged loss. The appeal court (Regional Court in Bratislava) affirmed this judgment. Given subsequent cancellation of the tender, there was no direct causal nexus between the quashed SkPPO decision and the alleged lost profit. The claim therefore failed on causation. It also noted that, where the procedure is cancelled and the offer is not assessed in later stages, lostprofit damages are not available.

[991] SK: Supreme Court, Judgment of 27 July 2019, No. 4CdO/98/2019, *ANITRAM EXPOS s.r.o. v 1) Železničná spoločnosť Cargo Slovakia, a.s., 2) Železničná spoločnosť Slovensko, a.s., and PP Office*, ECLI:SK:NSSR:2019:1205218147.1.

The claimant then submitted an extraordinary appeal to the Supreme Court of the SR seeking consideration for a key legal question, whether a direct, unbroken causal link existed between the unlawful review decision and the alleged lost profit, and whether the contracting entities could be liable where the operative exclusion and its review were carried out by the SkPPO.

The Supreme Court dismissed the extraordinary appeal by reasoning, that the lower courts' conclusions stood: annulment of a SkPPO decision does not by itself establish entitlement to award or lostprofit damages; cancellation of the procurement and remaining award contingencies break causation, and the claimant did not discharge the burden of proof.

As the Supreme Court pointed out, lost profit in procurement is recoverable only where causation is proved with sufficient certainty. Therefore, annulment of a decision in the review track and subsequent cancellation generally render lostprofit claims speculative. It also held, that contracting entities are not liable for acts taken by the review authority; and where the procedure restarts or is cancelled, a direct causal nexus to claimed loss is typically absent.

4.6 E. v U. (Faculty of Social and Economic Sciences tender)[992]

The claimant (E, a NGO) put in a bid for a public contract but was excluded due to failure to submit documents required by the tender conditions. The claimant contended that for below-threshold contracts, some of these documents were not strictly required and challenged both the exclusion and the contracting authority's right to set such requirements.

The claimant contested its exclusion from the procurement procedure for non-compliance with documentary requirements set out in the tender conditions and the relevant law.

The claimant claimed damages under the general civil liability regime (Section 420 SkCC), alleging wrongful exclusion and a right to compensation for loss suffered as a result. They further alleged the authority breached procurement law by imposing requirements not strictly demanded by the law for below-threshold contracts.

[992] SK: Supreme Court, Judgment of 3 May 2011, No. 1Obdo/34/2010, *E. v U.*

The first-instance court (District Court Bratislava III) ruled that the exclusion was justified as the claimant failed to submit all documents required by the tender and the relevant statutory provisions. It held that there was no wrongful act or omission, no causal link to alleged damage, and that legal preconditions for civil liability were not met. It also interpreted the SkPPA as giving the contracting authority some leeway to require additional documents. The appeal court (Regional Court in Bratislava) affirmed the first-instance judgment, agreeing the exclusion was correct and that no viable claim for damages arose.

The claimant then submit the extraordinary appeal to the Supreme Court of the SR to reassess, whether failure to submit documents listed in the tender (even when not strictly required for below-threshold contracts) justified exclusion, and whether such exclusion gave rise to a damages claim for wrongful conduct.

The Supreme Court dismissed the extraordinary appeal, ruling that the contracting authority was entitled to require proof of legal, financial, and technical compliance in line with its interpretation of procurement statutes and the published tender conditions; the claimant's exclusion for failure to submit all required documents was proper and therefore no breach of duty, and therefore no liability for damages under Section 420 SkCC exist.

The Supreme Court found that neither procurement statutes nor contract/tender documents created an obligation for the contracting authority to compensate for exclusion or to indemnify for participation costs or lost profit. Claims on "unjust enrichment" or lost profit failed as the strict legal requirements for liability (breach, loss, causation, and fault) were not met.

This case confirms a strict reading of both procedural requirements and of substantive liability in public procurement. The courts have upheld the discretion of contracting authorities to set and enforce explicit tender requirements, so long as those requirements are published and not manifestly ultra vires. Damages following exclusion will not be awarded unless clear and unlawful conduct by the authority, and all elements of civil liability, are convincingly proved.

4.7 EUREA[993]

This decision underscores that, absent contractual or statutory grounds, bidders in public procurements cannot claim for participation costs or lost profit if the tender is lawfully cancelled prior to award, reflecting the general principle of bidder risk in public tenders

The defendant (Ministry of Construction and Regional Development of the Slovak Republic) launched a public procurement procedure in 2006 which was subsequently cancelled. The claimant (EUREA), a bidder, incurred bid-preparation costs (including an author's fee under a contract for work concluded with its own statutory representative) and sought damages allegedly caused by the defendant's unlawful conduct, including exclusion of its bid and the cancellation of the procedure.

The claimant contested the cancellation of the public procurement before expiry of the claimant's time-limit for objections against exclusion, and the exclusion itself. The claim linked the alleged loss to that cancellation or exclusion. The action was framed as damages arising from breaches of public procurement rules based on state liability for damages under SkASLD and general delictual liability under SkCC (Section 420) assessed in conjunction with SkPPA.

The firstinstance court (District Court Bratislava II) dismissed the claim holding that (1) there was wrong passive standing under SKComC (the proper defendant would be the State, not the ministry). (2) The contracting authority's conduct in procurement was not an exercise of public authority but part of creating a commercial-obligational relationship; therefore, Act 514/2003 did not apply. (3) There does not exist direct right to recover bid-preparation costs; tender participants bear their own costs. (4) No causation was proven between the alleged breach and the claimed loss. (5) The authority could validly cancel the procedure without awaiting the bidder's objection period; both parties evidenced an interest in cancellation. The appeal court (Regional Court in Bratislava) affirmed the judgment. The appeal court added that correct legal characterisation under the SkPPA and Section 420(1) SkCC; therefore, the ministry was the proper defendant on that basis. Furthermore, the claimant's costs arose upon announcement and preparation of the bid, not due to exclusion/

[993] SK: Supreme Court, Decision of 29 May 2017, No. 7 Cdo/214/2017, *EUREA v Ministerstvo výstavby a regionálneho rozvoja Slovenskej Republiky*, ECLI:SK:NSSR:2018:1208200696.1.

cancellation. Bidders bear such costs irrespective of outcome or contract award. The claimant submitted the extraordinary appeal to the Supreme Court of the Slovak republic. Legal issues to be considered included whether the contracting authority's conduct constitutes exercise of public authority engaging State liability under SkASLD; whether a bidder has a direct claim to recover bid-preparation costs when a procedure is cancelled or the bid excluded; and whether causation between alleged breaches and loss was established. The Supreme Court dismissed the extraordinary appeal, pointing out that the decisive merits issue was causation, which both lower courts found lacking. Bid costs are borne by bidders; and there is no direct statutory entitlement to reimbursement of participation costs. Regarding the liability for damage in public procurement, the court held that conduct of a contracting authority in running and cancelling a procurement does not, without more, constitute exercise of public authority for SkASLD; and general civil liability (Section 420 SkCC) is the relevant framework. It also remind that there is no direct right to recover bidpreparation costs; bidders must bear their own participation expenses regardless of success or contract conclusion; causation must be specifically proven between an unlawful act and the alleged pecuniary loss; mere cancellation or exclusion does not suffice; where State liability under SkASLD is pursued, the proper defendant is the State, not the ministry.

4.8 CEVEO v Združenie miest a obcí, región JE Jaslovské Bohunice[994]

The claimant (CEVEO, s.r.o.), brought an action against Združenie miest a obcí, región JE Jaslovské Bohunice (defendant – association of municipalities), contesting certain acts associated with public procurement proceedings by the contracting authority.

The challenged act related to public statements and actions by the contracting authority and its representatives which allegedly harmed the professional reputation of the claimant during procurement proceedings being held before the District Court Trnava.

[994] SK: Supreme Court, Decision of 23 July 2025, No. 3Cdo/59/2025, *CEVEO s.r.o. v Združenie miest a obcí, región JE Jaslovské Bohunice Združenie miest a obcí, región JE Jaslovské Bohunice*, ECLI:SK:NSSR:2025:2121204541.1.

The legal grounds of the claim included protection against the unlawful damage of reputation under civil law provisions, with the claim seeking damages for harm suffered during public procurement procedures

First-instance court (District Court Trnava) dismissed the claim for lack of sufficient legal basis and found no liability on the part of the association of municipalities. The appellate court upheld the decision of the first-instance court, confirming the absence of actionable liability for damage based on the facts and applicable legal standards.

The claimant then filed an extraordinary appeal with the defined legal question whether the public procurement authority's statements or acts amounted to unlawful interference with the claimant's rights and triggered liability for damages under Slovak law governing public procurement and civil liability.

The Supreme Court dismissed the appeal and confirmed the lower courts' findings that the defendant was not liable. The Supreme Court reasoned that liability for damage in the context of public procurement cannot arise from lawful acts undertaken in fulfilment of public tasks, unless such acts amount to manifest illegality or breach of statutory obligations. The claimant failed to demonstrate unlawful conduct directly causing compensable harm. The decision clarifies that contracting authorities are not automatically liable for harm alleged to have arisen in standard procurement conduct unless there is clear unlawful interference, a direct and causal link to damage, and violation of protective statutory provisions

4.9 P v Q (Reconstruction of the building tender case)[995]

The claimant (P., a.s.) sought damages (including loss of profit and reimbursement of incurred expenses), alleging harm suffered after being declared the winner of a public commercial tender for the "Reconstruction of a Building" for the defendant (Q., a.s.). The claimant argued that a contract for work was formed, but the defendant launched a new tender, thus preventing them from executing the works.

The defendant's act in question was its announcement of a new public commercial tender after having already accepted the claimant's offer as the winning

[995] SK: Supreme Court, Judgment of 15 February 2008, No. 5Obo/46/2006-189 , *X v Q.*

bid, without concluding and honouring the contract or permitting performance by the claimant.

The claimant invoked compensation for damage pursuant to Section 373 et seq. of the SkComC, comprising both lost profits and actual damages (costs expended in preparation for the project).

