CZECH REPUBLIC

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I. Introduction

Like many of the EU member state's current competition laws, Act no. 143/2001 Coll., on the Protection of Economic Competition ("*Zákon o ochraně hospodářské soutěže*") (the "**Competition Act**") has been drafted so that it mirrors EC competition law. The Competition Act came into force on 1 July 2001 and superseded the previously applicable Act no. 63/1991 Coll.

A major amendment ("**Amendment**") has been recently adopted[1], the main aim of which is to reflect the changes brought about by Council Regulation (EC) no. 1/2003 (the "**Modernisation Regulation**"). While the Amendment introduces a number of procedural rules relating to the application of EC competition law by the Office for the Protection of Economic Competition ("*Úřad pro ochranu hospodářské soutěže*") (the "**Competition Office**"), no specific rules for private enforcement of EC or national competition law are contained therein.

The Competition Act (contrary to the previously applicable Act no. 63/1991 Coll.) does not contain any special provisions regarding private actions for damages. Consequently, general provisions governing actions for damages apply.

As regards actions for damages for breach of competition law, there has been no (publicly available) case law so far. Consequently, as far as we are aware, to date the role of national courts in private enforcement of this type of damages is non-existent.

Given that the Czech Republic has become a member of the European Union only recently, information contained in this Report is relates primarily to the application of Czech competition law.

II. Actions for damages – status quo

A. What is the legal basis for bringing an action for damages?

(i) Is there an explicit statutory basis, is this different from other actions for damages and is there a distinction between EC and national law in this regard?

The Competition Act does not provide for any specific legal basis for bringing actions for damages as a result of a breach of competition law, whether national or EC. As the Competition Act is a *lex specialis* in relation to Act no. 513/1991 Coll., the Commercial Code, as amended ("*Obchodní zákoník*") (the "**Commercial Code**"), the legal basis for bringing such actions under Czech law is found in the Commercial Code.

Section 373 of the Commercial Code provides that "*whoever breaches a duty arising from a contractual relationship is obliged to provide compensation for the damage caused to the other party, unless he/she proves that such a breach was caused by circumstances excluding his/her liability*". Although the wording of this Section implies that it is applicable only to breaches of contract, Section 757 of the Commercial Code actually broadens the scope of applicability of Section 373 to

1 Act no. 340/2004 Coll., effective as of 2 July 2004

liability for damage caused by a breach of any obligation under the Commercial Code. As Section 41 of the Commercial Code sets out, a general statutory duty to observe legally binding provisions on competition (which are as far as national law is concerned set forth in detail in the Competition Act), it must be concluded that any breach of competition law is to be regarded as a breach of a statutory duty as referred to in the Commercial Code.

Consequently, Section 373 of the Commercial Code - in connection with Sections 757 and 41 of the Commercial Code – is the statutory basis for bringing actions for breach of competition law. Given that Section 41 of the Commercial Code provides for a generally binding obligation to observe competition rules, it is obvious that this provision must be interpreted in the light of obligations arising out of the EC Treaty and the relevant secondary EC legislation. As Section 42 of the Commercial Code refers to a special law setting forth the legal regime for the protection of competition, we believe that this reference must be interpreted, as of 1 May 2004, as referring not only to the Czech Competition Act, but also to relevant EC law. Consequently, it may be concluded that the legal basis for bringing actions for breach of EC competition law remains the same as for national competition law.

As far as procedural rules for bringing actions for damages are concerned (whether incurred as a result of violation of national or EC law), these are contained in Act no. 99/1963 Coll., as amended ("*Občanský soudní řád*") (the "**Civil Procedure Code**").

The Amendment to the Competition Act introduces a number of procedural rules relating to the application of EC competition law by the Competition Office, yet, no specific rules for private enforcement of competition law are foreseen therein. Further, we are not aware of any proposals for amendment of the Commercial Code or the Civil Procedure Code that would aim at introducing specific rules for private enforcement of EC competition law.

To complete the overview of the legal bases for bringing actions for damages in the Czech Republic, it may be noted that the most general legal basis concerning civil liability for damage is contained in Section 420 (1) of Act no. 40/1964 Coll., the Civil Code, as amended ("Občanský zákoník"") (the "**Civil Code**"), which provides that any legal or natural person is liable for any damage caused by breaching a legal obligation. However, in the field of breach of competition law, this general legal basis is superseded by the above-mentioned rules of the Commercial Code (in accordance with the principle *lex specialis derogat lex generali*).

Finally, specific rules concerning liability for damage are contained in Act no. 82/1998 Coll., on liability for damage incurred in the course of exercise of public powers through a decision or incorrect administrative procedure, as amended ("*Zákon o odpovědnosti za škodu způsobenou při výkonu veřejné moci rozhodnutím nebo nesprávným úředním postupem*") (the "**State Liability Act**"). The State Liability Act applies to liability of public authorities. For example, should a public authority, such as the Competition Authority, issue an illegal decision or apply incorrect administrative procedure in the field of competition law, the injured party may bring an action for damages against the State on the basis of the State Liability Act.

B. Which courts are competent to hear an action for damages?

(i) Which courts are competent?

It follows from Section 9 (1) of the Civil Procedure Code that, generally, district courts ("*okresní soudy*") are competent in the first instance to hear actions, including actions for damages, unless the provisions of Section 9 (2) or (3) of the Civil Procedure Code provide for the competence of regional courts ("*krajské soudy*") in the matters specified therein. Generally, regional will hear matters concerning commercial disputes as well as matters that are more complex or require specialised knowledge.

Section 9 (3) lit. k) of the Civil Procedure Code provides that regional courts act as courts of first instance in commercial matters concerning the protection of competition. Section 9 (3) lit. r) of the Civil Procedure Code provides that regional courts act as courts of first instance in commercial matters consisting of disputes arising from commercial contracts (typically contracts between two entrepreneurs), including disputes concerning claims for damages between entrepreneurs in connection with their business activities (with certain exceptions, such as claims for amounts below 100,000 CZK (approx. 3,000 EUR) or disputes arising out of specified categories of contracts). Although the relation between these two provisions is not very clear, we believe that Section 9 (3) lit k) must be considered as special in relation to Section 9 (3) lit. r) and that, consequently, it applies in all disputes concerning protection of competition irrespective of their value.

It can therefore be concluded that regional courts are competent to hear actions for damages concerning protection of competition, whether under Czech or EC law.

(ii) Are there specialised courts for bringing competition-based damages actions as opposed to other actions for damages?

It follows from the above that in the Czech Republic there are no courts specialised exclusively in hearing competition-based damages claims, whether based on national or EC competition law. As set out in the previous paragraphs, the Civil Procedure Code (to be more specific: Section 9 (3) lit. k) thereof) recognizes that commercial matters concerning protection of competition require specialised knowledge and, thus, provides regional courts (which are higher in the court hierarchy than district courts) with competence to hear such matters, including competition-based damages actions.

C. <u>Who can bring an action for damages?</u>

(i) Which limitations are there to the standing of natural or legal persons, including those from other jurisdictions? What connecting factor(s) are required with the jurisdiction in order for an action to be admissible?

