

**The Position of the Office for the Protection of Competition of the Czech Republic
to the White Paper on Damages actions for breach of the EC antitrust rules**

I.

Introduction

1. The White Paper on Damages actions for breach of the EC antitrust rules issued by the European Commission on 2 April 2008 (hereinafter referred to as the “White Paper”) presents a variety of measures to be adopted in order to facilitate the enforcement of the victims’ right to damages in competition matters. These measures are in detail described in the Commission staff working paper accompanying the White Paper (hereinafter referred to as the “Working Paper”).
2. The Office for the Protection of Competition of the Czech Republic (hereinafter referred to as the “Office”) welcomes the proposals contained in the White Paper and endorses the Commission’s view on the need of adopting certain measures, which would help to foster development of private enforcement within the European Union. On the basis of discussion about the White Paper in the Czech Republic, the Office encourages the Commission to adopt binding legal instruments (directives or even regulations) guaranteeing minimal standards and harmonised redress mechanism for damages claims throughout the European Union in order to overcome existing obstacles dissuading the potential claimants.
3. Nonetheless, as will be in detail described below, the Office would like to recommend clarification of particular proposals contained in the White Paper, especially with regard to the *inter partes* access to evidence and collective redress, which would necessitate significant changes of the Czech Civil Procedure Act¹ and the Competition Act,² eventually the Commercial Code.³ Since the civil proceedings are generally based on very formal and strict rules in the Czech Republic, the Office expects a thorough discussion concerning any legislative proposals on these issues and it might be extremely difficult to implement the measures contained in the White Paper if they would not be explicitly and precisely specified at the European level.
4. The Office strongly supports the private enforcement of competition law in the Czech Republic. Recently, a proposal of amendment of the Competition Act prepared by the Office has been submitted to the Czech Government (hereinafter referred to as the “Amendment of the Competition Act”). It is inspired by the regulation of unfair competition, designed to protect consumer’s rights, and suggests that the same regulation should be adopted for infringements of the Competition Act (or European Competition Law). Individuals injured by anticompetitive behaviour should be able to bring an action claiming cease and desist orders or removal of effects of the infringement, and to ask for

¹ Civil Procedure Act No. 99/1963 Coll., as amended.

² Competition Act No. 143/2001 Coll., as amended.

³ Commercial Code No. 513/1991 Coll., as amended.

damage and recovery of unjust enrichment. Also the associations of undertakings or consumers should be empowered to bring “representative” claims for cease and desist orders (but not for recovery of damages). Should an individual consumer file an action, the burden of proof should be reversed as far as the infringement is concerned; nevertheless, even the consumers would still be bound to prove that they sustained damage as a result of the infringement and the amount they are claiming.

II.

Standing: indirect purchasers and collective redress

5. The White Paper suggests explicitly granting standing to sue damages to indirect purchasers and presents two complementary systems of collective redress, namely representative action for damages brought by qualified entities on behalf of victims and an opt-in collective action combining two or more claims from individuals or businesses.
6. There is no special legal regulation concerning the standing of indirect purchasers and representative or collective actions in the Czech Republic. Those injured by infringement of competition law can bring an action in civil procedure to the regional court, the applicable rules being the same for stand-alone and follow-on actions. If one action is brought in a single matter, other victims can join the legal proceeding as interpleaders. The Office is aware of the fact that this general regulation might not be suitable for recovery of damages caused especially to the consumers or small-sized undertakings.

(A) Indirect Purchasers

7. There is a general rule in the Czech law that *anybody* harmed by unlawful behaviour shall have a right to claim damages suffered by it. The Office therefore fully supports the standing of indirect purchasers and regards it as necessary for equitable private enforcement.

(B) Collective redress

8. The Office fully appreciates the fact that establishing some form of collective redress is necessary. As mentioned above, the Office has so far proposed the Amendment of Competition Act, on the basis of which the legal entities qualified to defend consumers’ and competitors’ interests should be empowered to bring claims for cease and desist orders; suing for damages by these entities could be the next step in legislative efforts of the Office.

