SLOVAK REPUBLIC

Tomáš Maretta & Tomáš Rybár
Čechová Rakovský
Cechova Rakovsky
Hurbanovo namestie 5
811 03 Bratislava
T: +421 2 5441 4441
+421 2 5443 4568
F: +421 2 5443 4598

I. Introduction

The Act on Protection of Economic Competition (the Act No. 136/2001 Coll., as amended, (the "**Competition Act**" or "**ZOHS**")), which stipulates the basic competition and merger control law in the Slovak Republic, reflects the main principles of the EC competition and merger control law. The Competition Act came into force on 1 May 2001 and was subsequently amended with the effectiveness as of 1 October 2002. It was substantially amended by the Act No. 204/2004 Coll., also amending the Civil Procedure Code (the Act No. 99/1963 Coll., as amended ("*Občiansky súdny poriadok*") (the "**Civil Procedure Code**" or "**OSP**"), in order to bring the Slovak competition law into line with EC competition law, in particular, with the Council Regulation No. 1/2003.

The Competition Act does not specifically regulate private actions for damages for breach of competition law. Consequently, general provisions governing actions for damages under civil and commercial law will apply.

Based on our experience and knowledge, there have been no actions for damages for breach of competition law filed or decided by the courts in the Slovak Republic.

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?

There is no explicit statutory basis regulating actions for damages for breach of competition law. Therefore, a potential action for damages for breach of competition law would not, under the current regulation, differ from other actions for damages brought pursuant to the general regulation stipulated in the Commercial Code (the Act No. 513/1991 Coll., as amended ("*Obchodný zákonník*") (the "**Commercial Code**" or "**ObchZ**")), the Civil Code (the Act No. 40/1964 Coll., as amended ("*Občiansky zákonník*") (the "**Civil Code**" or "**OZ**")) and the Civil Procedure Code). The Slovak law contains two distinct general regulations of liability for damages, contained in ObchZ and OZ. For damages caused by breach of competition law, the regulation contained in ObchZ applies.

As no specific regulation exists in respect of damages for breach of competition rules, no differentiation as regards breach of EC or national law is provided. This situation is not likely to change, as the general regulation of private claims for damages requires an infringement of legal duty only.

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

(i) Which courts are competent?

In general, district courts ("*okresný súd*") are competent for first-instance hearings in actions for damages. However, the OSP stipulates that a regional court ("*krajský*

súd") is always competent in the first instance for disputes connected with protection of competition (OSP, §9(3)(h)). The regional court handles the dispute as a commercial dispute. The territorially competent regional court is the court in which area the general (district) court of the defendant is situated. The general court in commercial matters is determined as the court in which area the defendant has its registered seat, place of entrepreneurial activities or residence, considered in that order. If no territorially competent general court can be determined for the defendant, the competent court will be the court in which area the defendant has property or, in case of a foreign legal entity, the court in which area it has a branch office or body authorised to carry on its business. In addition to the defendant's general court, the competent court will also be the court in which area : (i) the defendant has its permanent workplace; or (ii) the legal fact, on which the action for damages is based, occurred; or (iii) the branch of the defendant – legal entity is situated, if the action concerns the branch (OSP, § 84 et seq.).

Pursuant to the new Act on Court Seats and Circuits described below in B (ii), a single district court will be vested with the competence to handle competition cases as of 1 January 2005, with a stipulated regional court hearing appeals against its decisions.

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

Regional courts in which area general (district) courts referred to at B(i) above are competent under the currently effective regulation.

The new Act on Court Seats and Circuits No. 371/2004 Coll. ("*Zákon č. 371/2004 Z.z. o sídlach a obvodoch súdov Slovenskej republiky*") will enter into force on 1 January 2005, selecting a single court for competition related cases in both first and second instance. The District Court Bratislava II shall be used as the first instance court and it should be handling competition cases without differentiation whether based on breach on national or EC competition law. The Regional Court in Bratislava will hear appeals against its decisions. Both courts will be territorially competent for the whole territory of the Slovak Republic.

C. Who can bring an action for damages?

(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 person having the capacity to exercise rights and assume obligations is competent to stand trial. Every person may act on his or her own in the proceedings to the extent proportionate to its capacity to exercise rights and assume obligations through its own acts. Legal persons should be represented by their statutory bodies or officials duly authorised to act on their behalf.

Natural persons who cannot appear before the courts on their own have to be represented by their representatives appointed under law. The court may also decide that the natural person lacking full legal capacity must be represented by a representative appointed under law even where otherwise he could act on his own in the matter.

Both natural and legal persons may be represented by proxy on the basis of a written authorisation (OSP, §§ 18-31).

Under the Act on International Private and Procedure Law (the Act No. 97/1963 Coll., as amended ("*Zákon o medzinárodnom práve súkromnom a procesnom* ") ("**ZMPSaP**")), the procedural standing of a foreigner (individual or legal entity) is governed by the law of the country of his citizenship. It is, however, sufficient if he meets the requirements under Slovak law (ZMPSaP, § 49).

Claims for damages, except for claims arising from the breach of obligations under contracts or other (unilateral) legal acts, are governed by the law of the place where the damage has occurred, or where the event upon which the claim is based has occurred (ZMPSaP, § 15).

If the defendant is a person having residence, seat or property in the Slovak Republic, Slovak courts are competent to hear the case (ZMPSaP, § 37). Slovak courts are explicitly stated to be competent in cases of claims for damages arising from facts other than breach of contract, if the event upon which the claim is based has occurred within the territory of the Slovak Republic. The same applies to claims for damages arising from criminal acts investigated by Slovak criminal authorities (ZMPSaP, § 37b). This may be relevant in of the event of an investigation of the crime of abuse of participation in economic competition (Criminal Code ("*Trestný zákon*"), § 149). The parties may also voluntarily agree on jurisdiction of Slovak courts (ZMPSaP, § 37e).