The Regional Court in Košice (first-instance) dismissed the claim, finding that there was no contract formed between the parties and thus no breach of contractual obligation; as a result, the statutory conditions for damages were not satisfied. The Supreme Court of the Slovak Republic (appeal) affirmed the dismissal, agreeing that the essential precondition of a contractual relationship, conclusion of a contract, was absent, precluding liability for damages.

Within the extraordinary appeal a key legal question was to be solved: Can a contractor claim for lost profit and preparatory expenses against a contracting authority where it is not established that a binding contract arose in the course of a public procurement procedure?

The Supreme Court upheld the dismissal of the claim, concluding that in the absence of a concluded contract for work, there could be no breach of contractual duty and hence no liability for damages under the SkComC. Compensation for preparatory work was also denied. The Court clarified that a binding contract did not arise and the defendant's communication to the claimant did not constitute contract acceptance but was merely a statement of intent to negotiate a framework contract. The essential elements of a public commercial contract were absent; the conduct of the defendant did not satisfy the legislative requirements for a competitive public tender governed by Section 281 et seq. of the SkComC, nor those for a public invitation to tender under the SkCC. For liability in damages, it is fundamental that a contractual or statutory duty existed and was breached, causing loss. Since the contract was never formed, there could be no breach and thus no obligation to compensate for lost profit or expenses incurred during preparation. The Supreme Court reaffirmed that costs of participation and preparation in such tenders, absent contractual protection or explicit risk allocation, are borne by the participants themselves.

Regarding the liability for damage in public procurement, the court held, that damage claims for lost profit or preparatory costs in public procurement are contingent on the existence of a concluded contract or clear legal obligation. The act of declaring a party the "winner" of a tender, without more, does not, as

a matter of law, obligate the contracting authority to conclude the contract or compensate for subsequent damages if the contract is not formed. The burden is on the contractor to ensure the existence of a binding agreement; absent such, claims for damages in public procurement are generally excluded unless another statutory ground is expressly provided.

To sum up, where no binding contract for works is established in a public procurement context, the contracting authority is not liable for damages, whether for lost profit or preparatory expenses. The announcement of a successful tender outcome, in the absence of an unequivocal contractual commitment, does not give rise to legally enforceable rights to damages. Liability for damage requires a breach of an existing contractual or statutory duty, which was not proven in this instance.

4.10 Medika SK v Slovak Republic[996]

Medika SK, a.s. sought compensation for damages, alleging loss of profit and actual costs incurred due to the defendant's procurement of goods (mobilisation reserves - medicines and medical supplies) via third parties, allegedly bypassing the claimant's exclusive position as "protector"[997] (custodian) under a safeguarding agreement covering strategic reserves.

Contested Act of Contracting Authority: The State Material Reserves Administration (defendant) directly procured goods from other suppliers through negotiation procedures, rather than via Medika SK, who claimed exclusive rights to such procurements under a contractual and statutory framework.

The claim was grounded in breach of statutory and contractual duties, seeking damages under Section 373 et seq. SkComC, relying on the safeguarding agreement and related claims for hypothetical lost profit (margin) and actual losses.

The first-instance Court (District Court of Pezinok) dismissed the claim, holding the claimant failed to establish an exclusive right, noting the State as

[996] SK: Supreme Court, Decision of 24 November 2021, No. 1Obdo/90/2021, *Medika SK v Slovenská republika (Správa štátnych hmotných rezerv)*, ECLI:SK:NSSR:2021:1710207258.1.

[997] A claimant was designated as an economic mobilization entity under the Act No. 414/2002 Coll. on Economic Mobilization and on Amendments to Act of the National Council of the Slovak Republic No. 274/1993 Coll. on the Definition of the Competence of Authorities in Matters of Consumer Protection, as amended.

purchaser was entitled to procure by negotiation, and no proprietary margin was proved. The appeal court (Regional Court in Bratislava) affirmed dismissal, finding the claimant was one of several protectors; procurement was lawfully undertaken by the State, and not all claimed losses were causally linked to the alleged breach.

Within extraordinary appeal procedure a key legal question was assessed: Does a statutory or contractual "protector" of State reserves acquire any right to damages for loss of profit when the State procures goods itself in line with public procurement law, despite existing agreements or historical practice?

The Supreme Court set aside the regional court's decision and remanded the matter for rehearing. It found that both prior courts had failed to adequately assess the interplay and potential conflict between two statutes – the Act on State Material Reserves[998] and the Act on Public Procurement – and the contractual regime for safeguarding arrangements. The lower courts had also insufficiently reasoned the causation between acts and alleged loss. The Supreme Court emphasised that for liability in damages for public procurement, there must be a breach of a specific statutory or contractual duty, clear establishment of injury (actual loss or lost profit), and direct causal link between the breach and damage. It found the lower courts had inconsistently analysed whether the claimant possessed an exclusive status for procurement, as well as failing to properly resolve whether loss of profit (margin) was genuinely claimable under the agreement or regulatory framework. It noted that compensable loss cannot be hypothetical, but must reflect actual market practice and proved entitlement. The judgment stressed the importance of properly assessing the relationship and hierarchy between special and general statutes that may govern public procurement and management of State reserves, and the legal effects of agreements concluded under these laws.

Regarding to Liability for Damage in Public Procurement, the court held that damages in public procurement presuppose a clearly established breach of procurement or safeguarding duties; actual, not hypothetical, loss directly and immediately stemming from the breach; causation proven between procurement conduct and claimed loss. Existence of an agreement as "protector" or service provider does not automatically confer an entitlement to profit lost as a result of lawful procurement by the State. Market practice, statutory limits,

[998] Act No. 82/1994 Coll. on State Material Reserves, as amended.

and contract terms must be thoroughly considered before any award for damages is made. SkPPA may override customary or contract-based exclusivity unless specifically preserved by law.

4.11 Soft v Slovak Republic[999]

The claimant (COOPEX Soft, s.r.o.) sought damages arising from harm allegedly incurred when the Ministry of Economy (as contracting authority) awarded a contract for a central mobilisation information system (JISHM) to another supplier. The claimant asserted rights as the exclusive integrator based on previous ministerial appointments and a historical maintenance contract.

Contested Act of Contracting Authority: The Ministry invoked an exemption from the Public Procurement Act, arguing that the JISHM contract was classified and thus could be procured outside standard procurement rules. This exemption meant the claimant was not selected for the tender, which resulted in economic loss.

The claimant grounded its claim was founded on Section 17 SkASLD (state liability for unlawful official procedure or decision), Section373 et seq. SkComC (loss of profit and actual damages) and arguments regarding breach of obligations under the SkPPA and mobilization legislation.

The first-instance Court (District Court Bratislava II) found for the claimant, holding the Ministry liable for misapplying the exemption and failing to follow public procurement, thereby causing the claimant's loss. The appeal court (Regional Court in Bratislava) reversed and dismissed the claim. The court held that, although the Ministry's tender process may not have complied with SkAPP, this did not by itself constitute actionable state liability. More critically, causation between the Ministry's conduct and the claimant's alleged damage was not sufficiently proved. The claimant had not submitted a proposal or participated in the tender, and the contract was lawfully terminated.

Within the extraordinary appeal, the key legal question was, whether mere breach or erroneous application of public procurement exemption – and non-selection for a public contract – does give rise to damages under state liability statutes, absent clear causality and substantiated losses?

[999] SK: Supreme Court, Decision of 30 November 2021, No. 2Cdo/71/2020, *COOPEX Soft, spol. s r. o. v Slovenská republika*, ECLI:SK:NSSR:2021:1211222974.1

The Supreme Court dismissed the extraordinary appeal. It confirmed the appellate decision, according which state liability under SkASLD and/or loss of profit under the SkComC require a proven unlawful act or decision, actual provable damage (not hypothetical profit), and direct causal link between breach and damage. According to the court it was not sufficient to allege improper administrative procedure, the claimant was required to show that the Ministry's process directly and objectively caused actual damage. The claimant's non-submission in the tender and lack of evidence of lost opportunity meant the necessary causation was absent. Active standing does not guarantee success; claimants must prove all material prerequisites (unlawfulness, loss, causation). The Supreme Court ruled there was no statutory or contractual expectation for compensation in such circumstances, especially given that the exceptions from SkPPA were lawfully invoked.

4.12 Procu v Národný ústav celoživotného vzdelávania[1000]

The claimant (Procu, a NGO sought damages against the National Institute of Lifelong Learning, claiming loss due to the unlawful cancellation of a public procurement procedure, which deprived the claimant of the opportunity to win the contract and earn profit.

The contested act of the contracting authority**:** The National Institute of Lifelong Learning revoked the procurement procedure. The claimant argued that this action was unlawful and claimed damages for loss of potential profit from the contract that was not awarded due to the cancellation.

The claimant based its claim with arguments that the cancellation violated procurement rules and caused quantifiable economic loss (foregone profit).

The first-instance court (District Court Bratislava IV) dismissed the claim. It found that the contracting authority was entitled to cancel the tender according to procurement law; no breach of mandatory statutory duty occurred, and causation between alleged breach and damage was not proven. Claimant was not an eligible winning bidder. The appeal court (Regional Court Bratislava) confirmed the dismissal. It found that claimant did not meet qualification criteria for participation in the procurement; even the lowest price was

[1000] SK: Supreme Court, Decision of 17 March 2016, No. 3Cdo/1375/2015, *Procu, o.z. v Národný ústav celoživotného vzdelávania*, ECLI:SK:NSSR:2016:1012896219.1.

legally irrelevant. Agreed claimant had not established sufficient legal or factual grounds for liability.

Legal Problem**:** Does the lawful cancellation of a public procurement procedure by the contracting authority create liability for damages in favour of a non-successful participant who alleges lost profit?

The Supreme Court dismissed the further extraordinary appeal. It confirmed that **l**awful exercise of cancellation powers under procurement law does not amount to a breach giving rise to claims for damages by unsuccessful bidders. Causation and actual loss must be demonstrated; speculative foregone profit from an unawarded contract is not compensable. Only eligible, qualified participants who are awarded a contract can seek performance or damages; simply being the lowest bidder does not confer rights.