(i) Representative actions

9. A representative action could be according to the White Paper brought by qualified entities on behalf of identified or identifiable victims, who are not themselves parties to the proceedings but are represented by this entity. Represented victims should be informed that an action is about to be brought or have been brought. Qualified entities could be

designated “generally” in advance or certified according to national law on an *ad hoc* basis to bring the representation action to protect the interests of its members in relation to a particular infringement of competition law.

10. The Office supports this proposition; we would nonetheless welcome further clarification on certain points.
11. Firstly, the Office believes it is necessary to stipulate which individuals are to be represented, especially in cases when the action is brought on behalf of merely “identifiable” individuals – the term “rather restricted cases” mentioned in the White Paper needs to be clarified. The Office would welcome an “opt-out” system stipulating the obligation of representative bodies to inform the “representable” victims that the action is about to be brought, what consequences it has for them and how they could express their position, including their willingness not to be represented.
12. Secondly, as far as the quantification of damages and their distribution is concerned, the Office would welcome more detailed rules. Because of the loosely defined notion of “victims” who are to be represented, it would probably not be able to quantify the damages exactly, which could cause application problems to Czech courts; the same would be true for the amount allocated to each of the represented individuals. The Office is therefore of an opinion that there should be some minimal standard rules for distribution of damages, including conditions for who should be entitled to decide and for which purposes it would be possible to use the money awarded to the representative entity.

(ii) Opt-in collective actions

13. The White Paper proposes a system of opt-in collective actions, whereby individual claims could be joined in one single action. The proceedings should be initiated upon express intention of the victims to do so. The damages should correspond to the harm suffered by them. Individual victims should not be deprived of their right to bring an individual action for damages.
14. With regard to complete lack of experience with collective actions in the Czech Republic, the Office is not convinced that the opt-in system would be sufficient to stimulate individuals to combine their claims. The Office therefore encourages the Commission to reconsider the possibility of collective actions being based on the opt-out principle.

(iii) The interrelationship between available types of action

15. The proposed means of collective redress should not deprive individuals of their right to bring their claims on their own. The White Paper stresses the importance of safeguards preventing overcompensation, i.e. that the same harm should not be compensated several times, through the various means of action available. Nonetheless, no concrete proposals are contained in the White Paper in this regard.

16. The Office believes that such measures should be explicitly specified, especially with regard to implementation of these measures on national level.

III.

Access to evidence: disclosure *inter partes*

17. The White Paper proposes a minimum level of disclosure *inter partes* in order to overcome obstacles caused by potential claimants by the information asymmetry among parties in competition matters. The central role is entrusted to the courts, which should be empowered to order the defendant to disclose precise categories of relevant evidence provided the legal conditions on part of the plaintiff are fulfilled. Regarding specification of facts and means of evidence, member states should alleviate their requirements if they are very strict. The adequate protection should be given to confidential information, corporate statements of leniency applicants and the results of investigations of competition authorities. Courts should have the power to impose effective sanctions to prevent destruction of relevant evidence or refusal to comply with the disclosure order.
18. The *inter partes* disclosure is unknown in Czech legal order. According to the Czech Civil Procedure Act, the claimants are obliged to precisely specify relevant facts supporting their claim and individually identified evidence proving it, together with a clear-cut demand for relief. The judge is entitled to order the defendant or third parties to submit to the court the evidence. There are no legal measures alleviating the burden of proof, although the proposed Amendment of Competition Act should reverse the burden of proof in case of consumers.
19. The Office admits that current legal framework in the Czech Republic may pose serious obstacles to potential plaintiffs. Strict legal requirements imposed on parties having burden of proof in civil proceedings and unequal access to evidence dissuades victims from private enforcement actions in competition matters. The Office therefore supports the proposal of *inter partes* disclosure, contained in the White Paper.