A Slovak court may, at the request of the defendant, impose on a foreign plaintiff seeking a court decision on a property right (which covers also claim for damages) an obligation to deposit a bail in order to cover the court fees. Such an obligation cannot be imposed if (a) in the home country of the plaintiff the deposit is not required from foreign plaintiffs, or (b) the plaintiff is the owner of any real estate located in the Slovak Republic the value of which sufficiently covers the court fees, or (c) the plaintiff is exempt from the payment of court fees, or (d) the petition is decided by a payment order, or (e) the defendant has demanded a bail after it has filed an action in court and despite being aware that the plaintiff is foreign (ZMPSaP, § 51).

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

Though similar instruments are not stipulated in the Civil Procedure Code, they may be found in other laws, in particular, the Competition Act (ZOHS, § 42) and the Commercial Code (ObchZ, § 54). None of them, however, explicitly allow persons other than those injured to claim damages.

Section 42 of the Competition Act deals with civil lawsuits arising from unlawful breach of competition rules. It stipulates so called *actio negatoria,* i.e. the right of consumers to require a person violating competition rules to refrain from such conduct and to remedy the illegal situation (i.e. to rectify the illegal state, however not to compensate any damage). This right may also be exercised by a legal entity (e.g. consumer association) entitled to protect interests of consumers. Such entities are not specifically regulated and only need to meet general requirements for a citizen's association or association of legal entities and have consumer protection as their registered scope of activity. The Competition Act does not even refer to the right of an injured person to claim damages arising from infringement of competition rules. Such claims may be brought to courts pursuant to general regulation of claims for damages under the Commercial Code (ObchZ, § 373 et seq., reference is made to section II. A. 9. (i) above.)

Similar provision may be found in the Commercial Code (ObchZ, § 54) dealing with legal instruments aimed at protection against unfair competition. In addition to persons whose rights have been impaired or endangered by unfair competition, a legal entity entitled to protect interests of competitors or consumers may file a claim against an unfair competitor requiring him to refrain from such conduct and to remedy such breach (*actio negatoria*). Unlike the legal entity, the affected person may, in addition, claim appropriate relief, compensation of damages and forfeit of the unjust enrichment. Thus, actions by representative bodies for damages are not recognised in the Commercial Code.

In connection with the above, certain principles of class action are applied in this type of public interest litigation, as stipulated in the Commercial Code (ObchZ, § 54(2)). Provided the proceedings concerning claims requiring the unfair competitor to refrain from unlawful conduct and to remedy such breach (*actio negatoria*) have been commenced or concluded, actions put forward by other entitled persons

regarding the same claims in the same matters are not admissible. Those entitled persons may be given the status of subsidiary parties to the proceedings and the court's ruling will apply also to them. This provision is intended to prevent courts from being under unreasonable caseload in the same matter. However, this restriction is applicable only to proceedings concerning actions to refrain from such conduct and to remedy such breach (*actio negatoria*) and does not cover actions for damages.

Although the public prosecutor is entitled to bring claims in public interest, this does not involve claims for damages. The public defender of rights (ombudsman) is neither entitled to bring any such claims.

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

(i) What forms of compensation are available?

Under the Commercial Code (ObchZ, § 373 et seq.), compensation is provided in the following forms:

- pecuniary form; or
- restitution into previous status (*restitutio in integrum*), at the request of the plaintiff, if possible and feasible.

Under the new 155 (3) of OSP effective as of 1 May 2004 a court may grant to a successful plaintiff the right of publication of the judgement, in cases concerning unfair competitive behaviour or consumer protection. The court shall stipulate the extent, form and method of publication. The costs of publication are born by the unsuccessful party.

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

The Slovak law does not explicitly stipulate any disqualification of directors for breach of competition law. The Commercial Code (ObchZ) provides for liability of directors and other statutory representatives of different forms of companies. Directors are generally obliged to perform their function with due professional care and in the interest of the company and its shareholders. The statutory representatives are liable to the company for any damage caused by breach of their duties. They will not be liable if they perform their duties with due professional care and in good faith to the benefit of the company. They will also not be liable if damages have arisen from their conduct when applying binding resolutions at shareholders meetings, except when such resolutions violate the law or constitutional documents of the company (ObchZ, §§ 135a, 194). Actions for damages against directors may be brought not only by the company but, if its board fails to do so, by its shareholders in the name of the company (ObchZ, §§ 122, 182). A creditor unable to satisfy his claim from the property of the company may bring, in his own name and on his own behalf, such an action is available against liable statutory representatives as well (ObchZ, §§ 135a, 194).

(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?

As there is no specific legal rules on damages for breach of competition rules stipulated in the Competition Act, the rules on damages arising from contracts provided for in the Commercial Code (ObchZ, § 373 et seq.) should apply to extra-contractual damages arising from the breach of Commercial Code (including breach of competition rules) *per analogiam*. Contrary to the general regulation of liability for damages under the Civil Code, under which an infringement must imply fault and where subjective liability is applied[1], the Commercial Code requires objective

1 Under Slovak law, there are two types of liability, either subjective or objective, depending on whether the fault is required to be implied in an infringement. Where the fault is an element necessary for liability for damages to arise, it is the case of subjective liability. However, objective liability does not require the fault to be implied in the infringement. Though the Civil Code (OZ) does not define the term fault, the civil law practice is inspired by the Criminal Code distinguishing various forms and degrees of fault as follows:
Intentional fault: it may be broken down into direct and indirect:
direct intention (*dolus directus*) - the person was willing to cause damage;

liability only, fault being irrelevant where an infringement has occurred. The only exception to this rule is through so-called "conditions for liberation" (justification), largely similar to "force majeure" known in certain other legal systems. The conditions for justification basically cover obstacles occurring independently of the will of the violator and preventing him to perform his legal duties (in this case the duty not to act in an anti-competitive manner). The stipulated objective liability is neither absolute nor rebuttable, as the conditions for liberation exclude liability, which otherwise may not be rebutted.