As pointed out by the court**,** it is not enough for a claimant to allege lost profit due to cancellation of a procurement if there was no statutory or contractual entitlement to win. Even if a participant offers the lowest price, their bid must be successful and meet qualification criteria for any entitlement to arise. Causality and breach of a specific statute or contract must be strictly demonstrated; neither was proved. Lawful cancellation is not a basis for compensation unless the process itself breaches mandatory rules giving rise to a direct and immediate loss.

5. Evaluation of the environment for private enforcement of public procurement law

Private enforcement of public procurement in Slovakia is technically accessible but in substantive and practical terms displays limited intensity and insufficient quality. The regulation is fragmented, and effective compensation for damaged tenderers is rare. Tripple legal regime and ambiguous approach of the court to the issue of legal subsumption of liability to the specific law causes significant legal uncertainty. This relates especially to limitation periods, appropriate procedure, and competent courts.

Regarding the analysed case-law of Slovak courts, most actions failed due to claimants' inability to prove direct causation or quantum of loss. Claims for

damage after unlawful exclusion, cancellation or procedural irregularity tend to be dismissed unless there is a concluded contract and clear duty breached (existence of such legal circumstance would, however, requalify such relationship to other legal regime). Even when review authorities confirm a breach or administrative decisions are quashed, courts are unwilling to infer entitlement to damages.

Catalysing and prohibiting elements can be illustrated as follows:

Catalysing elements	**Inhibiting elements**
EU law supremacy and effectiveness (inclusion of loss of opportunity)	Fragmented regimes (civil/commercial/state-law) No single, clear legal regime governs procurement damages, leading to disputes over applicable standards and procedures.
Administrative findings Where a prior administrative finding or court judgment confirms infringement, follow-on actions may have a greater chance of success.	Burden of proof wholly on claimants All aspects—breach, loss, and causation—must be rigorously established by the claimant, with no legal presumptions or shifting burdens.
	No guidance on quantification of damage The law provides no clear mechanism for calculating damages, exacerbating risk for claimants.
	Limitation period uncertainty
	High costs and procedural complexity

The probability of successful damages actions is low. While public enforcement via the SkPPO is relatively robust, the private compensatory track is largely illusory. Slovak law requires doctrinal clarification and legislative reform to ensure compliance with EU effectiveness principles and to enable genuinely effective remedial protection for harmed tenderers.

6. Suggestions for further development

To tackle the weaknesses and improve the quality of private enforcement of public procurement rules in Slovakia, a few suggestions can be proposed:

1. Adoption of a specific statutory regime would introduce clear, unified legislative provisions regarding damages in public procurement cases, bridging the current gap between the SkCC, SkComC and the SkASLD. This could clarify the applicable limitation periods, procedural requirements, and evidentiary standards.
2. Amendment of the applicable law to comply with the judgment of the CJEU in *INGSTEEL* case (C-547/22), that is to explicitly include the loss of opportunity and preparation costs as compensable damage, ensuring EU law effectiveness and equivalence.
3. Development of statutory or judicial guidelines for the quantification of damages, including presumptions (perhaps in form of lump sum compensation) or models for assessing lost profit or loss of opportunity. Such guideline would ease the claimant's burden and enhance predictability of outcomes of the courts.
4. Setting the rules for suspension of limitation periods during review proceedings, and ensure that findings of illegality by the SkPPO or courts can be more readily relied upon ("follow-on" actions).
5. Designation of specialised courts for procurement damages claims and specialisation of judges. This would lead to more consistent judgments.

Moving towards a coherent, accessible and effective system for private enforcement in Slovakia requires legislative, procedural and institutional reform. The goal should be to realise the full compensatory and deterrent potential of damages actions in the procurement field, in line with EU law expectations. Currently, there is ongoing reform of SkCC in Slovakia. Perhaps the final outcome will reflect some of these recommendations, which may help to increase the quality of legal environment in this area.

7. Summary

This chapter provides an in-depth analysis of the legal environment for private enforcement of public procurement law in Slovakia, questioning whether

it remains largely "ornamental" rather than effective. It begins by outlining the EU and national legislative frameworks, focusing on the obligation of Member States to ensure effective remedies, specifically damages, for breaches of public procurement law. While Slovakia has a relatively robust system of public enforcement via the Public Procurement Office and administrative courts, the private enforcement route, pursuing damages, is fragmented and legally uncertain.

The chapter explains that claimants must navigate between three competing legal regimes (Civil Code, Commercial Code, and the Act on State Liability for Damage), with no clear demarcation regarding which regime applies in any given situation. This leads to significant problems and legal uncertainty, particularly in terms of applicable limitation periods, procedural rules, and qualified courts. The practical barriers are compounded by strict evidentiary requirements: successful claims for damages are rare, as courts demand proof of an unlawful act, clear causation, and actual (not hypothetical) loss or lost profit.

Case law analysis reveals that most private actions for damages in the public procurement context fail, especially where there is no concluded contract or direct statutory breach. Even where review authorities confirm an infringement, or unlawful exclusions/cancellations occur, Slovak courts seldom award compensation without a direct, unbroken causal link to the claimant's loss. Preparation costs and lost opportunity were by now generally not compensable unless expressly provided for, even though EU law suggests that such losses may fall within the scope of effective relief.

The chapter concludes that, although private enforcement mechanisms are technically accessible, their practical effectiveness is very limited. The author recommends legislative and procedural reform: adopting a specific statutory regime for procurement damages, clarifying the quantification and scope of recoverable damages, aligning national law with CJEU case law, and reducing procedural and evidentiary barriers to claims. Only through such reforms can Slovakia fulfil the EU's effectiveness principle and create genuine avenues for redress in public procurement disputes.

C. CONCLUSIONS

CHAPTER 15

Damages arising from violation of competition law and public procurement rules in selected Central and Eastern European EU countries: Solutions and challenges

by

Ondrej Blažo*+

1. Introduction

The research in private enforcement of competition law in the Central and Eastern EU countries is not a greenfield project. The conference held in Supraśl in 2015 resulted in a publication of a series of papers related to emerging legislation in private enforcement of competition law in the region.[1003] The collective monograph collected by Anna Piszcz created a building block of comprehensive overview of development in private enforcement of competition law in terms of transposition of the DD.[1004] Following the publication of the monograph and yet

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+ This paper was prepared within the project VEGA 1/0710/23 "Damages in competition law and public procurement – limits and challenges to effective enforcement of the European Union Law".

1003 CSERES, Katalin J. *Harmonising Private Enforcement of Competition Law in Central and Eastern Europe*.; JURKOWSKA-GOMUŁKA, Agata. *How to Throw the Baby out with the Bath Water. A Few Remarks on the Currently Accepted Scope of Civil Liability for Antitrust Damages*.; PISZCZ, Anna. *Piecemeal Harmonisation Through the Damages Directive?*.; BUTORAC MALNAR, Vlatka. *Access to Documents in Antitrust Litigation – EU and Croatian Perspective*.; GULIŃSKA, Anna. *Collecting Evidence Through Access to Competition Authorities' Files – Interplay or Potential Conflicts Between Private and Public Enforcement Proceedings?*.; MOISEJEVAS, Raimundas. *The Damages Directive and Consensual Approach to Antitrust Enforcement*.; STANIKUNAS, Rimantas Antanas and Arunas BURINSKAS. *The Interaction of Public and Private Enforcement of Competition Law in Lithuania*.; BLAŽO, Ondrej. *Directive on Antitrust Damages Actions and Current Changes of Slovak Competition and Civil Law*.; GALIČ, Aleš. *Disclosure of Documents in Private Antitrust Enforcement Litigation*.

1004 PISZCZ, Anna, ed. *Implementation of the EU Damages Directive in Central and Eastern European countries*.

another conference in Supraśl, comparative analyses were published focusing on individual aspects of transposition of the DD: scope of the transposition,[1005] institutional setting,[1006] consensual dispute resolution,[1007] type of liability,[1008] joint and several liability,[1009] quantification of harm,[1010] passing-on of overcharges,[1011] limitation periods,[1012] disclosure of evidence,[1013] collective redress[1014] and effect of decisions of the competition authorities.[1015] Another study on harmonization of competition law, including private enforcement, was brought by Jurgita Malinauskaite.[1016] All these works enhanced the academic research in the area of private enforcement and it is continuously growing.

This publication, however, expanded the private enforcement of antitrust with the questions of private enforcement of state aid, which appears to be even more scarce than private enforcement of antitrust.

The private enforcement of public procurement rules is herein compared with private enforcement of competition law. The reason for this comparison

1005 PETR, Michal. *The Scope of the Implementation of the Damages Directive in CEE States*.

1006 BLAŽO, Ondrej. *Institutional Challenges for Private Enforcement of Competition Law in Central and Eastern European Member States of the EU*.

1007 MODZELEWSKA DE RAAD, Małgorzata. *Consensual Dispute Resolution in the Damage Directive. Implementation in CEE Countries*.

1008 WOLSKI, Dominik. *The Type of Liability in Private Enforcement in Selected CEE Countries Relating to the Implementation of the Damages Directive*.

1009 MISKOLCZI BODNÁR, Péter and Róbert SZUCHY. *Joint and Several Liability of Competition Law Infringers in the Legislation of Central and Eastern European Member States*.

1010 MIKELĖNAS, Valentinas and Rasa ZAŠČIURINSKAITĖ. *Quantification of Harm and the Damages Directive*.

1011 MOISEJEVAS, Raimundas. *Passing-on of Overcharges and the Implementation of the Damages Directive in CEE Countries*.

1012 VLAHEK, Ana and Klemen PODOBNIK. *Provisions of the Damages Directive on Limitation Periods and their Implementation in CEE Countries*.

1013 DRUVIETE, Inese, Jūlija JERŅEVA and Aravamudhan Ulaganathan RAVINDRAN. *Disclosure of Evidence in Central and Eastern European Countries in Light of the Implementation of the Damages Directive*.

1014 PISZCZ, Anna. *Compensatory Collective Redress: Will It Be Part of Private Enforcement of Competition Law in CEE Countries?*.

