Czech national report

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Should private enforcement (actions for damages) of competition law be encouraged, and if so, through what concrete measures?

1. GENERAL CONTEXT

**Description of the applicable legal provisions**

The principal competition regulation in the Czech Republic is contained in the Act no. 143/2001 Coll., on the Protection of Competition ("Zákon o ochraně hospodářské soutěže") which came into force on 1 July 2001. However, as for the issues covered by this report it must be said that it does not contain any special provisions regarding private actions for damages.

Consequently, general provisions governing actions for damages apply; in the area of competition law it is the Act no. 513/1991 Coll., the Commercial Code, as amended ("Obchodní zákoník").

The legal basis for bringing such actions under the Czech law is found in the Section 373 of the Commercial Code. This provision states that "whoever breaches a duty arising from a contractual relationship is obliged to provide compensation for the damage caused to the other party, unless he/she proves that such a breach was caused by circumstances excluding his/her liability". Linked-up with Section 757 of the Commercial Code broadening the scope of applicability of Section 373 to liability for damage caused by a breach of any obligation under the Commercial Code and with Section 41 of the Commercial Code setting out a generally binding obligation to observe competition rules (including EC competition law), Section 373 of Commercial Code is the statutory basis for bringing actions for breach of competition law.

According to the Commercial Code, the existence of fault is not a condition for liability for awarding damages and damages could be awarded in case of illegal behavior, regardless of whether such activity was a consequence of intention or negligence. Still, there is a possibility for an infringer to exclude his/her liability if he/she is able to prove that the breach of competition law was caused by so called circumstances excluding liability. The concept covers obstacles which arose independently of the defendant’s will and that prevent him/her from performing his/her duty, provided that it cannot be reasonably expected that the defendant could prevent or overcome such obstacles or their consequences.

As far as procedural rules for bringing actions for damages are concerned (whether incurred as a result of violation of national or EC law), these are contained in Act no. 99/1963

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1 Information regarding existing law may be found also in the already published study (available on the EC website) conducted by Dejl, P., Löfflerová, A., Kubík, F., which was broadly used for this report.
Coll., the Civil Procedure Code, as amended („Občanský soudní řád“ or “CPC”). The CPC establishes rules of court competence, the composition of senates, procedural requirements that parties have to fulfill if they are to bring an action to the court, rights and duties of parties to the proceeding, rules of evidence, terms of appeal procedures etc. The most important thing is that there are no specific procedural rules either on damage claims in competition matters, or damage claims in general. So the damage claims for the breach of EC competition law are to be pursued according to the procedural framework generally applicable to any other kind of civil proceeding including damage claims.

Thus, there are general substantive and procedural rules concerning damage claims applicable in the Czech Republic. This is due to the fact, that neither the Competition Act nor any other legal statute in the Czech Republic, provides for specific rules for private enforcement of the EC (and the Czech) competition law. The former competition law (the Act No. 63/1991 Coll., as amended) contained several specific procedural rules according to them the private disputes arising from the breach of this Act were dealt and a list of possible claims. According to this legislation, the victim of anticompetitive behavior could claim that the infringer refrains from the illegal behavior, removes the illegal situation, provides reasonable compensation, pays damages and returns unjust enrichment.

In this context, none of four recent amendments of the Competition Act has brought any change. So called first and fourth amendment (Act No. 340/2004 Coll. and Act No. 367/2005 Coll.) have brought several specific provisions on public enforcement of the EC competition law by the Czech Antimonopoly Office (the Office for the Protection of Competition – hereinafter “the Office”). No legislation is prepared or envisaged to date that would enact specific rules on private enforcement of competition law in the Czech Republic.

- **Recent or foreseen changes in these provisions**

  None of the recent amendments to the relevant law have introduced any *specific rules for private enforcement* of competition law. In addition, no such amendment is expected in the nearest future as well.

  However, a complex project of *recodification* of the whole private law is now in progress in the Czech Republic. As stated above, the crucial role concerning the problem of private enforcement is that of *general provisions* governing actions for damages; and these provisions will be widely affected by the recodification.

  Firstly, the regulation nowadays included in the Commercial code will be transferred to the Civil code. As it is planned in the moment of writing of this report, there will be some (minor) changes in the (for this topic) relevant provisions:

  - As for the forms of compensation, the current rule (Section 378 of the Commercial Code) states that „damages are generally paid in money; however, if the aggrieved party so requests, and if it is possible and customary, damage is compensated by restoration to the previous status (*restitutio in integrum*).” Henceforth (Section 2450 of the proposal) the primary general rule should be *restoration* to the previous status and *monetary* damages should be paid only if *restitutio in integrum* is not acceptably possible or if the aggrieved party requests so.
- New rule (Section 2470 of the proposal), potentially important (as regards calculation of the amount of damages) for the damages actions for breach of competition law, is a provision stating that „if it is impossible to assess the amount of damages precisely, the court assess the amount by a fair deliberation taking into account the circumstances of the case.”