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.)

Judicial proceedings on damages are commenced upon the presentation of a petition by the plaintiff. In the petition, the plaintiff must state, *inter alia*, the factual basis of his claim and specification of evidence to support his or her statements. The court will decide what evidence is presented. The court may exceptionally present evidence other than the evidence proposed by the parties, if presentation thereof is necessary for a decision in the matter (OSP, § 120).

The plaintiff has to prove the infringement or unlawful conduct (or omission) by the defendant, the damage and the causal link (*nexus causalis*) between the two. If the defendant claims that conditions for justification have been met, it is up to him to prove this.

Any evidence must be presented at the hearing, unless its presentation out of the hearing is more effective, in which case the court must inform the parties of the result of such evidence at the hearing. The court may suggest that the presented evidence is supplemented or repeated before the court (OSP, § 122).

Where the law contains a rebuttable presumption, the court will deem this fact to be proven unless the proceedings have shown that the opposite is true (OSP, § 133). Also, documents issued by courts of the Slovak Republic or other state bodies within the bounds of their authority, and documents declared as public deeds under separate legal provisions, certify that they are orders or declarations made by the body that issued them and, unless there is proof to the contrary, are regarded as truth of the facts they certify or confirm (OSP, § 135).

(ii) Standard of proof

The court determines the case on the basis of facts ascertained from evidence presented and non-contentious facts concerning the parties, provided it has no reasonable and serious doubts about the veracity of such facts. The fundamental principle is that the court must evaluate the evidence at its own discretion, taking into consideration all facts that stated at the proceedings (OSP, § 132). The principle of "free evaluation of evidence by court" applies in Slovak civil court proceedings, meaning that it entirely depends on a decision of the court, which evidence to admit and how to evaluate the evidence.

There is no standard of proof recognised by the Slovak law in terms of "beyond reasonable doubt" or "preponderance of evidence" standards recognised in common law jurisdictions. It is impossible to make a comparison with those

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indirect intention (*dolus indirectus*) - the person knew that he or she may cause damage and was aware of (agreed with) that;
Negligent fault: it may be broken down into conscious and unconscious:
conscious negligence - the person was not willing to cause damage, however, he or she was aware that it may be caused but he or she relied without reasonable grounds that it will not be caused;
unconscious negligence - the person was not willing to cause damage and was not aware that it may be caused, however, considering the circumstances and his or her personal condition he or she must and could have been aware of it.

standards, although, "preponderance of evidence" standard of proof appears to be more equivalent in civil or commercial proceedings at Slovak courts than the "beyond reasonable doubt" standard of proof. As mentioned, the evidence is based on "free evaluation of evidence by courts" which means that 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.

As regards standard of proof used by courts in issuing injunctions, it is in practice lower, as for an issue of injunction only a need to temporarily regulate the situation of the parties or a threat of impossibility of future enforcement of judgement need to be proven.

(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?)

All instruments, which could serve as means to find out the real status of the matter, are capable to serve as evidence. Any means that allow the court to ascertain the facts, in particular examination of witnesses, expert opinions, reports and statements of bodies, legal entities and individuals, documents, and inspection and examination of the parties, may be used as evidence. The Civil Procedure Code explicitly stipulates rules for examination of certain evidence, e.g. hearing of witnesses, expert opinions, presentation of reports, statements and other documents, inspections and examinations. Where the method of examination of evidence is not prescribed, it shall be determined by the court (OSP, § 125).

Any witnesses may be called, regardless of his or her nationality. The plaintiff and defendant cannot formally have a status of witness. In practice, however there is almost no difference between testimony given by the party upon the order issued by the court and testimony given by a witness.

Every natural person has a duty to appear as a witness when summoned by the court. This duty may be refused when a summoned person risks exposing himself or herself or connected persons to criminal prosecution. A person who does not appear before the court without an excuse, may be brought to the court by the police, if previously warned of such consequence.

OSP allows securing of evidence prior to commencement of proceedings upon request of a party. Therefore also a witness testimony may be obtained prior to the trial, if there is a serious threat that it might not be obtained or might be obtained only with serious difficulties at a later stage.

A person who hinders proceedings by refusing to stand before the court as witness or follow an order of the court (e.g. ordering to produce a document) will be subject to penalties of up to SKK 25,000. The criminal act of contempt of court bears a sentence of up to 1 year or financial penalty (ranging from SKK 5,000 to SKK 5 million) and applies when someone does not execute an order of the court without excuse or does not follow a call issued by the court.

Evidence or witnesses from other jurisdictions are admissible in proceedings before the Slovak courts and may be obtained in accordance with the rules of private international law and bilateral agreements on legal aid and co-operation.

New provisions of OSP effective as of 1 May 2004 provide for a specific type of evidence that may be provided by the European Commission and the national competition authority in cases concerning application of Articles 81 and 82 of the EC Treaty. They may submit a written statement on legal and factual issues directly connected with the case. European Commission may also be allowed to provide an oral statement before the court. The parties are entitled to submit their statement on the issues presented by the competition authorities. The competition authorities have a right of access to the court file and to have delivered the copies of any documents needed for preparation of the statement, as well as the judgment in the case.