1015 PÄRN-LEE, Evelin. *Effect of National Decisions on Actions for Competition Damages in the CEE Countries*.

1016 MALINAUSKAITE, Jurgita. Harmonisation of Private Enforcement in the Central and Eastern European Countries. In: MALINAUSKAITE, Jurgita. *Harmonisation of EU Competition Law Enforcement*. Cham: Springer International Publishing, 2020. DOI: 10.1007/978-3-030-30233-7_7.

lies in their common trajectory, as the private enforcement of competition law was originally "harmonized by judgments" of the CJEU. This regulatory vacuum has not been overcome and therefore, it is useful to compare, side by side, the basic elements of liability for harm and damages.

Although the remaining chapters review all types of private law remedies for violation of competition law, the common feature in the analysis is linked to the protective effect of both sets of rules to competitive environment, which can be impaired by anticompetitive behaviour of undertakings or public bodies (in the sphere of state aid or public procurement).

2. Substantive elements of damages claims

In the terms of quantification of harm, the DD provides several sets of rules that are simultaneously protecting rights of the injured parties as well as the infringers. The former group covers mainly the right for full compensation (Art. 3), quantification of harm, including empowerment of the national courts to estimate harm (Article 17(1)) and rebuttable presumption of harm caused by cartels (Art. 17(2)). The latter category is linked to limiting damages that can be requested from infringers through excluding overcompensation from the scope of the DD, limiting joint and several liability for immunity recipients (Article 11(4)) and SMEs (Art. 11(2)-(3)) and rules passing-on overcharges (Art. 12). The DD also strictly defines the scope of compensation for harm: actual loss and the loss of profit, plus the payment of interest (Art. 3(2)).

The DD itself does not provide any guidance whether the civil liability shall be based on fault or whether strict liability shall be applied.

In areas outside the scope of the DD, there are no additional rules on the EU level governing damages claims arising from violation of competition rules other than agreements restricting competition and abuse of dominant position, i.e. mergers and state aid. Although the activity of national courts is expected by Art. 29 RegSAP, no further substantive details are provided, in terms of binding law (the notice of the Commission[1017] cannot be seen as EU regulation of dam-

[1017] Commission Notice on the enforcement of State aid rules by national courts 2021/C 305/01 (OJ C 305, 30.7.2021, p. 1-28), par. 87-99.

ages claims, notwithstanding its practicality). Three types of damages claims related to state aid may arise due to existence of three categories of persons that may have an incentive to raise their claim: (i) the Member State against the beneficiary; (ii) the competitors of the beneficiary and directly affected third parties against both the Member State and the beneficiary; and (iii) the beneficiaries against the Member State[1018] (or presumptive beneficiary, as the case analysed in Slovakia showed). The damages claims in the field of state aid are mainly formed by case law of the CJEU along the lines of the principles of effectiveness and equivalence.[1019]

Compared to competition law, damages claims for violation of public procurement are underregulated on the EU level. The RemD[1020] (although remedies in the utilities sector are covered by other directive,[1021] for the sake of conciseness this text will refer only to the RemD, as the principles are the equivalent) provides merely framework provisions for damages, i.e., "Member States shall ensure that the measures taken concerning the review procedures (…) include provision for powers to (…) award damages to persons harmed by an infringement.[1022] Therefore, other elements for conditions are left to national legislation[1023] formed by requirements of case law of the CJEU: "In the absence of EU provisions in that area, it is for the legal order of each Member State to determine the

[1018] For more details see, e.g. HONORÉ, Michael and Nanna Eram JENSEN. Damages in State Aid Cases. *European State Aid Law Quarterly* [online]. 2011, vol. 10, no. 2. Available at: https://www.jstor.org/stable/26686169

[1019] E.g., Judgment of 11 July 1996, SFEI and Others, C-39/94, ECLI:EU:C:1996:285; Judgment of 23 January 2019, Fallimento Traghetti del Mediterraneo, C-387/17, ECLI:EU:C:2019:51; Judgment of 5 October 2006, Transalpine Ölleitung in Österreich, C-368/04, ECLI:EU:C:2006:644; Judgment of 18 July 2007, Lucchini, C-119/05, ECLI:EU:C:2007:434; Judgment of 11 November 2015, Klausner Holz Niedersachsen, C-505/14, ECLI:EU:C:2015:742.

[1020] Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, pp. 33–35) as amended.

[1021] Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, pp. 14–20).

[1022] RemD, Art. 2(1)(c).

[1023] RemD, Rec. 6 „...Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement..."

criteria on the basis of which damage arising from an infringement of EU law on the award of public contracts must be determined and estimated (…) provided the principles of equivalence and effectiveness are complied with (…)."[1024]

2.1 Existence of infringement and effects of decisions of public enforcement body

Competition law

The EU law provides two avenues for national courts to establish the existence of an infringement of competition rules. First, they can establish the existence of an infringement themselves[1025] or they can rely on decision of the competition authority. Indeed, decisions of the European Commission are, strictly applying Art. 288 TFEU, binding only inter partes. However, Art. 16 of Regulation 1/2003 makes these decisions binding on courts as they cannot decide contrary to the Commission's decision. The DD provides certain flexibility for binding effect of decisions of NCAs. The infringement established by the NCA of the Members State where claims were brought "is deemed to be irrefutably established" if the decision is final and decision of other NCAs shall be "at least prima facie evidence that an infringement of competition law has occurred". Similarly, national courts may apply state aid rules and may decide on recovery of unlawful state aid even in the case when the European Commission takes no action.[1026]

Provisions of Art. 9 DD on the effect of the NCAs' decisions set a minimum standard, and the analysis showed that some transpositions went further and provided stronger impact of the NCAs' decisions. Moreover, the lawmakers should address the concept of *prima facie evidence*, as this concept stems from common law tradition.[1027]

1024 Judgment of 9 December 2010, Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others, C-568/08, EU:C:2010:751, par. 90.

1025 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty *(OJ L 1, 4.1.2003, s. 1 – 25),* Art. 6.

1026 Judgment of 7 December 2023, RegioJet and STUDENT AGENCY, C-700/22, EU:C:2023:960.

1027 PISZCZ, Anna. Multilingualism in the EU and Consistency of Private Enforcement of Competition Law: Two Examples from CEE Countries. *Studies in Logic, Grammar and Rhetoric*. 2017, vol. 52, no. 1, p. 171. DOI: 10.1515/slgr-2017-0049

The Slovak legislation aimed to strengthen the position of the NCAs' decisions, however establishing binding effects of authority's decisions and consequent interpretation by the Supreme Court[1028] and the Constitutional Court of the Slovak Republic[1029] chilled the possibility of stand-alone actions.[1030] The Slovak courts interpreted the binding effect of the NCAs' decisions as depriving them of their competence to decide cases on infringement of competition rules. Similarly, in Bulgaria the Supreme Court of Cassation[1031] confirmed the practice of courts that an infringement of competition law can be established only by the NCA. It is noteworthy that Slovenian legislation contain provision on binding effect of administrative decisions, which have also been explicitly confirmed by courts in competition matters. Nevertheless, this legislative setting has not precluded stand-alone actions. In such situations, the binding effect of NCA's decision is reflected in the courts duty to align with it, provided that it becomes final during the course of proceedings before the court.[1032]

Moreover, in Slovenia, the court has also allowed evidentiary value to the decisions of other regulatory bodies than NCAs. The Higher Court in Ljubljana held that analyses included into the decision of the telecommunication authority on the existence of dominant position have the character of public documents, to which the presumption of truth attaches regarding the facts they set out, and that the burden of proof for rebutting this presumption thus lies with the defendant.[1033]

In the state aid cases, the European Commission, in its notice confirmed that private claims are independent from decisions of the European Commission, and therefore, it enabled stand-alone actions.[1034]

[1028] SK: Supreme Court, Judgment of 24 June 2020, No 3Obdo/108/2019, ECLI:SK:NSSR:2020:1213230629.2.

[1029] SK: Constitutional Court, Order of 2 December 2021, No II. ÚS 564/2021.

[1030] BLAŽO, Ondrej. *Private (Non-)Enforcement of Competition Law in Slovakia*, pp. 45–53.

[1031] BG: Supreme Court of Cassation, Judgment of 28 July 2014, No 4004/2013.

[1032] Cf., FATUR, Andrej, Klemen PODOBNIK and Ana VLAHEK. *Competition Law in Slovenia*, pp. 115–116.

[1033] In this book, VLAHEK, Ana. Chapter 7, Section 4.1.

[1034] Commission Notice on the enforcement of State aid rules by national courts 2021/C 305/01 (OJ C 305, 30.7.2021, p. 1-28), par. 96.

Public procurement

As it was discussed above, the RemD provides almost no precise binding rules for damages claims. Nevertheless, in terms of the effects of decisions of review bodies, the RemD allows that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary power.[1035] In other words, courts deciding on damages cannot invalidate unlawful decisions themselves, if it is stipulated in national law. This requirement, if applicable, deserves an activity of the claimant in the public procurement procedure, because without setting aside the decision its invalidity cannot be claimed. Requirement of a previous decision on illegality of the decision by which the harm was allegedly caused, can have a chilling effect on private claims for damages, in particular in jurisdictions that are mainly based on administrative revision system, such as analysed CEE EU countries. Turudić showed that in Croatia, the number of revisions of public procurement procedures has decreased due to rising level of fees.[1036] On the other hand, in Poland, the Supreme Court unequivocally confirmed that a contractor may pursue damages directly before a civil court, without the need for a prior final ruling of the KIO or a judgment of a court reviewing such a decision.[1037] Furthermore, in some jurisdictions it is not possible to challenge small-scale public contract via administrative review by the public procurement revision authority[1038] and therefore private enforcement remains the only avenue for remedy.

2.2 Fault

Competition law

In the analysed jurisdiction, certain level of divergence of approach to application of fault-based or strict liability is apparent. The silence of the DD on this matter is a consequence of the application of the principle of subsidiarity and the encroachment to national civil laws is limited to the necessary scope.