Any natural or legal person who has the capacity to assume legal rights and obligations has standing, i.e. the capacity to be a party to civil proceedings, before Czech courts. This follows from Section 19 of the Civil Procedure Code.

In accordance with Section 49 of Act no. 97/1963 Coll., on International Private and Procedural Law, as amended ("*Zákon o mezinárodním právu soukromém a procesním*") (the "**IPL Act**"), the standing of a foreign person in proceedings before Czech courts is governed by the rules of his/her jurisdiction. However, it is sufficient that the person has standing under Czech law. Section 48 of the IPL Act stipulates the principle that all participants to proceedings before Czech courts have equal rights, regardless of their nationality.

However, under Section 51 of the IPL Act, the court may – upon application by the defendant – impose on a foreign plaintiff demanding a court decision in a property dispute an obligation to pay a deposit in order to cover the litigation costs (please note that the term "property dispute" ("*majetkový spor*") is a very broad concept under Czech law, which includes also disputes concerning any damages claims). Although the IPL Act does not provide for any distinction in the application of this condition as regards EC/EEA nationals/residents and non-EC/EEA nationals/residents, we believe that it will not be possible to apply such provision vis-a-vis the EC/EEA nationals/residents given the overriding non-discrimination principle under EC law. The application of this rule, is subject to a number of important restrictions. Most significantly, the court cannot apply this rule if in the jurisdiction of the plaintiff no such deposit is required from Czech nationals in similar circumstances. In any event, this rule does not amount to a limitation on the standing of foreign plaintiffs in practice.

Thus, it can be concluded that in the Czech Republic there are principally no limitations to the standing of natural or legal persons in proceedings concerning damages claims, including those from other jurisdictions.

It follows from Section 37 of the IPL Act that the competence is given to Czech courts to hear disputes concerning property if: (i) Czech procedural laws stipulate such competence, or (ii) if the parties to the dispute have agreed in writing on the jurisdiction of Czech courts.

As regards damages claims with an international element (e.g. actions brought by foreign plaintiffs), the following connecting factors with the Czech jurisdiction are sufficient under the Civil Procedure Code:

- the defendant has its place of residence, place of business or seat in the Czech Republic (Section 85 of the Civil Procedure Code);
- the defendant has property in the Czech Republic (Section 86 (2) of the Civil Procedure Code);
- the defendant, which is a foreign entity, has a business or a business branch in the Czech Republic (Section 86 (2) of the Civil Procedure Code); or
- the event triggering the claim for damages occurred in the Czech Republic (Section 87 lit. b) of the Civil Procedure Code).

As regards jurisdiction within the Czech Republic (so called geographical competence), please note that the same rules as described above for jurisdiction where Regulation 44/2001 does not apply shall be relevant. The main rules are set in Sections 84 et seq. of the Civil Procedure Code and, under Section 37 (1) of the IPL, they apply similarly to disputes involving an international aspects.

(ii) Is there any possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

Czech law does not recognise collective claims or class actions.

Joint action

Under Section 91 (1) of the Civil Procedure Code it is possible for several plaintiffs to bring an action jointly. Further, under Section 92 (1) of the Civil Procedure Code, the court may – upon application of the plaintiff – admit further plaintiffs to pending proceedings. In addition, Section 93 of the Civil Procedure Code enables a person who has a legal interest in the outcome of the dispute to join the plaintiff as a "supporting participant".

Furthermore, for reasons of procedural economy, the court has, under Section 112 (1) of the Civil Procedure Code, the right to join cases for the purpose of joint proceedings, if the facts of the cases concerned are linked, or if they involve the same parties.

As regards joint actions, it should also be noted in this context that Section 83 (2) of the Civil Procedure Code stipulates that initiation of certain proceedings prevents initiation of further proceedings that are directed against the same defendant and are based on the same claims arising out of the same cause. Among these proceedings are certain actions against unfair competition practices (but not actions for breach of rules on competition within the meaning of the Competition Act or EC competition law) or actions based on consumer protection laws. Damages actions are not covered by this provision.

Public interest litigation

Section 54 (1) of the Commercial Code provides that a legal entity authorised to protect the interests of competitors or consumers can bring an action against unfair competition practices (but, again, not actions for breach of rules on competition within the meaning of the Competition Act or EC competition law). Further, Section 25 (2) of the Act no. 634/1992 Coll., on the Protection of Consumers, as amended ("*Zákon o ochraně spotřebitele*") (the "**Consumer**

Protection Act") makes it possible for an association of consumers or a legal entity that is authorised to protect the interests of consumers to bring an action based on consumer protection laws. Neither of these two statutory provisions, however, applies to damages actions.

As regards other forms of public interest litigation, Section 35 of the Civil Procedure Code lists certain (very limited) categories of proceedings that can be initiated in the public interest by the public prosecutor. This provision, however, does not apply to damages claims. The ombudsman (the public defender of rights) is not entitled to bring any such claims either (Act no. 349/1999 Coll., on public defender of rights).

D. What are the procedural and substantive conditions to obtain damages?

(i) What forms of compensation are available?

In accordance with Section 378 of the Commercial Code, damages are generally paid in money. However, if the aggrieved party so requests, and if it is possible and customary, damage is compensated by restoration to the previous status (*restitutio in integrum*). The distinction between monetary compensation and restoration to the previous status is a traditional concept of the continental legal system. Restoration to the previous status provides compensation in kind. For all practical purposes, damages relating to breaches of competition law would be paid in money.

Generally, Czech law (both under the Civil Code and the Commercial Code) recognises two categories of damage: (i) actual damage (*damnum emergens*), and (ii) loss of profit (*lucrum cessans*). Section 379 of the Commercial Code provides that, in principle, compensation must be provided for both actual damage and loss of profit (if, of course, both of these two categories of damage occur in a given case; the two categories of damage are not necessarily linked to each other, and it is entirely possible that in a concrete case, only one of these categories of damage may occur). (See also below section E.)

(ii) Other forms of civil liability (e.g. disqualification of directors)?

The Commercial Code provides for liability of directors/statutory representatives of different forms of commercial companies (Section 194 of the Commercial Code). Statutory representatives are obliged to perform their duties with due professional care. Should the company incur any damage as a result of a breach of their obligation, the director/directors are jointly and severally liable for such damage towards the company. Any agreement between the company and the director/s or any provision of the company's constitutional documents limiting the scope of such liability is null and void. The burden of proof in respect of due professional care is borne by the directors. In the event the directors have acted pursuant to express authority conferred upon them by shareholders in general meeting, they shall only be liable for such damage if the authority was contrary to legal regulations.

Actions for damages against directors may be brought not only by the company itself, but, if its board fails to do so, by its shareholders in the name of the company (for ex. Sections 122 and 182 of the Commercial Code).

Directors who are liable toward a company for damage are *ex lege* joint and several guarantors of the obligations of the company towards the creditors provided that the relevant damage claim remains unpaid and the creditor is not able to satisfy his claim from the property of the company or the company ceased to pay its obligations. The scope of such guarantee is limited by the scope of the liability for damages towards the company (Section 194 (6) of the commercial Code).