(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)**

As a general rule, evidence is reviewed and examined only before the court at the hearing. If appropriate, the court may ask another court to examine evidence or empower the presiding judge to do so outside the hearing. Parties to the case have the right to be present in the above mentioned examination and its results will be announced at the next hearing. This is also applicable for on-spot inspections of items. The parties to the proceedings have also the right to present their opinions on proposed evidence as well as on all evidence already examined. Third parties, as well as respective authorities, have a duty to present items necessary for proof of their statements unless these are subject to secrecy. The evidence proposed by the parties shall be sufficiently specified in order to allow exact identification (e.g. document name, date of issue or signature, author, location of the document) and no general designation of a category or type of documents is permitted. Obviously, documents in the files of the national competition authority may also be accessed, while ensuring protection of business secrets.

The court decides on admissibility of evidence in its own discretion, however it can order disclosure of evidence other than proposed by parties only if essential for deciding the case. Evidence obtained through disclosure outside the Slovak Republic is not excluded and it is in the discretion of the court under the principle of free evaluation of evidence whether it is admitted. If necessary, the court may, upon the request of the parties, "secure" evidence (OSP, § 102). Under a new provision effective as of 1 May 2004, court may upon proposal of the European Commission or the national competition authority allow inspection of premises, if securing of evidence is necessary for purposes of investigation under ZOHS or Council Regulation (EC) 1/2003.

(b) Proving the infringement

(i) Is expert evidence admissible?

Yes, expert evidence is admissible. It may be obtained by means of an expert being heard by the court or an expert's report provided in writing. Also, opinions of expert institutions and bodies are admissible, where the court considers them absolutely reliable and correct. An expert will be appointed by the court upon its own discretion or on the request of the parties. If expert knowledge is necessary than an expert must be appointed by the court (OSP, § 127).

Experts are registered in the list of experts and sworn translators kept by the Ministry of Justice of the Slovak Republic and experts should be appointed from such list, based on their area of specialisation. A registered expert institution may be appointed for extraordinarily complicated issues. An expert not registered in 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 based on the proposal 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 for purpose of provision of explanation of the issues concern or items necessary.

As regards expert's role in cases on liability for damage, no special regulation exists and the expert's role is not restricted. Therefore, should the court be of the opinion that expert knowledge is necessary to determine whether damage has actually occurred, the expert may be also ordered to provide an opinion in this respect.

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

The court is able to question witnesses. However, after the witness was examined by the judge, the parties themselves may also be allowed by the court to question witnesses. The same applies when a party is questioned. Unlike in the case of a witness, false or inaccurate testimony of the party does not constitute a criminal offence. The court and the parties may question an expert (OSP, § 126). The court may also choose to re-examine the report of the expert by submitting it for further evaluation to a second expert or institution (OSP, § 127).

(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?

The broad term "competent authority" used in the Civil Procedure Code could cover both national and relevant EU authorities, however, it does not cover authorities of another country (unless the authority of another EU Member State is acting under authorisation of EU law as the competent body).

The Civil Procedure Code (OSP, § 135(1)) explicitly stipulates which decisions are binding for the courts, decision of a competition authority, whether national or EU, not being among these. The court has a discretion to examine all matters falling within the scope of other competent authorities. If the competent authority has already decided on the matter, the court's ruling shall take the decision into account. In practice it means that the court has a discretion to decide on any matter, and once the matter in question was subject to a decision of relevant authority, the court must take such decision into account when deciding on the matter, but it is not binding for it.

A statement of a competition authority may be admitted as evidence and the law expressly provides for substitution of expert witness by an opinion of the competent authority (OSP, § 127(4)), in case the court considers it sufficient. Statements and decisions of foreign authorities and courts may be proposed as evidence, leaving the court with the discretion to decide on their admissibility. The weight given by the court to such evidence may vary significantly from case to case, as the court utilises the principle of free evaluation of evidence. In cases concerning the enforcement provisions of EC law (Articles 81 and 82 of the EC Treaty), a special provision (OSP, § 35a) provides for a right of both national competition authority and the European Commission to submit a written statement on legal and factual issues connected with the case. Commission may also be allowed to provide an oral statement.

Decisions of other courts in other matters may also be proposed as evidence. The law does not preclude the possibility of different court decisions being presented as evidence.

The Supreme Court may unify different interpretations of legal regulations by lower courts or its different senates. However, in the courts of the Slovak Republic, the doctrine of *stare decisis* is not applied.

(c) Proving damage

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

No. The general rules on proving and quantification of damage are applied. No specific proof of damage is stipulated, evidence should be submitted that will

support the claim and will be deemed satisfactory by the court after its free evaluation.

The quantum of damage is calculated as the loss of profits, instead of actual loss suffered the plaintiff may claim profits usually earned in same line of business (please see section G. (a) (iii) below.

The Civil Procedure Code (OSP, § 152(2)) provides for the possibility of a partial judgement. The partial judgement may be made also concerning the claim itself, leaving the decision on the claimed amount for a later decision. Such decisions are however rarely used and the Civil Procedure Code in the same provision emphasizes the need to decide on the whole case in a single decision.

(d) Proving causation

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

Slovak legal theory does not make a distinction between direct or indirect causation. A causal link between unlawful conduct (or omission) of the defendant and damage incurred must be clearly established, probability alone is not sufficient. The causal link includes also indirect causation, if such causation is deemed by the court to be relevant. However, some case law indicates the court may require the plaintiff to prove the existence of a direct causal link between the infringement and the damage incurred[2].