(A) Conditions for obtaining a disclosure order by the court and its scope

(i) Sufficient fact pleading

20. The plaintiffs must put forward plausible grounds demonstrating that they suffered some harm through infringement of competition law caused by the defendant; it must be admitted that the claimants cannot be expected to demonstrate any elevated degree of certainty proving their claims are well founded. The claimant would thus only have to assert general facts and propose less precisely identified evidence.
21. The Office considers this condition to be crucial in order to prevent unfounded or even abusive claims. Since the *inter partes* disclosure would be a completely new legal instrument in the Czech legal order, the Office would however need further clarification of the proposed measures, especially the minimal standard of pleading the plaintiff would be required to make, the timing of the disclosure request (whether it could be made only at

the beginning of the proceedings or even later) and possible remedies in case the court rejected the request. It might also be considered whether the court should not be allowed to order the disclosure upon its own motion under certain conditions.

(ii) Inability of to claimant to get access to relevant evidence by other means

22. The claimants must also show that they are unable to produce the requested evidence by other means, despite making all efforts that can reasonably be expected from them. Similarly to the submission made above, the Office would welcome clarification of minimal procedural rules related to proving this condition and the extent of the claimants' obligations.

(iii) Specification of categories of evidence to be disclosed

23. Specification of sufficiently precise categories information, evidence or other means of evidence relevant to the claim is the third condition for the court to issue a disclosure order. From the point of view of the Office, the term "categories of evidence" requires further clarification, as well as their "sufficiently precise" specification.

(iv) Judicial control of relevance, necessity and proportionality of disclosure measure

24. The fourth condition requires that information about to be disclosed support the allegations of claimants (relevance), that there is no available equally suitable but less onerous measure which could have equivalent results (necessity) and that legitimate interests of the other parties should not be manifestly out of proportion to the objective of disclosure measure (proportionality).

25. The Office considers the judicial control in terms proposed as suitable to safeguard protection against unmeritorious claims. Should the Commission decide to turn the White Paper into some form of legally binding measures, the Office would encourage it to specify these terms in a way similar to the text contained in paragraphs 108 to 109 of the Working Paper.

(B) Further issues related to the scope of the disclosure order

26. The White Paper proposes that disclosure order should include all types of evidence that are admissible in the Member State concerned and that are under the control of defendants or third parties. With regard to disclosure and protection of confidential information the court should assess these conflicting interests from the point of view of proportionality. Disclosure of corporate statements submitted to a competition authority as part of a leniency application should be treated specifically; leniency applicants should be protected against court disclosure orders to submit these documents. The protection from disclosure should be also granted to certain pieces or categories of evidence during a specified period of time if the competition authority shows the disclosure would jeopardise an ongoing antitrust investigation. On the other hand, unfavourable evidence should not be protected from disclosure.

27. The Office considers these rules governing the extent of disclosure as crucial for the effectiveness of the proposed systems. The Office encourages the Commission to specify these terms in the forthcoming legislative measures in a way similar to paragraphs 116 - 120 of the Working Paper directly to the legislative text and specify more clearly what is to be meant by “adequate” protection. Minimal rules governing the process of assessment whether the information is really confidential should also be considered.
28. With regard to the “investigative privilege” of competition authorities the Office also suggests adopting specific rules on sharing information among the competition authorities and the courts.

(C) Potential addressees of disclosure orders and their right to be heard

29. The paragraphs 121 to 127 of the Working Paper deal with different means of assessing the proportionality of disclosure by courts depending on potential addressees of the disclosure orders. Judges should take into account whether required evidence is in possession of the defendant, third party that may be a co-infringer or a non involved third party. Special protection should be given to such third parties who could be ordered to disclose only if the evidence is not available from parties of the law suit. They are entitled to have reimbursed any costs they incurred in relation with the disclosure order. As for public authorities, they should not be normally ordered to disclose any documents.
30. The right to be heard should be awarded to all potential addressees provided that there is no particular urgency. The Office puts forward that the right to be heard should be guaranteed unless there were some clearly defined exceptional circumstances. Moreover, the individuals ordered to disclose should have the right of appeal against the court’s order.