Czech law does not recognise other forms of civil liability, such as disqualification of directors.

As regards criminal law liability, we note that directors or other persons acting on behalf of the legal entity can be held criminally liable for violation of national competition law (Section 127 of Act no. 140/1961 Coll. as amended, the „**Criminal Code**"). [2]

(iii) Does the infringement have to imply fault? If so, is fault based on objective criteria? Is bad faith (intent) required? Can negligence be taken into account?

The concept of liability for damage under the Commercial Code is based on objective criteria. Therefore, existence of fault is not a condition for liability for damages; it is sufficient for the plaintiff to prove that a contractual or statutory duty (as stipulated by the Commercial Code) has been – objectively - breached. Consequently, various degrees of fault, such as bad faith (intent) or negligence, are irrelevant.

However, Section 373 of the Commercial Code stipulates that liability for damage is excluded if the party that has breached a contractual or statutory duty proves that such a breach was caused by "circumstances excluding liability". These circumstances – which resemble the concept of *vis major* - are defined in Section 374 of the Commercial Code as impediments which arose independently of the obligor's will and which prevent the obligor from performing his/her duty, provided that it cannot be reasonably expected that the obligor could avert or overcome such impediments or their consequences, and, further, that the occurrence of such impediments was unpredictable at the time when the obligor undertook to perform his/her duty (obviously, this last condition can be reasonably applied only to breach of contractual duty).

In accordance with Section 373 (2) of the Commercial Code, an impediment that only arose during the time when the obligor was in delay with the performance of his/her duty, or which ensued from his/her financial situation, does not exclude the obligor's liability.

Finally, it follows from Section 373 (3) of the Commercial Code that the consequences excluding liability are limited only to the duration of the impediment to which they relate.

E. Rules of evidence

(a) General

(i) Burden of proof and identity of the party on which it rests (covering issues such as rebuttable presumptions and shifting of burden to other party etc.)

The plaintiff must prove the following:

- breach by the defendant of a statutory or contractual duty;
- occurrence of damage; and
- causal link (*nexus causalis*) between the breach and the occurrence of damage.

Should the defendant claim that his liability is excluded by circumstances excluding liability within the meaning of Section 374 of the Commercial Code, the burden of proof in this respect rests on him.

There is only one provision in the Commercial Code that contains rules on shifting the burden of proof. This is Section 54 (2) of the Commercial Code, which applies to certain actions brought by consumers against unfair competition practices (but

2 Note: Although irrelevant for this particular question, it might be of interest that a new act on criminal liability of legal entities in currently under discussion. If passed, it will be possible to establish liability of a legal entity among others for a criminal offence consisting of a breach of competition law (Section 127 of the Czech Criminal Code). Any legal entity found guilty of such offence could be punishable also by the impossibility of receiving any grants or subsidies (including the Cohesion and the Structural Funds) or participating in public tenders.

not actions for breach of rules on competition within the meaning of the Competition Act or EC law). According to this provision, if the right to request that the offender desist from an unlawful act or remove the unlawful state of affairs is claimed by a consumer (in certain proceedings relating to unfair competition practices), the defendant must prove that his acts did not involve acts of unfair competition. The same applies to the defendant's duty to provide compensation for damage, to the extent that damage was caused by acts regarded as unfair competition practices. However, the scope of damage caused must always be proven by the plaintiff, even if they are a consumer.

As regards rules on rebuttable presumptions, Section 133 of the Civil Procedure Code stipulates the general principle that the court shall consider as proven a fact for which the law stipulates a rebuttable presumption, provided that nothing to the contrary has come to light in the course of the proceedings. One example of a rebuttable presumption stipulated by law is contained in Section 134 of the Civil Procedure Code, according to which documents issued by Czech courts or other state authorities within the scope of their competence, as well as documents declared by law to be "public deeds", certify the truth of the facts contained therein, unless the contrary is proven. Under Section 135 (1) of the Civil Procedure Code, breach by the defendant of a statutory duty need not be proven by the plaintiff if there is a decision by competent public authorities stipulating that an administrative offence has been committed through such breach (see further under Section E. b) (iii)).

(ii) Standard of proof

Czech civil procedural law is based on the principle of free evaluation of evidence by the court. This basic principle is specified in Section 132 of the Civil Procedure Code, which stipulates that the court shall evaluate evidence as it considers fit and shall consider every piece of evidence separately and all the evidence as a whole. In so doing, the court shall take due account of everything that has come to light in the course of proceedings. Consequently, it is up to a particular judge to assess individually the evidence presented, assign particular weight and relevance to it and decide the case on the basis thereof.

While there is substantial case law on the principle of free evaluation of evidence by court in the Czech Republic, there is not much case law dealing specifically with the issue of standard of proof.

The Regional Commercial Court in Prague ("*Krajský obchodní soud v Praze*") ruled in its judgement no. 2 Cm 63/94, dated 28 June 1995, that in order to successfully claim compensation for loss of profit, the plaintiff must prove that such profit would be secured under regular circumstances "with probability that is nearing certainty". Nevertheless, it is difficult to assess on the basis of this judgement alone whether the standard of proof declared therein is equivalent to or stricter than the "beyond reasonable doubt" standard. Moreover, it is not clear whether this particular wording of the standard of proof would be acceptable to higher courts.

As regards standard of proof used by courts in issuing injunctions, it is in practice lower, as for an injunction to be issued only a need to temporarily regulate the situation of the parties or a threat that future enforcement of judgement will be impossible need to be proven (Sections 74 and 102 of the Civil Procedure Code).

(iii) Limitations concerning form of evidence (e.g. does evidence have to be documentary to be admissible. Which witnesses can be called, e.g. the CEO of a company? Can evidence/witnesses from other jurisdictions be admitted/summoned?)

There are no limitations concerning form of evidence in Czech procedural law.

Section 125 of the Civil Procedure Code stipulates that all means by which the merits of a case can be ascertained may be used as evidence. A non-exhaustive list of forms of evidence appears in this Section, which includes the most common forms of evidence, such as witness interrogation, expert opinions, reports and

statements of public authorities or any legal or natural person, deeds executed by a notary public and any other documents, on-the-spot inspections and interrogation of the parties. If the manner of taking evidence is not prescribed by law, it shall be set forth by the court.

Any witnesses may be called. However, according to Czech case law, a testimony of statutory representatives (such as members of the board of directors of a company) is considered as a testimony by the party to the proceedings (and not a witness testimony) (Section 126 (4) of the Civil Procedure Code).

Any person summoned is obliged to appear before court and provide a testimony. The testimony may be denied only if as a result of it, a person would cause criminal prosecution to himself/herself or to close relatives.

According to Section 124 of the Civil Code, the taking of any evidence must keep confidential facts protected by a special law or respect the confidentiality obligation stipulated by law or acknowledged by the state. In such cases, a testimony may only be given if the competent authority/entity has relieved the witness of the confidentiality obligation.