F. Grounds of justification

(i) Are there grounds of justification?

Justification reasons are grounds or circumstances of any kind that occurred independently from the will of defendant, that could not be reasonably foreseen and overcome by defendant and that prevent the defendant from fulfilment of its obligation.

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

The 'passing on' and 'indirect purchaser' issues are not recognised under Slovak law nor have been addressed in the recent case law. For determination of the damaged entity (entitled to damages) and the violator (obliged to pay damages), three conditions that must be proven in court need to be taken into consideration: (i) infringement of legal duty[3], (ii) damage, and (iii) causality between the infringement and the damage.

In case of 'passing on', based on determination under the above conditions, the plaintiff/damaged entity would be the person downstream (likely at the end) of distribution chain, who has suffered the actual damage by, e.g. bearing the increase in prices caused by overcharging. The violator/defendant would then be the entity in breach of its legal duties, e.g. the entity upstream in the chain that has committed an infringement of competition law, e.g. by imposing the overcharge concerned. Therefore, the 'passing on' defence appears to be possible in case of damages that were claimed by a person positioned downstream to the violator, if such claimant has not suffered any damages due to passing the increased costs arising from the infringement onto its customers. In such a case, it appears to be possible to argue such claimant has not suffered damages.

The same applies to the 'indirect purchaser' defence, where there is no direct link between the damaged entity and the violator required and therefore it makes no

2 Ruling No. 7/1979"...A causal link between the conduct of damaging person and damage incurred cannot be derived from the fact which itself is a consequence of an infringement, for which the damaging person is liable from other legal reason. This is for instance the case when a person suffered a damage as a result of the reaction (shock) to the announcement of fatal accident of any other person which was caused by the damaging person and for damage of which such person is liable (compare OZ, § 448)."

3 In case of damages claimed under general regulation of Civil Code, the infringement must imply the fault.

difference to the damages claim. There is no presumption of the higher prices passed on under Slovak legislation. The damaged person would, again, be determined on the basis of the above mentioned principles, notwithstanding that there exists a direct link between the claimant and the defendant. Therefore, the indirect purchaser who suffered damages as a result of the infringement of competition law would be deemed to be the damaged entity while a person who committed the infringement (e.g. a producer) would be deemed to be the violator.

The Slovak law does not explicitly address the issue of whether the indirect purchaser does not need to prove the passing on of the higher price. However, as the plaintiff must prove the causal link between the infringement and damage incurred, it is likely this would involve the need to prove the passing on of the higher price as a result of infringement.

(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 general regulation under the Civil Code, in case the damage is partly caused by the plaintiff, the damages would be apportioned (OZ, § 441). The Civil Code also contains a general obligation for persons threatened by damage to adequately intervene to avert damage (OZ, § 417).

Under the Commercial Code, the damaged person is not entitled to compensation, if the infringement of duties on the part of the defendant was caused by actions of the plaintiff or lack of collaboration, to which the damaged person was obliged (ObchZ, § 376). The damaged person is also not entitled to receive compensation for the share of damage caused by its failure to meet duties under regulations on damage prevention or damage reduction. (ObchZ, § 382).

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?

Neither special laws nor case law of the Slovak Republic deal with damages in case of breach of competition rules. Therefore, only general practice and legal regulation of damages stipulated in the Commercial Code and the Civil Code may be described.

Under the case law, the term "damage" is defined as a loss of property suffered by the plaintiff.[4]

Under the Commercial Code (ObchZ, § 379) and the Civil Code (OZ, § 442), damage consists of two compounds:

- **Actual damage (*damnum emergens*)** – economic damage including, e.g. decrease of existing property of the injured party. Such damage represents economic values needed to restore the status of property before the occurrence of damage or provide pecuniary compensation to the injured party.[5]
- **Loss of profit (*lucrum cessans*)** – the injured party is also compensated with respect to profit he or she would have gained if no such infringement had occurred. Loss of profit may also include interest, e.g. bank interest.[6]

Where damage involves damage to property it must be determined according to the price of the property damaged at the time when the damage occurred. When

4 case R 55/1971. In: Lazar, J. a kol., *Základy občianskeho hmotného práva 2* (Iura Edition, 2002), pg 240.
5 cases R 27/1977 and R 5/1978. In: Lazar, J. a kol., *Základy občianskeho hmotného práva 2* (Iura Edition, 2002), pg 241
6 case R 12/1973. In: Bičovský, J. – Holub, M., *Náhrada škody v občanském, obchodním, správním a pracovním právu* (Linde, 1997), pg 33.

determining this price, one should take into account legally determined or acquisition prices and should also consider amortisation or appreciation of the property.[7] Unlike damages on property, damage caused by the infringement of competition rules will often result in higher amounts for the customers. Thus, inspiration might be drawn from a case in which actual damage was determined as a difference between the price of a rental car and repair costs of his or her own car, which would have been used by a plaintiff if damage to his or her car did not occur.[8]

Defendant's gain is not used as a measure of the plaintiff's damage under Slovak law.

Non-material damage is not included in the definition of damage under Slovak law, however specific provisions allow for provision of an adequate compensation for non-material damage. Such is the case of unfair competition, unauthorised use of business name, damage to reputation of a legal entity, intrusion into personality of an individual/libel and non-material damage caused by criminal act of corruption.

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

There is no relevant case law regarding assessment of damages in the field of competition rules or in any other similar field, e.g. IP law. Therefore, it is difficult to foresee whether the Slovak court would take into account the damage suffered on a national territory or even more widely. Since the court applies the remedy of actual damage, should it cover a territory wider than the Slovak Republic, the court would likely take into account the actual scope of damage with no regard to territorial restrictions such as state boundaries. In any event, the court would probably apply the definition of relevant market as used by the Slovak Antimonopoly Office ("*Protimonopolný úrad SR*").