D. Refusal to submit evidence and destruction thereof

31. In case that the party obliged to do so refuses to disclose evidence regardless of the court’s order or it destroys it, the White Paper proposes that the courts should be provided with the power to choose from a range of sufficiently deterrent sanctions, including drawing adverse inferences from it. Whether sanctions would be imposed in individual cases should only depend on the discretion of courts.
32. Apart from the sanctions that clearly are necessary for the *inter partes* disclosure to be workable, the Office proposes that there should be set up a supervisory system of compliance with the court orders and the position of judges during this process should be specified. Some undertakings under investigation refuse to submit to the Office requested evidence even though the Office possesses very far reaching investigative and enforcement powers – without very strong and efficient supervisory and enforcement mechanism, the Office doubts that the system could work in countries where there is no experience with *inter partes* disclosure.

33. In this regard, the Office also encourages the Commission to consider the possibility of introducing presumptions of infringement of competition law for undertakings that would not submit the documents required.

IV.

Binding effect of NCA decisions

34. Final decisions adopted by competition authorities or review courts finding an infringement of article 81 or 82 EC, which are related to the same agreements, decisions or practices of the identical infringers, should be legally binding on national courts in actions for damages. However, national courts can (or have to), in case of serious doubts, seek clarification on the interpretation of article 81 or 82 EC by the question for preliminary ruling to the Court of Justice pursuant to Article 234 EC.
35. Decisions of the Office are already binding for Czech courts, and so are the decisions of the Commission. The Office shares the view of the Commission that “...*there are no reasons to introduce a distinction of the effects of NCA decisions based on their origin.*” The Office therefore strongly supports this proposal.
36. Exceptions to the binding effect of NCA decisions analogous to the public order principle in Article 34 of Regulation 44/2001 seem to be reasonable and guaranteeing protection of interests of parties concerned.
37. The Office would however welcome a further clarification of what is to be meant by “*final judgement upholding the decision*”. For example in the Czech Republic, decisions of the Office are reviewed by the Regional court; its judgement is binding and immediately effective, but it can still be cancelled by the Supreme Administrative Court, whose decisions are in turn reviewed by the Constitutional Court, not to mention the European Court of Human Rights. It is not clear from the White Paper at which level should the decision of competition authorities start to have binding effects.

V.

Fault requirement

38. The White Paper sets out standards for proving fault with regard to the harm caused by the infringer. Since the Czech law does not require fault to be proven in order to claim damages, these proposals are not applicable. The Office nonetheless supports these proposals and it would even suggest to reconsider whether there should be at all the necessity to prove fault.

VI.

Damages

39. The guiding principle for determination of damages suggested in the White Paper is the full compensation of the real value of the loss suffered by victims, including actual loss, loss of profit and respective interest. However, if the national law sets out exemplary or punitive damages for infringement of national competition law, the victims are entitled to be awarded the same level of damages level in case EC law is infringed. The Office agrees that the *acquis communautaire* on the definition of damages should be codified as a minimum standard.
40. To ensure effective antitrust damages actions the Commission further intends to issue non-binding guidance for quantification of damages which should show calculation methods and could include simplified rules on estimating the loss suffered.
41. The Office fully supports such guidelines. Since there is a rule in the Czech law (albeit not often used in practice) that the judges can in exceptionally difficult cases only estimate the damages (i.e. the precise calculation and proof thereof is not required), the Office further suggests that similar rule could be set as a binding measure in the private enforcement as well.

VII.

