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Slovakia: Stand-alone claims stuck dead in the water?

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In any system, the competition regulator's ability to investigate, sanction, and remedy competition grievances are directly dependent on the size of resources (financial, personal, and informational) that regulator has at their disposal. Competition regulators have been known to issue policies setting priority areas for competition law enforcement based on sectoral and severity criteria to overcome this issue.

As a result, competition law enforcement generally suffers from a wide enforcement gap. While this approach may be cost-effective, ensuring that regulators can focus on cases with the biggest macroeconomic impact, many competition law breaches of lower macroeconomic importance (while still having an impact on individual competitors) remain uninvestigated by the regulator.

To tackle the enforcement gap, a system of damages claims evolved. Within the EU, damages claims rules are harmonized per the EU Directive 2014/104 ("Damages Directive"), which entitles businesses and other damaged persons to claim damages caused by infringing on both the EU (especially art. 101 and 102 of TFEU) and national competition laws. In a specific Slovak case (discussed below), the Damages Directive has been transposed into the national law by the Act no. 350/2016 Coll., which deals specifically with private damages claims ("Competition Infringement Damages Act") caused by breaching the EU competition rules and national competition law (Act no. 187/2021 Coll. on protection of competition; prior to June 2021 Act no. 136/2001 Coll. on protection of competition).

Generally, the damages claims system rests on two approaches – follow-on and stand-alone lawsuits. Both approaches have their merits and drawbacks. In the case of follow-on lawsuits, the claimants can rely on previous findings of a competition regulator, which are typically binding for the courts. The main drawback is the tardiness in which the claimants can achieve an enforceable award of damages. On the other hand, stand-alone lawsuits may be speedier. However, the claimants bear the burden of proof regarding establishing that a competitor has breached competition laws which resulted in damages to the claimant.

Given the existing enforcement gaps and prioritization policies in public enforcement of competition law, relying on follow-on lawsuits may not always be an option for the enterprise damaged by the anti-competitive conduct of its competitors. Thus, private enforcement of competition law via stand-alone claims is often the only recourse enterprises may have at their disposal to counter anti-competitive practices.

The stand-alone lawsuits doctrine has been developing especially in the US. Already in the 1970s,

91% of all privately initiated competition litigation took the form of stand-alone cases. In the EU, stand-alone cases are far less prevalent while permitted under the Damages Directive. As a result, in smaller jurisdictions where private competition enforcement is almost non-existent, confusions arise when considering the permissibility of stand-alone lawsuits.

Confusion arises in Slovakia

A recent example of such confusion is the 2020 verdict of the Slovak Supreme Court ("SSC") which has categorically rejected stand-alone lawsuits (case 3Obdo/108/2019), despite previous doctrinal acceptance of the concept.

A private health insurer brought the lawsuit in question against a public hospital. The insurer claimed that the public hospital by cancelling a health care provision contract. The claimant brought the claim as a stand-alone action.

Without considering the merits of the case, the SSC held that stand-alone lawsuits are inadmissible under Slovak law. The court cited Section 193 of the Act on Civil Procedure on prejudicial questions to support the verdict. Per this section, courts are not entitled to consider whether a crime or administrative delict was committed prejudicially. Based on this, SSC argued that since abuse of dominance is considered an administrative delict under the Protection of Competition Act, courts are not allowed to rule on damages claims before findings of infringement by the Antimonopoly Office. This, in practical terms, means that currently, only follow-on lawsuits are permissible in Slovakia.

However, SSC's findings are flawed on two counts:

- SSC failed to examine the EU dimension of the case.
- SSC also did not consider the spirit of the Competition Infringement Damages Act.

EU law provides clear answers

SSC's ruling violates the EU law, which obliges the Member States to permit stand-alone lawsuits.

National courts are empowered to apply articles 101 and 102 of TFEU, as stated in art. 6 of the EU Regulation 1/2003 ("Competition Regulation").

Under art. 3(1) of the Damages Directive, *"any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm."*

While this section does not directly deal with the stand-alone vs. follow-on dilemma, it needs to be interpreted in light of the directive's underlying principles outlined in the recitals. Here, recital 13 is particularly relevant, as it explicitly states that *"the right to compensation is recognized … regardless of whether or not there has been a prior finding of an infringement by a competition authority."*

The EU-wide permissibility of stand-alone lawsuits is long established in the case law of the Court

of Justice. An extensive discussion of this development has been recently provided by Advocate-General Bobek in his opinion on the Stichting Cartel Compensation and Equilib Netherlands BV v Koninklijke Luchtvaart Maatschappij NV case (C-819/19). Bobek makes a clear conclusion that exclusion of stand-alone lawsuits would be incompatible with the nature of the European competition law system and the case-law of the Court of Justice.