In Slovakia, the civil liability for competition infringement is based on strict liability, however only within the ambit of application of SkADAA and

1035 RemD, Art. 2(6)

1036 In this book, TURUDIĆ, Marko. Chapter 10, Section 5.

1037 PL: Supreme Court, Resolution of 25 February 2021, No. III CZP 16/20.

1038 E.g., in this book, PETR, Michal. Chapter 9, Section5.1.

SkComC.[1039] However, this strict liability is not applicable in state aid cases related to pre-contractual phase.[1040] Similarly, Croatia opted for strict liability, although in general the Croatian civil law is operating within fault-based liability principles.[1041]

In other CEE EU countries fault-based liability stemming from general civil law rules is applicable.

However, the Polish legislation introduced a "presumption of fault". Generally, Article 415 PlCC is applicable on civil liability, but PlACD introduced specific rules. Article 3 PlACD stipulates that the infringer is obliged to redress harm caused by the infringement to anybody, unless the infringer is not at fault, and Article 7 PlACD introduces the presumption of fault. The Polish legislation shifts the burden of proving non-existence of fault to the infringer. In combination with the presumption of damage caused by infringement of competition law (not only cartels), the PlACD goes beyond the requirement provided by Art. 17(1) DD.[1042] Since the former presumption is completely out of scope of the DD (similarly the strict liability in Slovakia) and both presumptions are rebuttable, neither of regulations is contrary to the requirements established by the DD.

Neither of selected jurisdiction consider a "political harm", i.e. harm caused to the general public due to a lack of funds of a public body whose financial sources were diminished because of anticompetitive behaviour. Therefore, it is not relevant, in this context to assess the causal link between anti-competitive behaviour and "political harm".

Public procurement

There are no expressed specific provisions in the RemD on whether the liability for damages for infringement of public procurement rules shall be fault-based or strict. In general, in selected legal systems the legislation maintains general rules on fault applicable in civil law. Slovakia and Slovenia applies the principle of strict liability. While in Slovenia, this strict liability is specially

[1039] See, in this book, KOVÁČIKOVÁ, Hana. Chapter 8, Section 5.

[1040] Idem, Section 2.

[1041] BUTORAC MALNAR, Vlatka. Croatia. In: PISZCZ, Anna, ed. *Implementation of the EU Damages Directive in Central and Eastern European countries*. Warsaw: University of Warsaw. Faculty of Management Press, 2017, p. 63.; WOLSKI, Dominik. *The Type of Liability in Private Enforcement in Selected CEE Countries Relating to the Implementation of the Damages Directive*, pp. 74–75.

[1042] In this book, PISZCZ, Anna and Dominik WOLSKI. Chapter 5, Section 2.2.2.

tailored for public procurement cases by Art. 49 ZPVPJN in terms of civil liability of the contracting authority, in Slovakia, it merely reflects existing rules on liability of the state (SkASLD). The Slovak regime is also complicated by dualism of general civil law (based on fault) and commercial law (based on strict liability).

Notwithstanding the divergence between the Member States, the CJEU made the harmonization of rules on damages in public procurement cases more detailed in C-314/09 *Strabag and Other*. In this case, the CJEU found no reason that application of the remedies required by then RemD shall be subject to any condition such as fault (even presumed) and therefore it *de facto* interpreted the RemD as requiring strict liability: RemD "must be interpreted as precluding national legislation which makes the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable, including where the application of that legislation rests on a presumption that the contracting authority is at fault and on the fact that the latter cannot rely on a lack of individual abilities, hence on the defence that it cannot be held accountable for the alleged infringement."[1043] Therefore, the courts of the Member States shall disapply provisions of national legislation that require proving fault in cases related to damages claims in public procurement matters.

Strict liability in the sector of utilities may stem also from Art. 2(7) of Council Directive 92/13/EEC which sets the only conditions for claims for damages and fault is not among them.[1044]

2.3 Causality

Competition law

The DD provides a presumption of causality in cartels only. In Poland, this presumption was extended to all anticompetitive behaviour.[1045] Art. 17 (2) and its

[1043] Judgment of 30 September 2010, Strabag and Other, C-314/09, EU:C:2010:567

[1044] "Where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim shall be required only to prove an infringement of Community law in the field of procurement or national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected."

[1045] In this book, PISZCZ, Anna and Dominik WOLSKI. Chapter 5, Section 2.2.2.

transposition established merely one part of the causality, i.e. the link between illegal behaviour and existence of harm. Another element of causality, i.e. link between illegal behaviour and scope of harm is not covered by these provisions. In Czechia[1046] and Slovakia,[1047] the element of foreseeability of harm exists, i.e. an infringer is liable only for the harm that could have been reasonably expected in the time of infringement. Although it can appear that the requirement of foreseeability may limit the full compensation required by Art. 3 DD, it still provides enough space to the Euro-conform interpretation. Precisely, the injured parties still have the right for full compensation within the meaning of Art. 3(2) DD and merely unpredictable and random incidents that are remotely linked to competition infringement are excluded from compensation. Furthermore, the Czech legal order considers the protective purpose of legislation and ties it to a causal link between illegal behaviour and harm.[1048] Therefore, other harmful consequences than economic cannot be covered by the liability for anti-competitive behaviour, e.g. deterioration of health because of stress caused by an anti-competitive behaviour cannot be covered.[1049]

A specific form of causality was confirmed by the Slovak Supreme Court in the case stemming from claims for compensation of harm caused by refusal to sing a state aid contract.[1050] The court found a causal link between the unlawful act of the State (refusal to sign a contract despite the minister having approved its award) and harm calculated as a loss of profit comprising of the sum of non-provided entitled costs according to the approved budget of the project.

Public procurement

Causality became one of the most tested elements of liability in public procurement cases. Claimants shall show that they suffered harm due to behaviour or omission of contracting authority. The causality requirements differ, depending on the type of damages claimed (costs of participation or lost profits) or on the subject matter of the concerned decision[1051] (award of the contract, modification of contract, etc).

[1046] In this book, PETR, Michal and Eva ZORKOVÁ. Chapter 2, Section 4.1.

[1047] SkComC, Section 379.

[1048] In this book, PETR, Michal and Eva ZORKOVÁ. Chapter 2, Section 4.1.

[1049] MIKULÍKOVÁ, Lucie. *Soukromoprávní vymáhání soutěžního práva v ČR. Teorie a praxe*, p. 245.

[1050] SK: Supreme Court, Judgement of 25 June 2013, No. 4 MCdo/2/2013, S v Slovak Republic (for payment of EUR 4,979,087.83).

[1051] GINTER, Carri and Mari Ann SIMOVART. Part V: Enforcement Directives (1989/665 and

Art. 2(7) of Council Directive 92/13/EEC provides a standard for causality for damages representing the costs of preparation of a bid or of participating in an award procedure: (i) only to prove an infringement of EU law in the field of procurement or national rules implementing that law and (ii) that they would have had a real chance of winning the contract and (iii) that, as a consequence of that infringement, this chance was adversely affected. As Caranta notes, this test is not useful in infringement related to direct awards, because there are no costs associated with the preparation of a tender and no probability to win because there is no competition.[1052]

The thread of causality can be easily torn apart by subsequent actions of contracting authority decreasing the probability of possible success of claimant in tender. E.g. the Commercial Court in Osijek rejected the claim due to an illegal award to another bidder (the bid of the claimant was second). The court based its reasoning on the fact that the tender was annulled as a whole, and a new tender was called, therefore the probability of winning the tender by the claimant was lost.[1053] Similarly, in Slovakia, the Supreme Court confirmed that the chain of causality must be unbroken.[1054]

2.4 Existence of harm and quantification of harm

Competition law

There are two basic elements of harm, and its quantifications are addressed by the DD: presumption of harm caused by cartels (Art. 17(2)) and the power of the national courts to estimate harm "if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available."

1992/13). In: STEINICKE, Michael and Peter L. VESTERDORF, eds. *EU public procurement law: Brussels commentary*. Baden-Baden: Nomos, 2018, p. 1411. See also literature cited therein

[1052] CARANTA, Roberto. Damages for Breaches of EU Public Procurement Law. Issues of Causation and Recoverable Losses. In: FAIRGRIEVE, Duncan and François LICHÈRE, eds. *Public procurement law: damages as an effective remedy*. Oxford Portland: Hart Publishing, 2011, p. 178. DOI: 10.5040/9781472561046

[1053] HR: Commercial Court in Osijek, Judgment of 22 October 2021, No P 256/202-13.

[1054] See cases analyzed in this book in KOVÁČIKOVÁ, Hana. Chapter 14, Section 5.

The most intense transposition of the "presumption" of harm is the presumption of a certain level of harm in Hungary,[1055] Latvia[1056] and Romania.[1057] While the Hungarian and Latvian regulation introduced a rebuttable presumption of 10 % overcharges caused by cartels, the Romanian regulation went further with rebuttably presumed 20 % overcharges in cartel cases and also rebuttable presumption of harm caused by abuse of dominance.[1058] On one hand, these presumptions can serve as a central simplification, but on the other hand, they can lead to overcharges and lower compensation as well. Firstly, the economic analyses showed, that the average and median overcharges are higher than 10 %.[1059] Secondly, Van Wijck and Weber argue, that if actual harm is substantially lower than presumed, the defendants will try to rebut this presumption, and if the actual harm is substantially higher than presumed, the claimant will try to rebut that presumption.[1060] Therefore, the presumption is effective only in cases when actual harm is close to the presumed level and therefore neither party has an incentive to rebut this presumption and hence merely in this case it is really saving litigation costs. However, presumed 10 % overcharges probably do not lead in overcompensation because the empirical studies show that overcharges are in many cases higher.[1061]

There is no doubt that abstract presumption of a certain level of overcharge may give rise to abovementioned shortcomings and threats, or it can be ineffective. Nevertheless, in jurisdictions with low intensity and limited incentives for damages litigation, conditions can generate momentum for such claims. On the other hand, the presumption of overcharges cannot be understood as

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1055 MISKOLCZI BODNÁR, Peter. Hungary. In: PISZCZ, Anna, ed. *Implementation of the EU Damages Directive in Central and Eastern European countries*. Warsaw: University of Warsaw. Faculty of Management Press, 2017, pp. 143–144.