Passing-on of overcharges

42. As far as the passing on is concerned, the White Paper firstly proposes that defendants should be entitled to rely on the passing-on defence against a claim for compensation of the overcharge. The Office fully supports this proposal, which is in its opinion fully in line with the compensatory nature of private enforcement.
43. The White Paper further suggests to ease the burden of proof for indirect purchasers by enabling them to rely on a rebuttable presumption that the overcharge that the defendant illegally imposed on the direct purchaser has been passed on in its entirety down to their level. They are however still required to show to what extent the overcharge caused them harm. The Office supports the view of the Commission that the likelihood that the defendant would face multiple litigations on different levels of distribution is much lower than the likelihood of non-compensation of the indirect purchaser (and thus unjust enrichment of the infringer) due to the fact that the indirect purchaser was not able to bring sufficient evidence of the passing-on and its extent.
44. The last suggestion of the Commission as regards the passing-on is dealing with the cases in which purchasers at different levels in the distribution chain brought joint, parallel or consecutive actions. In the view of the Office the main principles for preventing under- or over-compensation in such cases should be specified directly in the forthcoming legal text. Mechanisms for informing about judgements in these matters should be established, for in the Czech Republic, there are no mechanisms under which claimants could gain knowledge about earlier judgments issued by the courts in damages actions.

VIII.

Limitation periods

45. Setting out rules on calculating limitation periods in cases of continuous or repeated infringements as well as such rules concerning cases where victims are not aware of the infringement and the harm it caused them is proposed by the Commission. The limitation periods should not start to run before the day, on which the infringement ended (in a case of a continuous or repeated infringement) and the victim of the infringement could be reasonably expected to have knowledge of it. These rules are already included in the Czech law.
46. There is also suggested to establish a new limitation period of at least two years which should start to run on the day that the appeal period against an infringement decision of a competition authority has elapsed or the review court has upheld its decision. Such a rule might strongly facilitate bringing of follow on suites and the Office encourages it to be established.

IX.

Costs of damages actions

47. The White Paper encourages the Member States to reconsider their rules on costs associated with bringing actions for damages and the recovery thereof to facilitate meritorious litigation, namely in cases when claimant's financial situation is significantly weaker than that of defendant and when high costs prevent meritorious claims being brought due to the uncertainty of the outcome. Commission suggests that there should be a possibility of providing courts with power to issue cost orders derogating from the general cost rules, preferably upfront in the proceeding, which would guarantee that the unsuccessful party will not have to bear all costs incurred by the other party. These principles should cover also the court fees.
48. As civil procedure before courts in the Czech Republic is very strict and formal, the Office would welcome binding and more specific rules dealing with the allocation of costs directly in the forthcoming legal text. The only reason when the Czech court shall not have to award reimbursement of costs of proceedings (fully or in part) in situations "eligible for special concern"; this derogation from the "loser pays" principle is however not often applied by Czech courts.
49. Decisions on costs are typically an integral part of judgments on the merits in the Czech Republic. Therefore, the parties get knowledge about the amount of costs they are to carry only when they receive the judgement. The Office believes this might dissuade potential claimants and therefore supports the Commission's proposal to shift the decision on the distribution of costs to initial stages of the proceedings.
50. As far as the court fees are concerned, the basic amount constitutes 4 % of the amount sued according to the Czech law. There are exemptions for certain categories of claimants and claims from having to pay the court fees, they do however not apply for the antitrust

damage actions. The requirement of the White Paper to set the fees in an “appropriate manner” is not sufficiently precise and the Office would welcome further clarification on this issue.

51. The White Paper finally suggests that there should be rules favouring settlements negotiations both before initiation of court proceedings and in the course of them. There is no effective mechanism in the Czech law in this regard. Due to its lack of experience, the Office would welcome further clarification of rules governing the settlements procedure and encourages the Commission to set them in a binding legal instrument.

X.

Interaction between leniency programmes and actions for damages

52. The measures which the Commission suggests in relation to the issue of interaction between leniency programmes and actions for damages are based on the principle that all leniency applications for immunity and for a reduction of fines submitted under the EC and national leniency programmes should be protected against disclosure. The protection of them should not depend on the fact whether the decision by the competition authority was already taken or not. The Office fully supports these propositions.
53. On the other hand, the Office does not support the idea of limiting the immunity applicant’s civil liability to his direct and indirect contractual partners. The Office perceives the mere immunity or reduction of fines within public enforcement as sufficient to motivate undertakings to file leniency applications.