SSC also did not comply with its obligation to refer the case for a preliminary ruling by the Court of Justice. Being a court of the last instance, SSC must refer to the Court of Justice any case concerning the interpretation of EU acts under art. 267 TFEU.

At this point, it needs to be noted that the claimant posed the question of legal importance in their extraordinary appeal to the SSC as to whether courts have jurisdiction to consider stand-alone lawsuits under relevant sections of the Act on Civil Procedure and norms of the EU law. Despite this clear lead-on by the claimant, SSC did not acknowledge the EU dimension of the case, failing to mention EU primary or secondary law even once. Thus, it comes as no surprise that SSC failed to request a preliminary ruling by the Court of Justice.

Implied stand-alone actions under national law

Moving away from the EU dimension, SSC's ruling is problematic even when examined through the prism of domestic law. To support its reasoning, SSC cited sec. 4 of the Competition Infringement Act per which courts are bound by previous infringement findings by the Antimonopoly Office, while infringement findings of regulators from other member states should be treated as evidence of infringement. SSC interpreted this section to mean that only follow-on actions are admissible in Slovakia. That is a grave misinterpretation of the law and its spirit. Sec. 4 ensures the compatibility of public and private competition law enforcement while maintaining the principle of legal certainty (see also ECJ case Masterfoods Ltd v HB Ice Cream Ltd.). However, there are no grounds to construe that provision as precluding stand-alone actions.

Even though the Competition Infringement Act does not explicitly deal with the stand-alone vs. follow-on question, the permissibility of stand-alone actions is implied in the construction of limitation periods for damages claims caused by competition law infringement in sec. 5 of the Act.

In line with the Damages Directive, the limitation period is 5 years. It will commence only after the competition law infringement ends and the claimant knows or can reasonably be expected to know the behaviour constituting the infringement, the fact that the infringement caused the claimant harm, and the infringer's identity. Furthermore, if Antimonopoly Office starts an investigation, the limitation period is suspended and starts anew only one year after the regulator ends the infringement investigation.

Such a dual nature of limitation periods clearly indicates that both follow-on and stand-alone lawsuits are permissible. To justify this reasoning, the principle of rational lawmaker needs to be taken into account. Under this principle, no part of the law should be deemed obsolete or not have a specific function. If we accept the conclusion that only follow-on actions are possible, there would be no need to state the limitation periods for the time preceding the infringement investigation by the regulator. Merely stating that the limitation period commences only after the investigation was closed would be sufficient. Thus, it needs to be reasoned that by establishing the pre-investigation limitation period, the legislator aimed to limit the claims brought as stand-alone

actions.

A chilling effect on private enforcement

As demonstrated above, SSC's reasoning regarding stand-alone lawsuits is flawed and runs contrary to both EU and domestic competition laws.

Due to the quasi-precedential nature of SSC rulings, we can expect that this particular opinion will trickle down into the decision-making practice of courts of lower instance (District Court Bratislava II and Regional Court in Bratislava that has exclusive jurisdiction to hear civil competition cases and related appeals respectively).

These consequences are already being felt in newer cases. Opinion of the SSC was already cited in a case heard by the Regional Court in Bratislava, which rejected an appeal regarding a petition to grant temporary injunctive relief in an abuse of dominance case (case 3Cob/39/2021). Thus, SSC's opinion already has far-reaching consequences on the development of competition law in Slovakia.

The current situation also has constitutional ramifications. Only a limited number of damages claims that qualify for follow-on actions will be adjudicated with stand-alone claims declared inadmissible. This raises concerns of *denegation iustitiae* and breaches of the right to access justice under art. 46 of the Slovak Constitution as well as the right to a fair trial under art. 6 of the European Convention of Human Rights.

Because of the limited scope of competition private enforcement in Slovakia, it will take some time to see a case of similar nature making its way up the court system for the SSC to revise its opinion. Until such time, stand-alone lawsuits are stuck dead in the waters of the Slovak judiciary.

When such a case arises, SSC should treat the national Competition Infringement Damages Act as a *lex specialis*, which provides for a deviation from the general Act on Civil Procedure. At the same time, SSC should attempt to reconcile the legislative gap between national and EU laws by interpreting the relevant provisions of the Act on Civil Procedure and Competition Infringement Damages Act in the light of the wording and the purpose of the Damages Directive (see ECJ cases Marleasing and Von Colson v Land Nordrhein-Westfalen).

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