Given the above general rules for evidence, it may be concluded that evidence and/or witnesses from other jurisdictions, whether obtained through disclosure or otherwise, can be admitted and/or summoned in proceedings before the Czech Courts and under the same rules as any other evidence, i. e. subject to the principle of free evaluation of evidence by the court. Alternatively, subject to the rules stipulated by the IPL Act and/or international agreements, Czech courts may – through the Ministry of Justice ("*Ministerstvo spravedlnosti*") acting as an intermediary - ask judicial authorities in other jurisdictions to carry out interrogation of witnesses, experts or parties, as well as other procedural acts, in their respective countries.

(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis: Defendants, third parties, competition authorities (national, foreign, Commission)

Under Sections 78 (1) and 102 (2) of the Civil Procedure Code, evidence may be secured both prior to the trial or during the trial if there is concern that such evidence might not be available later, or only obtainable with great difficulty. In the pre-trial stage, such security of evidence may be made only at a motion of a party to the proceedings. The security may concern any form of evidence (see point E (a)(iii) hereof) and must be performed in a manner prescribed by law for the form of evidence concerned. Article 78a of the Civil Procedure Code sets out further details for securing evidence by a public deed executed by a notary public or a public executor in respect of a process or a state of play.

Under Sections 128 and 129 of the Civil Procedure Code, any court has the right during the proceedings to request any natural or legal person to submit specific information and/or document that is important for the proceedings. The addressee of such request is obliged to provide the relevant information and/or document. However, the addressee may refuse to provide information (however, not a document) if he would be able to refuse to do so as a witness in the proceedings (see Section E(a)(iii) hereof). A party may ask for the disclosure of a specific document only in the framework of its general obligation to produce evidence to prove its assertions, yet it is up to the court´s discretion to decide which of the suggested evidence shall be performed (Section 120 (2) of the Civil Procedure Code. As regards the degree of specificity required, the request for disclosure must be sufficiently precise in order to identify the relevant evidence so as to differentiate it from others. For example, in respect of contracts, the document requested is identified by the subject of the contract, the parties and the date thereof.

Should a party, at the request of the court, fail to produce a document, there may be imposed, even repeatedly, a disciplinary penalty up to CZK 50,000 (Section 53 of the Civil Procedure Code). Theoretically speaking, criminal sanctions may be

imposed for "repeated obstructing to judicial proceedings" (the offence of a contempt of court) under Section 169b of the Criminal Code .

Subject to the rules stipulated by the IPL Act and/or international agreements, Czech courts may ask judicial authorities in other jurisdictions to carry out steps aimed at discovery/securing of evidence within their respective countries. Such steps, however, are subject to procedural rules applicable in the foreign jurisdiction.

Any taking of evidence must be done so as to preserve confidentiality of confidential facts protected by special laws or to honour other confidentiality obligation set forth by law or acknowledged by the state (such as business secrets, confidentiality obligation of advocates, experts, interpreters, etc.). In such cases, a testimony may be taken only provided the witness has been released of the confidentiality obligation by a competent body or by a person in the interest of which such confidentiality applies. The same rules apply analogously to any other form of evidence (Section 124 of the Civil Procedure Code). Should the confidentiality obligation be released, the court must take certain measures. It may exclude the public from the hearing if such publicity would or could threaten protection of classified information, business secrets, an important interest of a party or the public order. The courts may, however, still permit individuals to be present, while obliging them to keep any information presented confidential (Section 116 of the Code of Civil Procedure).

(b) Proving the infringement

(i) Is expert evidence admissible?

Expert evidence is not only admissible, but even obligatory whenever a decision of the court depends on an evaluation of facts for which expert knowledge is required (Section 127 (1) of the Civil Procedure Code). The court shall call an expert after hearing the parties.

Experts are registered on the list of experts and sworn translators kept by Ministry of Justice and should be appointed primarily from such list, based on their area of specialisation. An expert not registered on such list may be appointed by the court only if a registered expert is not available, may not perform the task or its performance would be connected with excessive difficulties.

The court appoints the expert in a case either *ex officio* or upon motion of a party. However any party may also obtain an expert's opinion and use it as evidence, although with a lower evidential value and with a high possibility of the other party claiming such opinion not to be objective.

The expert's role is set out in the appointment by the court, where the court gives questions that should be addressed in the opinion. The evidence and facts on which the expert bases his/her opinion are left to the discretion of the expert, who lists these as the basis of the opinion. Choice of these may often be a base for challenge by one of the parties. The court may order a party or other person to appear before the expert e. g. to provide an explanation for issues of concern.

As regards an expert's role in cases on liability for damage, no special regulation exists and the expert's role is not restricted. Therefore, in the context of action for damages incurred as a result of a breach of competition law, the court might ask for an expert's opinion for example to determine whether a document or a signature is genuine or not, what is the profit usually achieved in the area where the plaintiff has its seat or place of business, what were the additional costs that a consumer had to incur as compared to a situation if no violation of competition law had existed, etc.

(ii) To what extent, if any, is cross-examination permissible?

Cross-examination is permissible. Although Section 126 (3) of the Civil Procedure Code stipulates that parties to the proceedings and experts may question witnesses subject to the Court's consent, it is a standard practice that the court – after the witness has given his evidence and has been questioned by the court – invites the parties to the proceedings to put questions to the witness.

(iii) Under which conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?

It follows from the above that Czech procedural law is based on the principle of free evaluation of evidence by the court and that generally any forms of evidence are admissible. Therefore, any statements and/or decisions by any authorities or courts potentially have evidential value. It is left to the judge to assess the evidential value of such statements and decisions.

However, as regards decisions by competent authorities that a criminal or administrative offence has been committed, the courts are bound by such decisions as regards the identity of the offender and the existence of offence (Section 135 (1) of the Civil Procedure Code). Thus, for example, if the Competition Office decides in administrative proceedings that a competitor has breached a statutory duty imposed by the Competition Act and has thus committed an administrative offence, the courts are bound by these findings.

We believe that after 1 May 2004, this provision must be interpreted as applying to both national and foreign competent authorities, including the European Commission or a competition authority of another EU Member State.

(c) Proving damage

(i) Are there specific rules for evidence of damage?

There is one specific rule, which is set out in Section 381 of the Commercial Code that gives the plaintiff the right to claim compensation for an "abstract loss of profit" instead of an actual loss of profit. For further details see Section G below.

From a procedural point of view, should the amount of the claim for damages be impossible or exceptionally difficult to prove, the judge shall determine it at his/her discretion (Section 136 of the Civil Procedure Code).

In principle, the court should deliver a judgement in respect of the entirety of the claim asserted. Nevertheless, under Section 152 (2) of the Civil Procedure Code, the court may deliver a so called interim judgement ("*mezitímní rozsudek*") first in respect of the legal basis of the claim. It appears that this procedure is in respect of claims for damages. In such judgement, the court would decide on the legal basis of the claim, i.e. it shall consider all legal issues connected to the claim asserted, except for circumstances concerning the amount of the claim. Subsequently, the amount of claim shall be decided in the final judgement. The court may opt for the interim judgement at its own discretion. It may deliver it even without a motion of a party.

