Scope of liability for breach of EU competition rules

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The purpose of the thesis is finding of an effective instrument of defining the scope of liability for breach of EU competition law and the actual definition of the scope of liability. In particular, the thesis aims to prove that, contrary to the prevailing view, only direct victims of violation of EU competition rules should be compensated. The thesis is divided into four chapters; the first being devoted to the general methodology of the thesis, private and public enforcement of competition law and to the claim for damages under the EU law. The analysis of private and public enforcement of competition law is an important basis for the whole thesis. The question to which extent the damages claim are important for the enforcement of competition law determines the function of damages claims in the area of competition law. The thesis arrives at the belief that private enforcement is not the main tool fir the enforcement of EU competition law. However, it is a very important tool.

The following chapter focuses generally on damages claims in the area of competition law (the foundation of the claim for breach of competition law, of the claim for breach for unfair competition law and of the claim for breach of morality). Further, this chapter analysis the main functions of tort law: compensation, prevention, sanction and formation of law by courts. The choice of the function influences the construction of the damages claims, in particular the prerequisites for liability and the scope of liability. The previous chapter observed that the damages claims are an important instrument of EU competition law enforcement. For this reason, the thesis notes that from the viewpoint of the EU the main function in this case is prevention. Prevention expects a broader scope of liability than the compensatory function. However, the thesis point out that the compensatory function should never be forgotten and prefers this function to prevention.

The core chapter of the thesis is the third chapter on the scope of liability. This chapter compares on the basis of comparative method two instruments of determining the scope of liability for damage caused: adequacy, which is the main instrument in the Czech legal system, and protective scope, which is inherent to the German and Austrian legal system. Between those two instruments the thesis seeks for the more effective. Effective in the meaning of more reasonable, fair for both parties involved

(victim and tortfeasor) and with a foreseeable result. The reference legal systems are Czech, German and Austrian legal system.

It cannot be said that adequacy – working on the basis of foreseeability and probability of damage – doesn't limit the scope of liability at all. However, in the case of competition damage the application of adequacy doesn't lead to a fair or effective result. It can be claimed that the more the damage is remote, the less it will be successful in claim through natural selection. The more remote the damage is, the more difficult it is for the victim to prove the causal link between the loss and the forbidden anticompetitive act. At the same time, it can be claimed the more remote the damage will be, the more scattered it will be, i.e. its amount will probably be for each individual relatively low. A small damage is a very weak motivator for the demand of damages there, were the demand is connected with relatively high costs (in comparison with the loss).

The reliance on natural selection is not fair in the broad meaning of legal justice founded on certain rules like legal certainty. The tortfeasor cannot rely on where the scope of his liability will end, which can be problematic especially where the extent of fines and disgorgement of illegal gains is connected to the probable amount of the damages award. From this point of view, it can be claimed that the application of other mechanisms of defining the scope of liability seems to be convenient, as is e.g. the protective scope of the norm, which defines the extent of liability more clearly.

The second part of the chapter analysis the second instrument under scrutiny, i.e. the protective scope of the norm. The method of defining the protective scope is finding the personal, material and functional area of protection. These three views stem from three prerequisites: The tortfeasor is obliged to compensate only the person, whose protection the breached norm is aiming at. The breached has to be set up to protect the legal interest that has been interfered with. Further, the legal interest has to be interfered with in a way that should have been prevented by the norm. This means that compensated should be those persons that the author of arts. 101/102 TFEU meant to protect. Based on this method of definition, the legitimate claimants can be determined: cartel members, competitor, direct purchaser/supplier-entrepreneur, direct purchaser-consumer and indirect purchaser. The indirect purchaser, i.e. the indirect victim cannot be under the general principles of tort law authorised to claim damages. However, as the preventive function of tort claims is prioritized in the EU law the prevailing view is that indirect purchaser should be authorised to damages claims. The

thesis, however, comes to the belief consistent with the prioritization of the compensation function that the general principles of tort law shouldn't be violated and that for the compensation of indirect victims the legal systems know other means. In the case of extremely audacious conduct towards consumers the claim for breach of good morals can be used.