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

When calculating damage, a court proceeds with a view to compensate the actual damage suffered as well as a loss of profit. In relation to the actual damage, the courts usually consider costs that are necessary to restore the status of property as it was before the occurrence of damage or provide pecuniary compensation for damages. As regards the calculation of loss of profit, the plaintiff may either claim the actual loss of profit, or under the Commercial Code (ObchZ, § 381) so-called "abstract profit" which is a profit usually generated in the plaintiff's business by fair business conduct and under normal conditions, i.e. conditions that would exist if there was no infringement of competition law.

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

With regard to damage on property, the extent of damage is determined according to the price of the thing at the time when the damage has occurred. (OZ, § 443). However, when a court rules on the matter it takes into account and compensate for loss of profit. This means that when determining damages a concept of ex-post (time of trial) estimates should be applied in practice.

(v) Are there maximum limits to damages?

As a general rule, the damage is to be compensated in full. Under the Commercial Code, however, the compensation would not exceed damages that the liable party could have envisaged as a possible result of breach of its obligation at the time of establishment of contractual relationship, with regard to all facts the liable party should have known if all due care was taken (ObchZ, § 379). This rule applicable to

7 case R 25/1990. In: Bičovský, J. – Holub, M., *Náhrada škody v občanském, obchodním, správním a pracovním právu* (Linde, 1997), pg 123.

8 case R 7/1992. In: Bičovský, J. – Holub, M., *Náhrada škody v občanském, obchodním, správním a pracovním právu* (Linde, 1997), pg 121.

damages arising from contracts should be applicable to the compensation of damages arising from the infringement of competition law as well.

(vi) Are punitive or exemplary damages available?

The Slovak legal system does not recognise any punitive or exemplary damages.

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

The courts are obliged to award damages corresponding to the actual damage incurred and the law does not expressly provide for a possibility to mitigate loss taking into consideration a previous fine. The Court is generally empowered to moderate the damages only in cases justified by specific circumstances, considering the events and the standing of both the defendant and the plaintiff and provided the damage has not been caused by intentional fault (OZ, § 450). Since there has not been any case before the Slovak courts on damages for breach of competition rules, it is impossible to state or presume whether the courts would take into account any fines imposed by the Slovak Antimonopoly Office or other competition authority when determining the amount of compensation for damages in such a case.

(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?**

In general, the delay interest accrues upon notice by the injured party to the injuring party to pay the damages. Delay interest is an interest to be paid by a person in default of fulfilment of its financial obligation. In case no invitation to pay damages has been sent, the delay interest is deemed to accrue from the date the action has been served on the defendant.

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

Under the Commercial Code (ObchZ, § 369), the interest rate shall be the basic interest rate (discount rate) of the Slovak National Bank ("Národná banka Slovenska") valid before the first day of the calendar half-year when the interest is requested, increased by 10%. As the current basic rate is 5%, the interest rate would be 15%.

(iii) Is compound interest included?

The Slovak law does not recognise the compound interest concept.

H. Timing

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

The only time limit to institute proceedings is contained in the statutes of limitation. The limitation period for claims for damage is four years, commencing on the day the damaged person has learned or may have learned of the loss and the person liable for the damage. The claim for compensation must however, be brought to court in ten years at the latest, from the day when the breach occurred. (ObchZ, § 398).

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

The entire procedure of obtaining a civil court judgement takes at least several months, but often longer, in particular, in more complex cases (such as actions for damages arising from infringement of competition rules) where more evidence is required to be presented and examined. Unless the party to the proceedings files

an appeal ("*odvolanie*") within 30 days from the delivery of a court judgement, the judgement shall become effective. If the appeal is filed, the matter shall be decided by the court of appeal (which is a regional court ("*krajský súd*") in relation to the decisions of a district court ("*okresný súd*")). The court of appeal shall confirm, modify or annul the decision of the court of first instance (in the latter case it shall refer the case back to the first-instance court). There are also no time limits for the decision of the court of appeal and it usually takes several months.

The decision of the court of appeal by which it confirms or modifies the decision of the court of first instance can be further appealed ("*dovolanie*") within 30 days only if there are certain procedural defects of the proceedings or decisions, unless such further appeal is allowed due to the fact that (i) the court of appeal modified the original decision of the court of first instance, (ii) the court of appeal explicitly declared admissibility of further appeal due to the fact that the judgement is of legal importance, or (iii) the court of appeal expressed a different legal opinion than the court of higher instance. The Supreme Court shall decide on any further appeal and its decision may also take several months, as there is no time limit stipulated by law.

In addition, effective judgement can be challenged ("*obnova konania*") under certain limited conditions ((i) the evidence or certain decisions or facts important for deciding on the matter could not be presented to the court by the party in the original proceedings provided that more favourable decision could have been achieved, or (ii) disadvantageous judgement made as a result of a criminal action of the judge) or the General Prosecutor may, within one year from the entry into force of the decision, file an extraordinary appeal ("*mimoriadne dovolanie*"), provided that the protection of the rights and legally protected interests of the individuals, entities or the state require so and the reparation can not be achieved in any other manner.

The duration of proceedings should comply with the constitutional right for quick and effective court proceedings, which may be enforced at the Constitutional Court, which is entitled to award damages for inappropriate delays in proceedings.

