

Resumé

The purpose of this work is to provide its readers with comprehensive legal analysis of possibilities and limits of practical enforcement of the European Communities' (the "EC") antitrust rules through the damage actions for infringement of Article 81 of the Treaty Establishing the European Community (the "**Treaty**"). The work should, in broader context, contribute to the current discussion about the implementation and future development of so-called private enforcement of EC competition rules.

Given the complexity of its subject-matter, the work was structured into several chapters, which are logically linked to each other. At the outset, the elementary characteristics of the collusive practices falling within the prohibition of Article 81 of the Treaty were briefly analyzed. The main purpose of such analysis was to draw attention to certain issues, which may arise in connection with attempts to define the prohibited conduct under Article 81 of the Treaty.

The core part of the work deals with practical enforcement of EC competition rules through actions for compensation of damage caused by breach of Article 81 of the Treaty. It was disputable for a long time, whether the European competition law enables the aggrieved parties to lodge such claims for compensation of damage without any specific legal regulation on national basis. In other words, the question was – are all parts of article 81 of the Treaty directly applicable? The affirmative answer was repeatedly given by the Court of Justice of the European Communities (the "**Court**"), which added that the national courts are obliged to apply the community law in accordance with principles of equivalence and effectiveness. The application of these principles means that the enforcement of rights conferred by the community law can not be impossible, excessively difficult or less favorable than those governing similar domestic actions.

The Treaty declares any practices prohibited by Article 81 automatically void. However, the nullity sanction does not seem to be

sufficient redress for the third parties negatively affected by prohibited practices. Therefore, it may be concluded that the compensation by national court for damage resulting from EC competition law infringement is the only effective remedy for parties harmed by antitrust infringement. In addition, the Regulation No. 1/2003 explicitly stipulates that the national courts are authorized to apply Articles 81 and 82 of the Treaty.

The availability of private enforcement mechanism on the basis of EC law was subsequently confirmed by the case-law of the Court in its well known decisions *Courage* and *Manfredi*. According to the Court, any individual can claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. The conclusion of the Court brings necessary certainty to the legal practice, because it confirms prevailing opinion that individuals may be liable to other individuals for a loss caused by a breach of subjective rights arising under Article 81 of the Treaty. While the Court defined the basic principles of damage compensation, the specific aspects of damage actions are, in the absence of EC rules, regulated by the national civil and procedural rules. However, the traditional legal systems of member states do not provide effective mechanisms for antitrust damage claims and asserting of such claims may be excessively difficult. The claimants must face different approaches taken in the members states with respect to this type of damage actions and such diversity considerably increase a level of their legal uncertainty. As proven by comparative legal studies initiated by the European Commission, the prevailing majority of member states do not have specific rules for antitrust damage actions. It appears that the standard national rules on civil liability and civil procedure do not seem to be an appropriate for specific antitrust damage claims, due to some specificities in the field of antitrust damage claims. These specificities include, in particular, the difficult access of claimants to the evidence of the antitrust infringement, or the fact that the victims are frequently not in direct relationships with the infringer and the damage is spread over the large number of victims.

Further disputable aspect of the private enforcement elaborated herein is the potential use of preliminary injunctions against competition

law infringements. Generally, the preliminary injunction is, in accordance with applicable case law of the Court, available to each individual for protection of his/her subjective rights, if necessary in order to achieve the objectives set forth by EC law. I believe that the preliminary injunction in conjunction with the damage action should constitute two cornerstone protective mechanisms against the breach of Article 81 of the Treaty. However, the conditions for use of preliminary injunction are laid down by the case law of the Court only vaguely. Therefore, as part of effort to facilitate the private enforcement of antitrust law, it would be advisable to enact the legislation expressly regulating the use of preliminary injunction in EC competition law cases.

The positive impulse for the further development of private enforcement of EC competition law might be a set of measures proposed by EC Commission in its White Paper on damages actions for breach of EC antitrust rules (accompanied with Commission staff working paper). Generally, the proposed measures are based compensation principle, pursuant to which the damages is deemed to be a compensatory instrument for the loss of victims (including the loss of profit). Therefore, the compensation of damages should not be regarded as a penalty for antitrust law infringement and the victims should not be awarded with multiple of the suffered loss. The Commission made clear that it does not intent to implement the US antitrust litigation system within the EC. The second major principle of the proposed legislation relating is the complementary role of private enforcement to public enforcement. Thus, the measures proposed by the Commission should create an effective system of private enforcement through damage actions without jeopardizing the effectiveness of public enforcement.

In conclusion, it is summarized that the main benefit of the proposed measures consists in improvement of effectiveness of EC competition rules through antitrust damage actions. Despite the skepticism of some authors quoted herein, who are afraid that the private enforcement system might be abused for pursuing the private interests of competitors instead of promoting public welfare, the Commission's activities with respect to the

private enforcement should be supported. The effective private enforcement may be an additional incentive for undertakings to obey the EC competition rules. Simultaneously, the successful implementation of private enforcement on the basis of EC legal framework will be one of the significant milestones of the modernization of EC competition law.