(d) Proving causation

(i) Which level of causation must be proven: direct or indirect?

Neither procedural laws nor legal theory in the Czech Republic distinguish clearly between direct and indirect level of causation. Consequently, Czech courts do not deal directly with this issue in their decisions.

Nevertheless, some guidance on the difficult issue of proving causation may be given by the case law quoted below.

If it is discovered that a damage results from two or more causes, the importance of each of these must be distinguished. The contribution of each to the damage incurred may not have the same importance. The Supreme Court ("*Nejvyšší soud*") in its decision no. 5 Cz 39/1965 expressed its views on this issue as follows:

"*Considering a mutual nexus between events, every consequence has several, mutually related causes and every cause has several, mutually related consequences. Further, every cause is a result of other causes and every consequence is a result of other consequences. Not every cause in a line of mutually related causes creating a certain effect has the same importance. Some of them are more significant (major causes) and determine a certain consequence while others are less important but necessary for the certain consequence and yet others are secondary and unimportant for the consequence. The assessment of which causes are major and which secondary involves an assessment of all circumstances involved in the case in question. If an illegal act is one of the major causes of damage, then the causal link between that illegal act and the damage suffered is a fact.*"

No causal link between the defendant's conduct and the damage can be presumed simply because the defendant has been held liable for that conduct on other legal grounds. This conclusion was reached by the Supreme Court, for example in its decision no. 2 Cz 36/1976. That case concerned an action for damages incurred as a result of a shock suffered on hearing the news of an accident originally caused by the defendant.

F. Grounds of justification

(i) Are there grounds of justification?

Section 373 of the Commercial Code stipulates that liability for damage is excluded if the party that has breached a contractual or statutory duty proves that such a breach was caused by "circumstances excluding liability". These circumstances – which resemble the concept of *vis major* - are defined in Section 374 of the Commercial Code as impediments which arose independently of the obligor's will and which prevent the obligor from performing his/her duty, provided that it cannot reasonably be expected that the obligor could avert or overcome such impediments or their consequences, and, further, that the occurrence of such impediments was unpredictable at the time when the obligor undertook to perform his/her duty (obviously, this last condition can be reasonably applied only to breach of contractual duty).

In accordance with Section 373 (2) of the Commercial Code, an impediment that only arose during the time when the obligor was in delay with the performance of his/her duty, or which ensued from his/her financial situation, does not exclude the obligor's liability.

Finally, it follows from Section 373 (3) of the Commercial Code that the consequences excluding liability are limited only to the duration of the impediment to which they relate.

(ii) Are the "passing on" defence and "indirect purchaser" issues taken into account?

Czech law does not recognise the "passing on" or "indirect purchaser" issues. As there is no case law in the field of competition-based claims for damages, it is very difficult to assess the manner in which Czech courts might deal with those concepts.

At the theoretical level, the "passing on" defence should be successful, the reason being that where a direct purchaser has fully passed on an excessive charge, he will not be able to prove occurrence of damage on his side. As regards the "indirect purchaser" issue, an indirect purchaser should be able to recover damage if he can persuade the court that there is a causal link between the unlawful conduct (breach of competition law) and the damage. As was pointed out in Section E above,

neither legal theory nor legal practice in the Czech Republic distinguish clearly between direct and indirect causation. Therefore, the fact alone that the damaged party is not a direct contractual partner of the defendant does not prevent the damaged party from claiming damages.

(iii) Is it relevant that the plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement? Mitigation?

Under Section 376 of the Commercial Code, which is a mandatory rule (i.e. a statutory rule that applies regardless of any contractual provisions to the contrary), the aggrieved party is not entitled to damages if non-performance of obligations by the obligor is caused by the conduct of the aggrieved party itself, or by a lack of cooperation, which the aggrieved party was under a duty to provide.

While the above provision clearly applies to situations where the aggrieved party itself is fully responsible for the infringement, in situations where the aggrieved party is only partially responsible, Section 382 of the Commercial Code or Section 441 of the Civil Code apply respectively.

Section 382 of the Commercial Code provides that the aggrieved party is not entitled to compensation for any part of the damages which is caused by its own failure to discharge duties arising under laws on damage prevention or damage reduction. This provision is also of mandatory nature. It should be noted, however, that the application scope of this provision is limited to a breach of "laws on damage prevention or damage reduction". Neither the Competition Act nor EC competition law belong to this category.

With regard to partial responsibility of the aggrieved party that is not covered by the rules of Section 382 of the Commercial Code, the general provision contained in Section 441 of the Civil Code should be applied. This provision stipulates that where the damage is partly caused by the plaintiff, the damages shall be apportioned accordingly.

We believe the above general Czech rules withstand the test set forth in the ECJ´s judgement in *Courage v. Crehan*[3]. *Crehan* provides essentially that the liability of a party for anti-competitive conduct cannot be totally excluded unless the other party bears a significant responsibility for the breach because of special economic and legal context in which the parties find themselves. Nevertheless, we believe that *Courage v. Crehan* does not prevent application of national rules on contributory negligence and reduction of damages proportionate to the contribution made to the injury by the other party, even if such proportionate reduction would lead to granting no damages.

G. Damages

(a) Calculation of damages

(i) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?

The damages are assessed on the basis of injury suffered by the plaintiff. Under general principles (Section 379 of the Commercial Code), damages consist of actual damage to, and loss of profit by, the plaintiff.

Actual damage (*damnum emergens*) consists of a decrease of the injured party's assets and is quantified as the value of the investment that would be required to restore the plaintiff to the situation he was in prior to occurrence of such damage.

Loss of profit (*lucrum cessans*) is an economic detriment where the injured party is not able to increase its assets as a result of the breach, where such increase could have been realised in the normal circumstances.

3 C-453/99, *Courage v. Crehan,* ECR [2001] I-6297

Both of these forms – actual damage and loss of profit – are independent of each other and the existence of one of them is not a pre-condition for the claiming of the other. Consequently, it is not necessary to incur actual damage to claim loss of profit.[4]

(ii) Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?

The scope of damages awarded by Czech courts is not dependent on where the injury has been suffered. As regards loss of profits, under Section 737 of the Commercial Code the so-called abstract profit may be determined with regard to profits usually achieved in the state where the plaintiff has its seat or place of business.

(iii) What economic or other models are used by courts to calculate damage?

When; calculating damages, the courts take into account actual damage suffered as well as loss of profit.

As regards actual damage, the courts take into account any costs incurred in neutralising the effects of the damage or in determining the scope of the damage.

As regards loss of profit, the Commercial Code (Section 381) recognises the principle of so-called abstract profit. Under this principle, the plaintiff may, instead of the actual loss of profit, opt to claim compensation for the profit that is as a rule achieved in its line of business, respecting fair business relations and under normal competition conditions (i.e. conditions that would have existed had there had been no infringement of competition rules). The purpose of such an option for the plaintiff is to ease its burden of proof as regards the calculation of damages.