1056 VAN WIJCK, Peter and Franziska WEBER. The abstract presumption of harm in the Damages Directive: overconcern of overcompensation. *European Competition Journal*. 2022, vol. 18, no. 1, p. 207. DOI: 10.1080/17441056.2021.1979777

1057 In this book, ALMĂȘAN, Adriana and Horia BANCIU. Chapter 6, Section 2.4.3.

1058 In this book, ALMĂȘAN, Adriana and Horia BANCIU. Chapter 6, Section 2.4.3.

1059 HORNKOHL, Lena. The presumption of harm in EU private enforcement of competition law: effectiveness vs overcompensation. *EU and Comparative Law Issues and Challenges Series (ECLIC)*. 2021, vol. 5, p. 43. DOI: 10.25234/eclic/18813

1060 VAN WIJCK, Peter and Franziska WEBER. *The abstract presumption of harm in the Damages Directive*, p. 219.

1061 Cf., ibid., p. 227.

a presumption of harm.[1062] Therefore, the practice of Hungarian courts show that the presumption of overcharges can be sidelined, even though it is regularly applied, at least for three groups of reasons, as Nagy suggests:[1063] First, the quantification of loss is not the central question of the actions for damages. Second, based on the rules in force before the DD, Hungarian courts developed a relatively restrictive approach to the limitation period which may have excluded numerous cases from substantive consideration. Third, the 10% presumption may be rebutted by expert appointed by court.[1064] On the other hand, notwithstanding the similarity of the regime, due to *ratione tempore* of the Latvian rule, the 10 % overcharge rule was never tested in practice in Latvia.[1065]

The DD requires to cover actual harm and lost profit, including interests. Establishing lost profit seems to be the most complex type of harm. In Czechia, the courts require for establishing lost profit "certainty, not just probability" of profit and therefore "mere hypothesis based on several economic models" were not enough.[1066] Similarly, the Czech courts rejected claims where profits were hypothetical and subject to other conditions, or when the claimant was not able to prove that everything necessary was done to avoid the damage.[1067] In such a context, the possibility of establishing the amount of harm by an expert called by the court, as the DD requires, does not solve the problem in cases where the court simply does not recognise any lost profit at all.

Public procurement

Apart from the costs of preparing a bid or the cost of participating in an award procedure, which were mentioned above, the remedies directives are silent on the types of harm that may be covered by damages in public procurement cases. Lost costs for preparing the tender can be considered actual damage (*damnum emergens*). In Romania, this type of loss is expressly guaranteed by Art. 53(6) RoRemL. The lost profits (*damnum cessans*), including lost opportunity, are the second category of harm coverable in the public procurement cases

[1062] NAGY, Csongor István. Hungarian competition law's contribution to the European discourse on private enforcement. In: CSIRSZKI, Martin Milán, ed. *Twenty Years of EU Competition Law in Hungary*. Budapest: Gazdasági Versenyhivatal, 2024, p. 224.

[1063] *Ibid*.

[1064] Ibid., pp. 224–225.

[1065] In this book: JERŅEVA, Jūlija. Chapter 4, Section 5.3.

[1066] In this book, PETR, Michal and Eva ZORKOVÁ. Chapter 2, Section 4.2.

[1067] In this book, PETR, Michal and Eva ZORKOVÁ. Chapter 2, Section 4.2.

explicitly confirmed by the CJEU in *C-547/22 INGSTEEL*. It must be noted that the approach to the "lost chance doctrine" is uneven across the EU.[1068]

All chapters in this book show that the courts are quite reluctant to identify harm coverable by damages claims in public procurement cases. Predominantly, general rules on non-contractual liability are applicable, while in Slovakia and Slovenia there are specific rules on the liability of State (in Slovakia SkADAA and in Slovenia Art. 26 of the Constitution). In both jurisdictions, if the violation is attributable to the review authority, the liability of the State is invoked; if it is attributable to a contracting authority, general rules of civil liability are applicable. Notwithstanding the regime, actual damage and lost profit is covered as a general rule of civil law. Neither of analysed jurisdiction have statutory "lost chance" harm (only Art. 1385(4) RoCC can work in a similar way), however this doctrine can be accommodated not only via change of legislation but also through the change of judicial practice.

In Latvia, the Supreme Court confirmed the "lost chance" damages as early as 2014,[1069] as the concept originally stemming from civil law, not because there is an active breach of pre-existing rights resulting in lost expected income, but because, otherwise, no other worthy legal remedies would exist.[1070] Based on this case law, there are certain developments in Latvia regarding damages claims for harm caused in public procurement.[1071] Recently, the Higher Court of Ljubljana[1072] upheld a damages claim under Article 49 ZPVPJN brought by an unsuccessful tenderer whose bid had been unlawfully excluded, while the contract was simultaneously awarded to a competitor who should also have been disqualified. The court held that where it is established that the claimant's offer was admissible, economically the most advantageous, and would have secured the award but for the illegality, the resulting lost profit constitutes recoverable damage. On that basis, it confirmed an award of approximately EUR 311,567.00

[1068] SCHEBESTA, Hanna. The Iridescence of the Lost Chance Doctrine in Damages Claims. In: SCHEBESTA, Hanna. *Damages in EU Public Procurement Law*. 6. Cham: Springer International Publishing, 2016. DOI: 10.1007/978-3-319-23612-4_11

[1069] LV: Supreme Court (Department of Administrative Cases), Judgment of 22 October 2014, No. SKA-807/2014. Available: https://www.at.gov.lv/downloadlawfile/7447

[1070] DANOVSKIS, Edvins. *Arguments Against Damages as a Legal Remedy in Public Procurement Proceedings*. Riga: University of Latvia Press, 2024, p. 160. DOI: 10.22364/iscflul.9.2.13

[1071] For overview, see ibid., pp. 160–163.

[1072] SI: Higher Court of Ljubljana, Judgment of 19 April 2023, No. VSL Sodba I Cpg 515/2022, ECLI:SI:VSLJ:2023:I.CPG.515.2022.

corresponding to the profit the claimant would have earned under the contract after deducting performance costs. This approach aligns with the reasoning of the CJEU in Case *C-547/22 INGSTEEL*.

2.5 Damages

Competition law

Generally, damages are intended to compensate for the harm caused by a wrongful conduct. However, the amount of recoverable damages, as well as the party liable for payment, may be adjusted by law. Czech as well as Slovak civil law generally allows to mitigate damages under extraordinary circumstances. In competition cases, this mitigation competence of courts was excluded both, in Czechia and in Slovakia by CzCDA and SkADAA, as *lex specialis* to general provisions of civil law.

The DD requires several modifications of damages. The first group limits the extent of joint and several liability in cartel infringement of SMEs and immunity applicants under Art. 11 DD. This provision of the DD is sufficiently precise as not to leave room for manoeuvre in national legislation. The second group covers all types of antitrust infringement and relates to the rules on passing-on overcharges, passing-on defence and the rights of indirect purchasers to claim damages, as well as the distribution of the damages claims within the supply chain (Art. 12-16 DD).

Due to the strict wording of the directive, the legislative texts in analysed jurisdictions more-less mirrors the text of the directive. However, the Hungarian courts handled specific case of passing-on overcharges related to the Trucks cartel. The key question in case before the Hungarian Supreme Court (*Kúria*)[1073] was whether, in such a case, where the claimant acquired the truck through a lease contract, the damage occurred at the time of signing the contract or only upon the verified payment of the lease fees. The Supreme Court upheld the rejection of the claims, and the Constitutional Court rejected the complaint as well.[1074] The *Kúria* stated that any damage from the cartel would appear in the actual lease payments. Therefore, the applicant had to show, for each lease contract, the total lease amount it owed, how much of that could represent

[1073] HU: Supreme Court, Decision of 15 No vember 2023, No Gfv.III.30.246/2023/11.

[1074] HU: Constitutional Court, Decision of 18 June 2024, 3259/2024. (VII. 5.) AB

a 10% overcharge under Section 88/C of the Competition Act, and that it had fully performed the lease contracts. However, the applicant did not claim damages based on the lease payments it made, but only on the fact that it had entered the lease contracts. Because the applicant did not show any actual financial loss from performing those contracts, the *Kúria* held that there was no valid claim and dismissed the action.[1075]

Public procurement

Compared to competition law, there is no rule on full compensation in public procurement cases and effectiveness of application of EU law is the minimal standard. Therefore, mitigation of damages is possible, if it is in line with the principle of equivalence, i.e. such mitigation is applicable in purely domestic cases. The analysis provided several examples of mitigating damages.

The Municipal Court in Prague (confirmed by the Supreme Court) dismissed the action of the claimant because the claimant has breached its obligation to prevent harm and file a formal complaint with the review body.[1076] A similar approach was suggested by the Polish Supreme Court, that failing to challenge the contracting authority's decision at the KIO may lead to mitigation of damages.[1077] In Romania, Art. 1485(4) expressly stipulates that damages arising from the loss of opportunity shall be proportionate to the probability of obtaining the award.

3. Limitation periods in damages claims

3.1 Competition law

Limitation periods lie between substantive rules and procedural rules because, on one hand, they limit the possibility to claim damages, on the other hand, they limit the ability of courts to award damages. Not only the absolute length of the limitation periods, but also moments, when it starts to run and its

[1075] OSZTOVITS, András. The first experiences of Hungarian private enforcement cases for cartel damages: does the force awaken? In: CSIRSZKI, Martin Milán, ed. *Twenty Years of EU Competition Law in Hungary*. Budapest: Gazdasági Versenyhivatal, 2024, p. 219.

[1076] CZ: Municipal Court in Prague, Judgment of 17 July 2023, No 14Co 125/2023-122.