The fight against bad competition habits can be won with other means. But these means lie within the sphere of the European Commission and national competition authorities, not within the sphere of individuals. The preventive effect of damages claims can be considered as a welcomed secondary effect but not as the main objective of a tortious claim. Compensable should be only the damage and authorised should be only the person whose characteristics correspond to the classic tort law principles. We shouldn't be looking for new groups of authorised persons for the only reason that we need stronger weapons against anticompetitive conduct. The question who should be authorised to claim has to be considered very carefully.

When comparing the results of application of adequacy and of protective purpose, it has to be decidedly stated that for the area of competition damage effective result cannot be reached if adequacy is applied.

Adequacy on its own does not reply to the question of general determination who should be authorised to claim competition damages. While applying specific criterions that should be applied on entrepreneurs (competitors), one can expect that the group of authorised victims can be defined very broadly. Adequacy on its own cannot exclude other than pecuniary loss. The courts have to apply other undeclared considerations of justice. In particular, adequacy is not able to give certain limits to liability in advance and in this way to reply to the needs of legal certainty. When applying adequacy the scope of liability is rather unclear. This lack of clarity may have negative effects on judges in uncommon areas of law (as are competition losses nowadays). This can lead to the results that out of fear of limitless liability the judges will set the limits of liability too narrowly. In this way even authorised victims might be deterred from claiming for damages which would set back as well the wished for function of prevention of violating the EU competition rules.

The definition of the scope of liability with the help of the protective purpose of the norm gives a much more clear and accurate reply. Further, it defines the scope in an abstract way in advance. Thus, it is clear from the beginning which losses can be claimed for and which are not compensable. In this way, it has as well positive effects

on potential claimants and makes the enforcement process more effective. The protective purpose gives generally a narrower definition of the group of authorised person. However, this depends rather on the legal-political setting of the instrument. The moving of the limits in this or the other direction depending on political views in the time can be considered.

On the personal level, the protective purpose of the norm gives a clearer and narrower definition of authorised person (especially it is able to determine specific groups of authorised victims), which is more endurable for the whole system, from the economic point of view in particular. On the material level, it ensures that only those interesest will be compensated that are in the area of the activity of the violated norm. Other losses belong to the general live risk.

The final chapter analyses the conclusions of the performed examination a states that the original goal of proving that excluding claims of indirect victim is the only correct way was not entirely reached. It has been discovered that there are exceptions where the claims of indirect victims can be accepted. These exceptions should be, however, held in the limits where they are now. Further, it could be considered whether not to limit the liability to the first and second chain link or a specific way of interlinking of the victims by means of legislative acts. Such a limitation to specific indirect victims cannot be reached only by means of protective purpose or adequacy. These instruments cannot in a generally abstract way say, which indirect victims can claim and which not. Leaving this question to decisions in concreto could undermine the principle of legal certainty.

The question of how to define the scope of liability, especially on the personal level, depends of course as well on the function that is connected to the damages claim. If it is prevention and deterrence, then the scope of liability should be as broad as possible. This is however not the primary function of tort law. The main objective is reasonable and just allocation of losses. The original principle is casum sentit dominus. Only if a specific reason is given the loss can be attributed to someone else. Some losses are a common result of interaction between individuals, which have to be expected. These losses shouldn’t be subject to damages.

The protective purpose is not only mean how to define the scope of liability. The fact that neither adequacy nor the protective scope are enough as instruments of limiting the liability is proven by the two big European codification projects: Principles of European Tort Law (PETL) a Draft Common Frame of Reference (DCFR). The

PETLs name in the art. 3:201 (Scope of liability) next to the foreseeability (adequacy) and protective purpose of the norm other factors that have to be considered cumulatively while defining the scope of liability of the tortfeasor: he nature and the value of the protected interest, basis of liability (fault, breach of a standard of conduct, breach of a special obligation to protect other against damage) and ordinary risks of life. The DCFR limits the liability in its art. VI.-1:101 only to legally relevant damage. This legally relevant damage is given only if an interest has been violated that the law is specifically protecting or if this interest is worth of being protected by the law (art. VI.-2:101). incl. a clear statement of cases when indirect/secondary victims have a compensable damage (e.g. art. VI.-2:202).

The Czech legal system does not include such a detailed definition, however the construction of tortious liability does not prevent the Czech courts from using interpretation rules that would correspond to these principles.

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