A Czech court dealing with a claim for damages resulting from a breach of competition law would most probably rely on an expert report as regards the calculation thereof (see also Section E above).

(iv) Are ex ante (time of injury) or ex-post (time of trial) estimates used?

The law does not explicitly provide for this issue. However, the concept of damages both under the Civil and Commercial Code is interpreted as requiring that the damage be compensated in full.

In order to claim damages, whether through a pre-trial settlement or through an action before a court, the aggrieved party must calculate the damages suffered and, for the purposes of the action, must be capable of proving their existence. The calculation must be made with reference to a certain point of time. As, however, it may not be excluded that the damage continues to accumulate through the proceedings, the plaintiff should be entitled to claim full damages as of the day of trial.[5]

Under Section 154 of the Civil Procedure Code, the facts existing at the date of judgment are decisive. Technically, the plaintiff may at any moment (during the first-instance proceedings) extend the scope of its action under Section 95 (1) of the Civil Procedure Code, subject to the court's approval. Although such approval may be withheld if the results of the proceedings up to then would be rendered useless, in which case the court continues to hear the action as originally filed, this should not be the case should the plaintiff merely decrease the claimed amount of damages.

(v) Are there maximum limits to damage?

Generally, the damage is to be compensated in full.

4 Supreme Court of the Czech Republic II Odon 15/96 of 31 January 1996

5 Pelikánová, I., Commentary on the Commercial Code („Komentář k obchodnímu zákoníku") (LINDE, 1998, 2nd edition)

Nevertheless, under Section 379 of the Commercial Code, the damages are limited to so-called anticipated damages, i.e. damages that the defendant could have anticipated as a possible consequence of the breach of its legal obligation or that could have been anticipated taking into consideration the facts that were or should have been known to the defendant acting with due care at the relevant time. Given that this provision constitutes an exception to the rule, it is subject to a restrictive interpretation.

(vi) Are punitive or exemplary damages available?

Liability for damages under Czech law is designed to be preventive and reparatory. Consequently, punitive and exemplary damages are unknown to the Czech legal system.

(vii) Are fines imposed by competition authorities taken into account when settling damages?

Given that sanctions imposed within administrative proceedings by the Competition Office under the Competition Act are, functionally speaking, substantially different from damages in civil law, and given that damages are calculated in reference to the injury suffered by the plaintiff as opposed to the profit gained by the defendant, the fines imposed by the Competition Office should not be taken into account when determining the amount of damages.

(b) Interest

(i) Is interest awarded from the date the infringement occurred; or of the judgement; or the date of a decision by a competition authority?

As regards claims for damages, neither the Commercial nor Civil Codes explicitly state at what moment in time damages should be compensated. Consequently, it must be concluded in accordance with general rules (Section 340 (2) of the Commercial Code) that the defendant is obliged to compensate for damages without undue delay after it has been notified to do so by the plaintiff.

In general, the interest accrues from the date on which the defendant was obliged to perform; the defendant is obliged to perform without undue delay after delivery of the notice or within the period set forth in the notice, if such period exceeds the period provided in Section 340 (2) of the Commercial Code. Such notice may also take a form of an action before a court.

Should the anti-competitive behaviour, which caused the damage, not be terminated at the date of such notice and should, consequently, the damage further increase (see Article G(a)(iv) above), the plaintiff may claim the increased damages accordingly. Nevertheless, as the late interest itself is considered to be a form of damages, only compensation of damages not covered by the late interest may be claimed (Section 369 (2) of the Commercial Code).

(ii) What are the criteria to determine the levels of interest?

Under Section 369 of the Commercial Code, which refers to Section 517 (2) of the Civil Code implemented by Governmental Decree no. 142/1994 Coll., determining the amount of charges for late payment under the Civil Code ("*Nařízení vlády, kterým se stanoví výše úroků z prodlení a poplatků z prodlení podle občanského zákoníku*"), the interest rate applicable is twice that of the discount rate announced by the Czech National Bank *("Česká národní banka")* as on the first day of delay.[6]

(iii) Is compound interest included?

Compound interest is not applied in cases involving statutory interest for late payment.

6 The interest rate in May 2004 amounted to 2%, the CNB discount rate being 1%. Nevertheless, it should be noted that the interest rate peaked in 1997 when amounting to 26%.

H. Timing

(i) What is the time limit in which to institute proceedings?

Any action must be filed prior to expiry of the time limit set out in the statute of limitation. As regards actions for damages, the limitation period is four years (Section 397 of the Commercial Code) and starts to run from the moment the injured party learns or could have learned, of the damage and of the party liable therefor (the so-called subjective statute of limitation).

In addition to the above subjective deadline, an objective deadline of ten years starts to run from the moment the breach that ultimately caused the damage took place. The objective deadline applies also to ongoing breaches and may, consequently, lead to the impossibility by the injured party to recover damages for the entire duration of the anti-competitive behaviour.

(ii) On average, how long do proceedings take?

An action for damages at first instance usually takes approximately 1 year. However, the total length of the proceedings is dependent on the forms of evidence used (calling of experts, etc.). The total length of the first instance proceedings is also dependent on whether the judgement is appealed (within 15 days of declaration thereof) to a higher court and whether the higher court itself decides on the merits of the case or whether it annuls the decision of the court of first instance and refers the case back to it for a further hearing. Furthermore, a judgement of the court of appeal may under certain circumstances be subject to a further appeal (in cassation) within 2 months of delivery of the appellate court's judgement.

Given the complexity of actions for damages incurred as a result of violation of competition rules and on the assumption that a first instance court judgement would be appealed, we would assume that the final judgement might be obtained within two to five years.

(iii) Is it possible to accelerate proceedings?

Under Czech law, civil procedure is governed by the principle of "concentration", which ensures that the participants to the proceedings submit their claims and suggested evidence on time in order not to artificially extend the duration of the proceedings. Should a participant fail to comply with this principle, it might not be able at a later stage to raise its claims and suggestions before the court and the court shall disregard any such late suggestions.

Under the Civil Procedure Code, the concentration principle applies either *ex lege*, or it may be applied by the court at the request of one of the parties. As regards *ex lege* concentration, the parties are as a rule obliged to present decisive facts and evidence in the context of proceedings before the court of first instance (Sections 205a and 119a of the Civil Procedure Code). Subject to a motion by a party, the court may decide that the parties are obliged to present all decisive facts and evidence within a chosen deadline. Such a motion may be filed provided that the proceedings are being intentionally delayed through fault of the other party (Section 118c of the Civil Procedure Code). Save for strictly limited exceptions set forth in the Civil Procedure Code, the court does not take into account facts and evidence submitted to it after this deadline expires.

Under certain circumstances the court may, without hearing the parties and even without a motion by a party, issue a so called payment order ("*platební rozkaz*") under Section 172 of the Civil Procedure Code. The payment order may be issued only in respect of a claim for payment of a sum and only provided that it is possible for the court to establish the right of the plaintiff on the basis the facts asserted by the plaintiff. The payment order may not be issued where it would need to be delivered to a defendant abroad. The defendant must, within the deadline of 15 days, either pay the amount claimed and the costs of proceedings, or raise

objection against the payment order. Although the conditions for issuing the payment order are strict, it is not inconceivable that in certain cases, a plaintiff claiming damages incurred as a result of a violation of competition rules might be able to fulfil them.