[1077] PL: Supreme Court, Resolution of 25 February 2021, No. III CZP 16/20.

possible interruptions are crucial for effective private enforcement of competition law. In particular, interplay between public and private enforcement can shape the running the limitation periods. The DD provides minimal standards for limitation periods in Art. 10. First, paragraph 1 requires clear rules on limitation periods established by law. Second, limitation periods cannot be shorter than 5 years (paragraph 3). The limitation period shall not run before infringement ceases and the injured party has the knowledge on all elements of tort (paragraph 2). And finally, the interplay with public enforcement is secured by an interruption or suspension of the running of the limitation period while the competition authority conducts its investigation.

In the pre-DD period, several jurisdictions (Czechia, Poland, Slovenia, Slovakia) have distinguished two types of limitation periods based on the moment when they started to run: *a tempore scientia*, i.e. running from the day when the injured party has become aware of the harm and of the person obliged to remedy the harm and *a tempore facti*, i.e. running from the day of the event causing the harm. The DD contains rules merely on running limitation period *a tempore scientia* and it is silent on the running limitation period *a tempore facti*. Therefore, Latvia changed its ten-year *a tempore facti* period to a tempore scienta period without changing its length.[1078]

During the transposition, Czechia and Slovakia dropped the limitation period running *a tempore facti* and literally transposed the limitation periods as required by the DD as limitation periods *a tempore scientia.* Thus, these jurisdictions have created an exemption from general rules of civil law. It must be noted that this exemption is applicable within the scope of transposition of the DD, i.e. not for merger and state aid cases, where general rules of civil law are applicable. In Czechia, outside the scope of the CzCDA, the limitation period *a tempore facti* is ten years from the date of the offence (or five years in cases of intentional conduct), while the *a tempore scientia* period is three years. In Slovakia, the situation is more complex due to the dual regime of the SkCC and the SkComC. Under the SkCC (governing pre-contractual liability in state aid), two limitation periods apply: a two-year period running *a tempore scientia* and a three-year period running *a tempore facti*. Under the SkComC, the limitation periods are four years *a tempore scientia* and ten years *a tempore facti*.

[1078] In this book: JERŅEVA, Jūlija. Chapter 4, Section 2.2.

Poland and Slovenia maintained their ten-year *a tempore facti* limitation period. Outside of the scope of PlACD, shorter three-year *a tempore scientia* limitation period is applicable in Poland.

Although Romania transposed the DD correctly, the path was not easy. Originally, under the RoCC, the general tort liability limitation period was three years *a tempore scientia*. The 2010 amendment to RoCL introduced a shortened term of two years, in case the action for damages was a follow-on action. Only the EGO aligned the limitation periods with the DD.

Even the literal transposition of limitation period rules does not prevent disputes about the starting point of the running of the limitation period, i.e. when claimants have knowledge of elements of their claim. In Hungary, the courts initially calculated the starting point of the limitation period from the date of the European Commission's press release on the settlement of the Truck cartel and it had constantly rejected the claims (before the transposition of the DD, Hungarian courts adopted an even more restrictive approach which granted the injured party one year after the adoption of the NCA's decision to launch an action for damages).[1079] The Hungarian Supreme Court (*Kúria*) annulled judgments relying on the strict calculation of the limitation period from the press release of the European Commission following the interpretation by the CJEU in *C-267/20 Volvo and DAF Trucks*,[1080] i.e., the limitation period runs from the date of publication of the decision of the competition authority.[1081]

Outside of the scope of DD, running of the limitation period in a state aid case became decisive in Czechia in *RegioJet and Student Agency v. České dráhy and Správa železnic* case. The question, whether limitation period for the recovery decision of the European Commission bares also civil claims, was referred to the CJEU (C-700/22). This case confirmed not only the independence of limitation period for civil claims in state aid, but also the possibility of standalone claims in state aid cases.

[1079] NAGY, Csongor István. *Hungarian competition law's contribution to the European discourse on private enforcement*, p. 224.

[1080] Judgment of 22 June 2022, Volvo and DAF Trucks, C-267/20, EU:C:2022:494, par. 72.

[1081] OSZTOVITS, András. *The first experiences of Hungarian private enforcement cases for cartel damages: does the force awaken?*, p. 217.

3.2 Public procurement

Similarly to other elements of liability, the RemD provides no minimal requirements for limitation periods. However, in *C-166/14 MedEval* the CJEU found that six-month *a tempore facti* limitation period is too short to achieve effectiveness of the enforcement of public procurement law.[1082] Hence, also in this instance, the rules on damages claims are *de facto* harmonized by the court, rather than by legislative body. In all analysed jurisdictions are the limitation periods longer that those precluded by the CJEU. Table 15.1 shows substantial divergence among countries in the length of limitation periods (including the triple regime in Slovakia).

Table 15.1 Overview of limitation periods

	CZ	HR	PL	RO	SI	SK		
						SkCC	SkComC	SkASLD
a tempore scientia	3y	3y	3y	1y	3y	2y	4y	3y
a tempore facti	10/15y	5y	10y		5y	3y	10y	10y

4. Selected procedural elements in private enforcement of competition law

4.1 Disclosure of evidence

Disclosure orders (Art. 5-8 DD) became one of the most significant innovations introduced by the DD into the civil procedural rules of the CEE EU countries. The majority of CEE EU countries did not contain disclosure orders in the pre-DD era, e.g., in Slovenia, the legislator used the momentum of transposition to introduce disclosure orders to Slovenian legal order in general.[1083]

[1082] Judgment of 26 November 2015, MedEval, C-166/14, EU:C:2015:779.

[1083] In this book, VLAHEK, Ana. Chapter 7, Section 2.1.9.

However, in the case of Romania, the literal transposition of the DD resulted in the restriction of the scope of disclosure. Before the transposition, the RoCPC allowed the courts to order to submit any evidence they deemed necessary to solve the case from the parties of the dispute as well as from the third parties. After transposition the DD, the claimant shall present a reasoned justification for the request in line with Art. 5(1) DD, not only showing the connection with the case, as before.[1084]

The relevance of the disclosure orders is also dependent on whether there are dissuasive and deterrent sanctions for non-compliance. In Czechia, requesting party shall submit a bond of CZK 100,000 (~EUR 4,000) for covering possible damages arising from harm caused by the disclosure of information. The Czech courts can impose a fine up to EUR 10 million (~EUR 400,000) or 1 % of the undertaking's turnover for non-compliance with the disclosure order. For infringing the duty of confidentiality, the fine can climb up to CZK 1 million (~EUR 40,000). For comparison, the fine for non-compliance with disclosure order is similar to a fine for obstruction of inspection under § 22a CzAPC. In Romania, the fines imposed for infringements related to disclosure are between 0.1 % – 1 % of turnover for legal persons and maximum ~EUR 1,000 for natural persons. By contrast, in Lithuania such fines may only reach up to EUR 10,000, in Estonia, EUR 3,200, in Slovakia EUR 500 or EUR 2,000 (in case of repeated infringements) and in Latvia EUR 40 (!).[1085] These fines cannot be considered dissuasive. Although fines have a deterrent effect, a presumption of the facts that the requested evidence is intended to establish is, in the end, the more dissuasive measure (e.g. Slovakia, Czechia).

4.2 Competent court

All jurisdictions faced a dilemma whether to invest in a specialized court or courts with an exclusive competence to hear competition cases. From the presented analyses, there is no substantial difference between the intensity and quality of litigation depending on specialization of courts. The reason is simple:

[1084] In this book, ALMĂȘAN, Adriana and Horia BANCIU. Chapter 6, Section 2.5.2.

[1085] PISCZ, Anna. Quo vadis CEE? Summary. In: PISZCZ, Anna, ed. *Implementation of the EU Damages Directive in Central and Eastern European countries*. Warsaw: University of Warsaw. Faculty of Management Press, 2017, p. 305.

due to low number of cases, the specialized and general courts are equally non-specialized because neither of them have experience based on the track of solved cases. Neither of the analysed jurisdictions has opted for merging the review of decisions of the NCA and damages claims in competition matters under the same roof and thus, administrative review and damages claims are handled by different courts. Therefore, judges cannot benefit form respective experience in handling competition matters.

Slovakia, Latvia and Lithuania opted for a specialized court handling civil competition matters. In Lithuania, the reform was introduced in 2024, and Vilnius Regional Court became the only specialized court handling civil competition cases and its judgments can be appealed to the Court of Appeal.[1086] It must be noted, that the same reform decentralized the administrative review of competition cases. Due to the recent adoption of the reform, it is hard to assess its consequences. The example of Slovakia is really dissuasive, as despite the long-term explicit specialization of certain courts, (originally the District Court Bratislava II, later the Municipal Court Bratislava III as first instances and the Regional Court in Bratislava as second instance), it has apparently not prevented other courts from hearing civil competition cases. Indeed, it can be assumed that, e.g. District Court Trnava did not consider state aid rules being a part of competition rules in the *Mesto Trnava v City-Arena and City Arena PLUS* case. However, in clear antitrust cases, the courts as well as the parties appeared undisturbed by the exclusive competence of a single court: e.g. *DAMIJO KOMPLET v Východoslovenská vodárenská spoločnosť* was for 13 years handled by the Distric Court in Svidník, the *A.-C. v C-I. I.C.* case was handled by the District CourtTrenčín and the Regional Court in Trenčín notwithstanding the fact that competition claims were used as a defence against intellectual property claims. The latter case also shows that the court specialization is relevant only in competition claims; when competition law arguments are used as defence, the case is handled by the court established according to the type of claim. Moreover, Kováčiková conducted research to examine whether the courts were aware of the exclusive competence of the Municipal Court Bratislava III. The results are quite shocking. The author contacted all 32 first-instanced courts with a request for information on how many actions for damages arising from cartels, abuse of dominant position, mergers and state aid under SkComC and SkADAA

[1086] In this book, MALINAUSKAITE, Jurgita. Chapter 3, Section 2.

they handled since 2001. 29 courts delivered their responses, of which 17 replied that they did not decide on such cases. Just one court replied that there is a case from 2018, however, currently suspended. Three courts did not respond at all. The remaining courts (including the Municipal Court of Bratislava III) dismissed the request and refused to provide an answer, stating that they could not find this information.[1087] It must be noted, that due to the Slovak transparency rules, the courts were obliged to provide such information and the Municipal Court Bratislava III (as was the District Court Bratislava II) is obliged to hold a special register for competition law cases.