According to statistics published by the Slovak Ministry of Justice ("*Ministerstvo spravodlivosti*") on its website, on average, the proceedings commenced upon actions on damages last cca. 15 months. As mentioned, it is likely the proceedings concerning actions for damages arising from infringement of competition rules will require more evidence and therefore will likely require even more time. On average, we estimate that first instance proceedings would take approximately two years and the second instance proceedings approximately one year.

(iii) Is it possible to accelerate proceedings?

No. The courts are under a general obligation to proceed as fast and effectively as possible. The parties are under an obligation to disclose all available facts and evidence in the first instance proceedings.

A default judgement may be issued by the court in case the defendant does not appear before the court, does not provide an adequate excuse and neither submits a timely written statement to the petition. In case the court deems the petitioner's description of the factual situation to be indisputable, it bases the default judgement upon it.

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

As a general rule, where the action is be heard by district court, a single judge will sit. The same applies to a regional court, deciding as a first instance court (save for certain exemptions). If the regional court decides on appeals against judgments of district courts, a senate of three judges will sit. In case a decision of the regional court is further appealed to the Supreme Court, it decides in senates presided by a chairman and made up of other two judges (OSP, § 36).

Currently matters concerning protection of economic competition should be brought to the regional court deciding as a first instance court (OSP, § 9(1)(h)). In such cases, the senate consisting of three judges will sit. As of 1 January 2005, a single district court is assigned with deciding competition cases in first instance, as described in B (ii). A single judge sits in district court cases. In the senate of regional court, which will hear appeals against decisions of the assigned district court, three judges will sit.

(v) How transparent is the procedure?

As a general rule, the proceedings are public. The court may exclude the public from participation only if the publicity would threaten protection of confidential information, business secrecy, an important interest of a party or public morality. The courts may, however, still permit individuals to be present, binding them to keep the confidentiality of information presented.

The case files are accessible to the parties to the proceedings and their appointed representatives. A person other than a party may access the files only on the basis of individual approval of the judge, subject to the condition that there is a proven reason for the demand and the legitimate interests of the parties will not be harmed.

I. Costs

(i) Are Court fees paid up front?

Court fees are payable along with the submission of a petition by the plaintiff, as well as with any further appeal. In case the fee is not paid within an additional period set by the court, the court terminates the proceedings. The court may also order a party to provide a deposit covering the costs of evidence proposed by, or in the interest of, the party concerned. In general, an action filed with the court in relation to legal relations regulated by the Competition Act is subject to the court fee of SKK 4,000 (approx. EUR 100). However, as the Competition Act does not specifically regulate the right to claim damages for breach of competition rules, the fees payable in general for petitions concerning financial claims in commercial disputes (including petitions concerning claims for damages) are used. These are calculated as 5 per cent of the amount claimed, with the minimum fee being SKK 500 (approx. EUR 13) and maximum fee being SKK 600,000 (approx. EUR 15,000).

(ii) Who bears the legal costs?

The court fees are paid by the party proposing the procedural action subject to the fee. Otherwise, each party is obliged to bear its costs, e.g. costs of its counsel (except for costs of state appointed attorneys), costs of evidence proposed by such party or personal expenses incurred throughout the proceedings (OSP, § 140).

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

Advocates are allowed to agree on a success fee[9] based on percentage of the sum awarded in the case. Such an arrangement may not be unreasonable or unfair.

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

In the case of 100 per cent success, the successful party will be entitled to full compensation of its costs. In case of partial success, the compensation is reduced or no compensation is awarded. The successful party may, however, obtain full compensation also in the case of partial success, if the unsuccessful demand concerned a marginal issue in the case, or if the decision on the amount of compensation awarded was dependent on discretion of an expert or the court. The

9 Decree of the Ministry of Justice No. 163/2002 Coll. on fees and remuneration of advocates for provision of legal services ("*Vyhláška Ministerstva spravodlivosti o odmenách a náhradách advokátov za poskytovanie právnych služieb*"), §§ 10 and 11.

losing party may also obtain compensation for costs, in case the losing party gave no reason for commencement of the proceedings (OSP, § 142 et seq.). The cost of a court appointed expert are also included in the costs compensated.

As regards the recovery of legal fees, the actual costs are not recovered. The costs are calculated based on advocate tariffs stipulated in a decree of the Ministry of Justice (Decree No. 163/2002 Coll.). These tariffs are set at a fixed amount for each necessary action of the advocate in the proceedings. Therefore there might be a significant difference between the costs recovered and the actually paid legal fees, which will frequently be a multiple of the official tariffs.

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

Costs of the proceedings include cash expenses of the parties and their counsel, including court fees, lost income of the parties, costs of presenting evidence, fees of interpreters and representation fees when the representatives are advocates (OSP, § 137).

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

There are no such specific national rules.

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

Under newly added provisions of the Civil Code (OZ, § 828a), legal aid insurance was introduced, although provided even before within the previous general legal framework for insurance. This insurance covers all costs incurred as part of the application of a right stipulated in the insurance policy. As the applicability is defined very widely, competition cases may also be covered by legal aid insurance. The insured person is free to choose his legal representatives.

(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?

As there have been no cases by the Slovak courts yet, at the present time it is difficult to estimate the likely costs of such proceedings. For the hypothetical claim of EUR 1 million, the court fees would be approximately EUR 15,000 and the lawyers' fees would be, under a rough estimate, approximately EUR 20,000.

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?

As there is no case law in this area or even similar areas like intellectual property rights, we could not identify any differences. Therefore, the general rules for private enforcement shall apply.

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

No.

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

Under the Act on Protection of Economic Competition (ZOHS, § 2), the competition rules also apply to public undertakings, state authorities and bodies of local self-government, i.e. municipalities and regions. However, the regulation shall not apply to restraints on competition by undertakings providing services in the public interest under special regulations, in case the application of competition rules would prevent them, either legally or factually, from performing their tasks in the public interest under the special regulations.