Under Section 153b of the Civil Procedure Code, a default judgement may be issued by the court provided that the defendant, which has been properly summoned, does not appear before the court at the first hearing without appropriate excuse, the default judgement has been requested by the plaintiff and the assertions hitherto made may serve as a basis for the court's decision.

(iv) How many judges sit in actions for damages?

A single judge sits in a regional court hearing actions at first instance.

Higher courts always sit in chambers of three judges. Chambers take decisions after deliberation, with a majority of votes required.

(v) How transparent is the procedure?

As a rule, the procedure is public. The court may exclude the public from the hearing only if publicity potentially threatens the protection of classified information, business secrecy, an important interest of a party or public order. The courts may, however, still permit individuals to be present, while obliging them to keep any information presented confidential.

The case files are accessible to the parties to the proceedings and their appointed counsels. A person other than a party may access the file only with consent from the judge and provided they have given a sound reason and no legitimate interests of the parties would be harmed.

I. Costs

(i) Are Court fees paid up front?

Court fees are payable upon filing of the action, the amount of the fees being fixed by Act. no. 549/1991 Coll., on court fees, as amended ("*zákon o soudních poplatcích*") at 4% of the claimed amount of damages. The maximum fees, however, are CZK 1,000,000, i.e. approx. EUR 32,000. These fees are to be paid by the plaintiff. Failure to pay the fee is, as a rule, a reason for the court to suspend the proceedings. In individual cases, however, the court may take into account the personal circumstances of the plaintiff or reasons for relief under Section 138 of the Civil Procedure Code.

(ii) Who bears the legal costs?

Under Section 140 of the Civil Procedure Code, each participant is obliged to bear the costs that it has incurred during the proceedings. Similarly, it is obliged to pay the costs of its counsel, unless an advocate has been assigned by the state (in which case, the state bears these costs).

As regards costs connected with the submission of evidence, the court may impose an advance payment obligation on a party in respect of costs of providing evidence that has either been proposed by such a party or that the court orders in respect of facts asserted by such a party or in its interest (unless conditions for a relief are met).

The costs that are necessary and inherent to the functioning of the courts system are borne by the state and are included in the state budget.

(iii) Are contingency fees permissible? Are they generally available for private enforcement of EC competition rules?

The Czech Bar Rules[7] do not permit arrangements whereby contractual remuneration of an advocate is fixed as a share of the damages awarded unless there are special reasons to be taken into consideration, more particularly property or social status of the client. Any remuneration has to be reasonable and proportionate given the value and complexity of the file. Given these restrictive conditions, this arrangement is not widely used.

(iv) Can the plaintiff/defendant recover costs? Are there any excluded items?

Rules relating to the recovery of costs are laid down in Sections 142 et seq. of the Civil Procedure Code. As a rule, a party that succeeds on every point shall be granted full recovery of costs subject to certain limitations as provided below. The unsuccessful party is obliged to pay his costs and the costs of the successful party. The degree of success is judged by comparing the verdict and the claim asserted in the action.

If the parties are only partially successful, the court may either grant partial compensation of costs or it may decide that each party shall bear its own costs.

In the event of partial success, full compensation may still be granted . This is the case if the lack of success is negligible or if the court's verdict regarding the adjudicated damages is dependent on an expert's report or on the court's discretion.

The degree to which costs of the parties to the proceedings and their counsels will be compensated, including cash costs (such as postal fees, travel costs, accommodation costs, etc.) is provided for by special regulation. When determining the amount of compensation under Section 151 of the Civil Procedure Code, the court shall stipulate the amount under the terms set forth in the Decree of the Ministry of Justice no. 484/2000 Coll., as amended, whereby flat rates of fees of representing a participant by an advocate or notary are fixed when deciding on compensation of costs within civil procedure ("*vyhláška Ministerstva spravedlnosti č. 484/2000 Sb., kterou se stanoví paušální sazby výše odměny za zastupování účastníka advokátem nebo notářem při rozhodování o náhradě nákladů v občanském soudním řízení*") ("**Legal Costs Decree**"). When claiming damages, the remuneration to be reimbursed is determined on the basis of the damages claimed.[8] There is no contingency fee available to be awarded under the Legal Cost Decree.

Consequently, the parties are rarely capable of recovering the entirety of their legal representation costs, even if fully successful in the proceedings.

(v) What are the different types of litigation costs?

The proceedings involve different types of litigation costs. Under sections 137 and 139 of the Civil Procedure Code, these include cash expenditures of the parties and their counsels, including the court fee, the participants' loss of profit because of the proceedings, costs of evidence, costs of legal representation (provided the participant is represented by an advocate or a patent attorney), costs of testimony, costs of expertise, costs of interpreting.

(vi) Are there national rules for taxation of costs?

No.

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7 Section 10 para 6 of the decision of the Board of the Czech Bar Association of 31 October 1996 (Ethical Code), the Bar Bulletin no. 1/1997

8 For example, when damages amounting to EUR 1 million be claimed, the remuneration would be approx. EUR 15,000.

(vii) Is any form of legal aid insurance available?

Currently, six insurance companies provide legal aid insurance. Under such insurance, the insurance company undertakes to pay for the insured party's costs connected to legal proceedings up to the insured amount. More particularly the insurance covers, as a rule, legal representation costs, court fees, expertise fees, translation fees, testimony fees, cash expenditures as well as the compensation of costs of the other-party, should the court decide that the insured party is to provide compensation therefor. As the applicability of the insurance policy is usually defined very widely, competition cases may also be covered by legal aid insurance.

Legal aid is available both in respect of court fees and legal fees.

Under Section 138 of the Civil Procedure Code, the court may relieve a plaintiff, whether partially or in total, from paying the court fee if this is justified given a personal situation of the plaintiff and provided that no arbitral or manifestly unsuccessful claim or hindering of application of law is in question. Certain further cases for relief from court fees are set forth in other legal regulations.

Section 30 of the Code of Civil Procedure provides for cases where a party may have an advocate assigned by the court. In such a case, the legal fee of the advocate is borne by the state (Section 23 of Act no. 85/1996 Coll., on Advocacy, as amended).

(viii) What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?

Given that – as far as we know - no such case has been heard before Czech courts so far, the question cannot be answered for the moment.

However, for a hypothetical claim for damages in the amount of EUR 1 million incurred as a result of a hard-core violation of competition law, the likely average costs might amount to EUR 60,000 (under the following calculation: court fees – 4% of the amount claimed, i. e. EUR 40,000, the legal fees (if agreed as per the Legal Costs Degree) - EUR 15,000, expert's report: EUR 5,000).[9]

J. General

(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules? If so, in what way do they differ from the general private enforcement rules?

No, private enforcement of competition rules is governed by general rules of civil law enforcement.

(ii) EC competition rules are regarded as being of public policy. Does that influence any answers given?