To sum up, it seems that the specialization of the courts may offer benefits, however these can be undermined by disregarding such statutory specialization. Furthermore, the specialization rules should be complemented by provisions on how to handle cases which lie at the intersection of two areas of law (e.g., competition and copyright) or when competition law is used as a counterclaim.

5. Evaluation of environment for enforcement of competition law and public procurement rules in selected CEE EU countries and suggestions for further development

5.1 Competition law

The evaluation the legal environment and enforcement practice provided by the authors of this publication can be divided into country-specific groups and general-oriented conclusions and suggestions. From the country-specific conclusions or suggestions, the critique of fragmentation of civil law in Slovakia, and high costs of litigation in Lithuania can be mentioned.

Overall, the development of enforcement practice of private litigation in competition law is small and even a large-scale economy, such as Poland, has not shown a significant increase of cases. In those jurisdictions with the track of private enforcement cases before the DD, the transposition of the DD does not seem to have a significant momentum effect for the private enforcement.

[1087] In this book, KOVÁČIKOVÁ, Hana. Chapter 8.

Moreover, discovery orders either predated the transposition, or are used infrequently, and the protection of leniency application is not crucial because of lower enforcement activity of NCAs as well as the limited number of leniency application. The decisions of the European Commission in the Trucks cartel, however, created a momentum for private litigation, at least in some countries – there have been cases launched in Bulgaria, Lithuania, Poland, Romania and Hungary and apparently in Slovakia as well.

In all jurisdictions, the transposition of the DD prolonged the limitation periods, however, out of the scope of the DD, diversity of limitation periods remained. Hence state aid rules enforcement via private claims slowly started to emerge (e.g. Czechia, Slovakia), as this area is still "harmonized-by-judgments". Therefore, as part of the review of the DD, it would be beneficial to expand its scope to other infringements of competition rules to unify the overall enforcement system[1088] (in this context, the absence of precise rules for private enforcement of the Digital Markets Act, as part of the pro-competitive regulatory setting, shall be mentioned as well[1089]).

From the point of view of effectiveness, length of proceedings shall be mentioned. For example, in Lithuania, the Riga Airport rebates case which lasted over 13 years and involved two preliminary reference rulings[1090] ended in no damages being awarded. Overall, measures such as capacity building and the centralization of cases in the competent court are suggested. However, there are two contradictory cases related to the establishment of a competent court: in Czechia, there are several cases handled by different courts and Petr and Zorková suggest that this decentralization does not hinder the enforcement itself.[1091] On the other hand, private enforcement of competition law is centralized by law

[1088] For these discussions, see, e.g. BAGHRIZABEHI, Denis and Aleš FERČIČ. Private Enforcement of EU State Aid Rules: Is There Any Room for National Procedural Autonomy Left? *Zbornik Pravnog fakulteta u Zagrebu*. 2023, vol. 73, no. 4. DOI: 10.3935/zpfz.73.4.02; JADOT, Clélia. Damages Actions and State Aid: Time for Action at EU Level? *Market and Competition Law Review*. Market and Competition Law Review, 2022. DOI: 10.34632/MCLAWREVIEW.2022.11305

[1089] BLAŽO, Ondrej. Private Enforcement of the Digital Markets Act: Filling Holes and Creating New Ones in Harmonized Enforcement. In: ŠIŠKOVÁ, Naděžda, ed. *Legal issues of digitalisation, robotisation and cyber security in the light of EU law*. Alphen aan den Rijn Praha: Wolters Kluwer, 2024.

[1090] Judgment of 23 October 2014, *flyLAL-Lithuanian Airlines*, C-302/13, EU:C:2014:2319; and Judgment of 5 July 2018, *flyLAL-Lithuanian Airlines*, C-27/2017, ECLI:EU:C:2018:533.

[1091] In this book, PETR, Michal and Eva ZORKOVÁ. Chapter 2.

in Slovakia, however, courts have found ways to circumvent this centralization. The research also showed that the centralization requires further details on allocation of mixed claims or situation, where competition law is a counterclaim. Nevertheless, training and capacity building seems to be a challenge for the future not only in competition law, but also in economic evidence.

There is a limited number of "positive" decisions on private enforcement of competition law (although there is some information on out of court settlements), and the majority of the decision of the courts in the CEE EU countries are decisions rejecting claims. In other words, we are starting to have a central basis of case law showing how not to enforce competition law via damages claims, yet incentives arising from successful cases are still missing.

The research showed that the DD served its limited purpose corresponding its content in the CEE EU countries. Currently, there is no need for a reform of the DD in order to serve to this purpose. Nevertheless, Piszcz and Wolski argue that the momentum for further and more dynamic development of litigation in the CEE EU countries can only be achieved through radical changes, such as allowing punitive damages.[1092]

5.2 Public procurement rules

Private enforcement of public procurement rules relies largely on general civil-law principles, which inevitably leads to divergences between Member States. Although the minimum standards are shaped by the case law of the CJEU, it is questionable whether this situation is desirable. Recent judgments increasingly encroach upon the limits of Member States' procedural autonomy, for example by defining the elements of liability. Inconsistency, and at times even outright contradiction,[1093] has become the price of this "harmonisation-by-judgments."

With increasing number of damages claims in public procurement matters, without clear rules on fault, causality, limitation period and scope and types of harm covered by damages, the system will become legally unsustainable.

[1092] In this book, PISZCZ, Anna and Dominik WOLSKI. Chapter 5, Section 7.

[1093] Cf. CARANTA, R. Damages in EU Public Procurement Law: Fosen-Linjen Can Hardly Be the Last Chapter. *European Procurement & Public Private Partnership Law Review*. 2019, vol. 14, no. 4. DOI: 10.21552/epppl/2019/4/4.

From selected countries, only Slovenia and Romania introduced special rules for private claims in their legislation. Introduction of clear and predictable rules can support effectiveness of damages claims in public procurement. In particular, specific harm, such as the costs of preparing and submitting a bid and loss of chance shall be addressed. Of course, this does not mean, that these types of harm shall always be covered, but at least their explicit stipulation and the provision of basic conditions for causality, quantification of harm and possible reduction of harm based on the probability, can make decisions of the courts more foreseeable. Greater foreseeability and a real possibility of success can increase the number of cases brought before the courts, thereby making contracting authorities more accountable in public spending through public procurement.

The interplay with the public (administrative) enforcement of public procurement rules is crucial for the existence of private claims and therefore low level of reviewability of public procurement procedures (e.g., Romania, Croatia) can discourage individuals from pursuing enforcement on their own.

6. Conclusion

The chapter illustrates that the private enforcement of competition law and public procurement rules in the selected CEE Member States continues to develop within a fragmented legal landscape. Although the DD and the case law of the CJEU establish certain minimum standards, the overall system is still shaped predominantly by national civil-law traditions, judicial inventions and legislative gaps. This results in notable differences in the treatment of liability, causation, limitation periods, quantification of harm, and the procedural tools available to claimants. The DD's silence on several key elements, such as the standard of liability outside the cartel context, the full contours of causation, and the treatment of state-aid damages, allows these divergences to persist. At the same time, the CJEU's increasing involvement, especially in state aid and procurement cases, narrows Member States' procedural autonomy while not necessarily delivering coherent or predictable outcomes.

Across the analysed jurisdictions, practical effectiveness varies considerably. Some Member States rely on strict liability in specific areas, other on statutory presumptions, and many maintain classic fault-based regimes. Causation tests

range from broad presumptions to strict foreseeability requirements. Quantification of harm shows similar incoherence, with certain countries adopting statutory overcharge presumptions and other placing demanding evidentiary burdens on claimants. Public procurement damages are particularly uneven, because the EU legislation only provides a basic framework and recent CJEU case law has pushed national systems toward stricter liability models without offering a fully developed guidance on the categories of recoverable loss or their assessment.

The chapter identifies several areas where legislative or policy action would be beneficial. At the EU level, the experience of the CEE region indicates the need for clearer and more comprehensive rules on key aspects of liability and causation, both in competition and in public procurement cases. In particular, more precise delineation of the scope of recoverable damages, the standard of causation, and the effect of administrative decisions could reduce the current reliance on "harmonisation-by-judgments", which has proved uneven and, at times, contradictory. In public procurement, the absence of a uniform EU regime for damages leaves too much to the variability of national systems; legislative clarification at EU level would support greater legal certainty.

At the national levels, several reform directions have emerged from the chapter's analysis. Jurisdictions with highly restrictive causation tests or narrow conceptions of recoverable harm would benefit from clearer statutory guidance, especially regarding the lost profits, bid-preparation costs, and the loss of chance in procurement cases. Strengthening or better structuring disclosure procedures, clarifying the binding effect of decisions by competition and procurement authorities, and ensuring coherent limitation regimes would also improve predictability. Finally, a more consistent use of judicial specialisation, combined with transparent criteria for allocating mixed cases, would support the development of expertise and reduce inconsistent reasoning.

Overall, it can be concluded that while the examined national systems have taken steps toward more effective private enforcement, substantial disparities remain. A more balanced combination of EU-level clarification and targeted national legislative reforms is necessary to ensure that claimants across CEE EU countries can obtain effective redress under both competition and public procurement rules. Without such developments, private enforcement will continue to depend heavily on the patchwork interaction of domestic doctrines and evolving CJEU jurisprudence, resulting in uneven protection and legal uncertainty across the region.

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Private Enforcement of Competition Law and Public Procurement Rules in Selected Central and Eastern European Union Countries

Ondrej Blažo (Ed.)

Editorial office Wolters Kluwer SR s. r. o.
Mlynské nivy 48, 821 09 Bratislava, Slovakia
Published by Wolters Kluwer ČR, a. s.
U Nakladoveho nadraži 3265/10, 130 00 Prague 3, Czech Republic,
in 2025 as its 5709th publication.
www.wkcr.cz, e-mail: knihy@wkcr.cz
tel.: +420 246 040 405, +420 246 040 444

ISBN 978-80-286-0488-2 (hardcover)
ISBN 978-80-286-0489-9 (pdf)