Under the new Act No. 514/2003 Coll. on Liability for Damage Inflicted in the Course of Exercise of Public Power ("*Zákon o zodpovednosti za škodu spôsobenú pri výkone verejnej moci*"), effective as of 1 July 2004 and replacing the previous Act No. 58/1969 Coll., the public bodies are liable to compensate damage resulting from illegal decisions or actions limiting personal liberty or an incorrect administrative proceeding.

Under the Civil Code (OZ), if the state is involved in a legal relationship governed by civil law, it has the standing of a regular legal entity, i.e. it is equal to other entities (OZ, § 21). There are also certain specific regulations covering the operation of public entities:

- bankruptcy or composition proceedings shall not apply to the state budgetary and contributory organisations, health insurance companies, municipalities, entities established directly by the operation of law (e.g. Slovak Radio, Slovak Television) as well as to farmers meeting certain conditions, or strategic providers of transport services;
- in specific cases stipulated by law or by the decision of the superior body, the entities administering state property are entitled to dispose of such property only with the consent of their superior body.

There are no other relevant differences between private and public entities. A competition action against a public body would be brought in the same courts as actions against a private party, as Slovak Republic has a unified court system.

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

No, there is no explicit legal provision for such interaction. A 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 <u>within</u> the Member State as regards damages actions for breach of national or EC competition rules?

As there is no case law in this area, no differences could be observed. However, in other cases on damages, significant differences occur in amounts awarded, mainly due to lack of calculation methods.

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

There are no other relevant issues. As regards rules of private international law applicable in the Slovak Republic, please answer to C(i).

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

To our knowledge, no decision on damages arising from the infringement of the Slovak competition law has been issued by the Slovak courts. The Slovak Republic is not yet a member of the EU, therefore there is no case law based on the violation of the EC competition rules.

<u>III. Facilitating private enforcement of Articles 81 and 82 EC</u>

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

The current legal framework in the area of claims for damages caused by breach of competition law is overly general and insufficient. The national competition rules lack an express statement of entitlement of damaged competitors and customers to claim damages together with a petition for cessation of anti-competitive activity

and *restitutio in integrum*. Such petition is permitted under the current law for consumers only, which highlights the question of potential extension to competitors. The courts are not authorized to handle petitions concerning breach of competition law and all the above mentioned related claims for damages in one single proceeding.

As the valid regulation of court fees provides for a reduced fee for claims under the legal relations regulated in the Competition Act, the inclusion of explicit regulation on the possibility to claim damages into the Competition Act and a reference to EC competition rules in the Act on Court Fees would decrease the currently required fee (up to approx. EUR 15,000) and therefore facilitate the enforcement of Articles 81 and 82 EC.

The present regulation also misses a possibility of class actions, therefore reducing the risk to violators in cases where there is a high number of damaged entities, to whom it is not feasible to initiate individual actions.

If there is a case on damages caused by breach of competition law occurring in the near future, the courts may lack the necessary expertise in competition issues. It is therefore very likely (in particular in cases where no previous decisions on infringement have been issued by the relevant competition authority), the courts will likely regularly be addressing the Slovak Antimonopoly Office with requests for an opinion as to whether the alleged anti-competitive behaviour constitutes an infringement of competition law. This may cause further delays in the proceedings. The possibility of such delays will likely be reduced once competition cases will be dealt with by selected general courts (i.e. as of 1 January 2005 District Court Bratislava I in first instance and Regional Court in Bratislava in second instance), as these may gain over time sufficient expertise in the application of competition law.

The non-existence of any legislation or at least guidelines or a model for calculating damage creates an environment of high uncertainty to both potential parties in a dispute. Without such guidance, the courts will have difficulties setting a realistic damage compensation.

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

Under the newly introduced legislation, the area of disputes, which may be resolved through arbitration covers any disputes concerning property, except for disputes concerning ownership of real estate. Previously, only a single arbitration tribunal was operating within the Slovak Chamber of Commerce and Industry ("*Slovenská obchodná a priemyselná komora*"), currently there is a number of new tribunals established. The number of cases has, however, not significantly increased as yet and the parties still largely prefer regular court dispute resolution. An increase is expected with the major tribunals gaining more experience and reputation.

Prior to commencement of court proceedings, special settlement proceedings may be initiated at a court that would be competent to handle the case in case of regular proceedings. This method is, however, used quite rarely.

In the course of court and arbitration proceedings, a settlement may be reached between the parties. In court proceedings, the settlement is approved by the court if it is compliant with the law. The parties are under law, obliged to attempt to reach a settlement during the course of proceedings. If a settlement is reached in the course of arbitration and if requested by the parties, the arbitration tribunal may issue an arbitration award stipulating the conditions of settlement. Such an award is binding and enforceable as any other arbitral award.

Mediation was until recently performed in civil proceedings without a special legal framework. However, the draft act on mediation was approved by the National Council of the Slovak Republic in June 2004 and not yet signed by the president. It stipulates the conditions of mediations in civil, commercial and labour disputes and

the rights and duties of mediators. It should become effective on 1 September 2004, if signed by the president. The act would allow the parties to mediate in advance of or during a dispute. A binding agreement may be concluded as a result of mediation, which may be enforced if it takes the form of a notarial deed, or if approved as a settlement by a court or arbitration tribunal.

IV. Bibliography

Please refer to the citation guidelines given above.

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V. National case law summaries

No relevant case law exists in relation to damages caused by violation of competition law.