No, this fact does not influence the answers given.

(iii) Are there any differences according to whether defendant is a public authority or a natural or legal person?

If state liability is in issue, the procedure of asserting claims for damages is governed by the State Liability Act. Under Section 3 thereof, the state is liable for damages caused by state bodies, legal or natural persons and autonomous regional authorities in the exercise of public powers that have been delegated.

The claim for damages must be filed with state bodies authorised to receive such claims (ministries and other central administration bodies). Should the claim not be

9 As explained above, the Legal Costs Degree provides for the maximum amount of legal costs that the successful party to the proceedings will be reimbursed by the other party. Nevertheless, it should be stressed that the contractual fees agreed between a client and an advocate usually exceeds such maximum amount.

fully satisfied by such state body within six months of its filing, the aggrieved party may file an action with a court.

(iv) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?

No, there is no explicit legal provision for such interaction. The leniency programme only prevents or reduces the administrative sanctions that may be imposed by the competition authority.

(v) Are there differences from region to region within the Member State as regards damages actions for breach of national or EC competition rules?

No

(vi) Please mention any other major issues relevant to the private enforcement of competition law in your jurisdiction.

In administrative proceedings before the Competition Office, an aggrieved party may become a party to the proceedings only with approval of the Competition Office and provided that its rights or obligations may be affected by the Competition Office's decision in such proceedings. Given the restrictive approach of the Competition Office towards admitting third party participants to administrative proceedings, third party's access to information, potentially useful for private enforcement, is limited.

Another problem might be the question of which law is applicable to a claim for damages. For the time being, as there is no international/EU instrument in this domain, the Czech Republic applies its own rules of private international law (the IPL Act as referred to in Section C(i) above). Under Section 15 of the IPL Act, claims for damages (except for claims arising from the breach of contractual obligations or other (unilateral) legal acts) are governed by the law of the place where the damage has occurred, or where the event on which the claim is based has occurred.

(vii) Please provide statistics about the number of cases based upon the violation of national or EC competition rules in which the issue of damages was decided upon.

To our knowledge, no case based upon the violation of Czech competition rules in which the issue of damages was decided upon has been heard so far before Czech courts.

III. Facilitating private enforcement of Articles 81 and 82 EC

(i) Which of the above elements of claims for damage provide scope for facilitating the private enforcement of Articles 81 and 82 EC? How could that be achieved?

As far as remedies are concerned, we believe that in principle as far as substantive national law is concerned, it does not pose any obstacle to the development of a stronger private enforcement system. There is, however, a whole range of issues of a procedural nature that we believe discourages plaintiffs from claiming damages incurred as a result of violations of competition law.

First of all, we believe that given the complexity of this area of law, specialised courts or at least court panels of civil/commercial courts should be created. It is our opinion that after the modernisation of EC competition law this will become a *condition sine qua non* for private enforcement of competition law - both EC and national.

As regards the procedure itself, the civil procedure is governed by the adversarial principle. Consequently, the plaintiff bears the burden of proof in respect of the existence of anti-competitive behaviour as well as in respect of the damage

suffered and the calculation thereof. We believe that it might be useful if certain guidelines concerning calculation of damages were established. The burden of proof is one of the most serious obstacles v*is-à-vis* effective private enforcement, so shifting the burden of proof in certain obvious situations might be of help. Like, for instance in actions brought against unfair competition practices (see Section II(E)(a)(i) hereof), where it is for the defendant to prove that his acts did not involve illegal behaviour. In this context, it might prove helpful to the plaintiff to be involved to a greater extent in administrative proceedings before the Competition Office.

Unlike U.S. law, Czech law just like other continental systems of law does not recognise the varied range of instruments used for effective private enforcement such as treble damages, class action, etc. Treble damages might have certain effect on private enforcement of competition law in increasing the incentives of a plaintiff to assert a claim for damages. They might also have a discouraging effect on potential offenders of competition-law related offences. Nevertheless, treble damage would for the moment be incompatible with the principle of damages under Czech law, i. e. restitution of damage actually incurred.

As no class/collective actions are currently permissible in the Czech Republic, it is difficult for consumers to defend their interests and to claim damages through a more efficient tool. Consequently, it seems necessary to widen the powers of consumer organisations to allow the latter to represent consumers in respect of damages claims. Similarly, application of Section 82(2) in connection with Section 159a(2) of the Civil Procedure Code to damages incurred as a result of competition law infringements might be advisable, since under this provision a final judgement is binding not only on the participants to the proceedings but also on other parties vis-à-vis the same defendant with regard to identical claims arising out of identical behaviour.

As regards the publication of judgements, for the time being, judgements of the courts are not publicly available. Nevertheless, the college of the Supreme Court may decide to publish certain significant judgements that are important for the purpose of unifying the case law. Such decision on publication is preceded by an internal discussion within the Supreme Court and an external consultation with presidents of regional and higher courts, law faculties and the Ministry of Justice. The judgements are consequently published in the Collection of judicial decisions and opinions. Given that the judgement is published without a prior explicit consent of the parties to the proceedings, their anonymity is preserved in order to prevent infringement of their rights. Similarly, business secrets of the case are preserved (Section 22(2) of Act no. 6/2002 Coll., on Courts and Judges, and the Rules of procedure of the Supreme Court of the Czech Republic). It is not possible to obtain judgements on request either. Under Section 44(2) of the Civil Procedure Code, any person having legal interest or important reasons may request to be permitted to inspect the relevant file, to make notes or take copies of it. Consequently, a less stringent rules for publication of judgements would certainly encourage increased activity to seek remedies by aggrieved parties.

Expenses such as court fees, counsel fees and the impossibility of recovering the totality of the costs of proceedings despite being fully successful in a claim are another deterrent for potential plaintiffs.

We believe that arbitration, representing a *de facto* private judgement, will also be substantially affected by the reform of EC competition law and that it might become an efficient alternative means of dispute resolution, provided, of course, that the parties agree on such forum.

(ii) Are alternative means of dispute resolution available and if so, to what extent are they successful?

Property disputes (including claims for damages, see also Section C(i) above as regards the notion of property disputes) may be decided upon within arbitration proceedings; this is generally governed by Act no. 216/1994 Coll., on arbitration proceedings and execution of arbitration awards ("*zákon o rozhodčím řízení a o*

výkonu rozhodčích nálezů"). Nevertheless, in such cases parties must conclude a written arbitration agreement/arbitration clause. The arbitration may take place either before individual arbitrators, or before a permanent court of arbitration. Arbitration plays a dominant and almost exclusive role in international business relations. Although arbitration reduces certain indirect medium – and long term costs of dispute (e. g. resulting from the length of the proceedings), the immediate direct costs (arbitration fee) as compared to a judicial proceedings are usually much higher.

In addition, the parties may conclude, both prior to initiating and in the course of the judicial proceedings as well as within arbitration proceedings, a settlement in the form of a final judgement and final arbitration award, respectively.

The concept of mediation is not recognised in Czech law.

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V. National case law summaries

No relevant case law in relation to damages resulting from competition law infringements exists to date.