- The judicial moderation of damages is also intended to be introduced in the case of non-professional anticompetitive conductor (Section 2469 of the proposal). Under the existing law, moderation of damages is not possible in antitrust-based cases.

- Description of competent courts

  Again, with the reference to the national study we can say that there are no special courts to hear competition-based damages claims. From the Civil Procedure Code follows that in the first instance regional courts („krajské soudy“) are competent to hear actions for damages concerning protection of competition, whether under Czech or EC law.

  Generally, district courts („okresní soudy“) are competent in the first instance to hear actions, including actions for damages, unless the provisions of Section 9 (2) or (3) of the Civil Procedure Code provide for the competence of regional courts in the matters specified therein. Ergo regional courts are higher in the court hierarchy than district courts, they hear matters that are more complex or require specialised knowledge.

  In the second instance (as appeal courts) high courts („vrchní soudy“) are competent to hear actions for damages concerning protection of competition.

  A single judge sits in a regional court hearing actions at first instance while in the high court there are chambers of three judges. Chambers take decisions after deliberation with a majority of votes required.

  The civil jurisdiction has to be distinguished from the judicial review of administrative decisions in antitrust cases adopted by the Office. The judicial review is performed within so called administrative justice established by the Act No. 150/2002 Coll., Administrative Justice Code, as amended. The effective decisions made by competition authority are reviewed on the basis of complaints lodged by dissatisfied party with the administrative proceeding. The only competent court to deal with such petitions is the Regional Court in Brno - its administrative branch – Note: administrative and private cases are not decided by the same judges. At the time, there is one senate dealing exclusively with competition cases and public procurement cases at the Regional Court in Brno. So called cassation complaint can be lodged with the Supreme Administrative Court against the decision of the Regional Court in Brno. The Supreme Administrative Court with its seat in Brno serves as a final instance in those cases. The cassation complaints are not decided by a single specialized senate within the Supreme Administrative Court.

  Although the private enforcement of competition law seems to be more and more actual topic for discussions among practitioners specializing in this branch of law, there is still only little awareness among general public about the fact, that individuals can fight against cartels and dominant position and seek damages at the civil courts in the Czech Republic. There are only a few pending civil cases in which the competition law has been applied and in most cases they were initiated by “follow on actions”. It is presumed that on the basis of grant
awarded by the European Commission for project/projects aiming at training of national judges in EC competition law will be organized. The Office will cooperate with the winner of the grant and will be the partner that guarantees the expertise of the training. This could lead to further dissemination of experience in this field of law.

- **Current debate and issues currently being considered regarding actions for damages**

  Regarding actions for damages arising from breach of competition law specifically there is not much deep debate concerning Czech law. However, there are some issues currently being considered regarding actions for damages like the question of permissibility of the contractual limitation of damages.

2. **LEGAL SYSTEM**

2.1 **Access to courts**

- **What are the legal requirements for bringing an action for damages?**

  As for standing, Section 19 of the Civil Procedure Code states that any natural or legal person who has the capacity to assume legal rights and obligations has the capacity to be a party to civil proceedings before Czech courts. An action for damages caused by anticompetitive behaviour can be brought by anybody, who claims that he/she suffered the actual injury or loss of profit as a consequence of this kind of illegal behaviour. Thus, it can be brought by any legal or natural person, theoretically regardless whether it is in position of a direct purchaser or a final consumer.

  An action may be brought by foreign persons, as well, under terms described further. In accordance with Section 49 of Act no. 97/1963 Coll., on International Private and Procedural Law, as amended ("Zákon o mezinárodním právu soukromém a procesním") (the "IPL Act"), the standing of a foreign person in proceedings before Czech courts is governed by the rules of his/her jurisdiction. However, it is sufficient that the person has standing under Czech law. Section 48 of the IPL Act stipulates the principle that all participants to proceedings before Czech courts have equal rights, regardless of their nationality.²

  The plaintiff has to pay a court fee. The amount of the fees is fixed by Act. no. 549/1991 Coll., on court fees, as amended ("Zákon o soudních poplatcích") at 4 % of the amount of damages claimed. The maximum fees, however, are CZK 1.000.000, i.e. approx. EUR 32,000. Failure to pay the fee is, as a rule, a reason for the court to suspend the proceedings. In individual cases, however, the court may take into account the personal circumstances of the plaintiff or reasons for relief under Section 138 of the Civil Procedure Code.

  If the plaintiff seeks an injunction, he/she must pay deposit CZK 100.000 (approx. EUR 3,450).

  Neither plaintiff nor defendant needs to be represented by lawyer (attorney), although it is usually the case.

² Further information about the standing of a foreign person may be found in the above-mentioned study.
Formal requirements of the legal action are set down by the Civil Procedure Code (mainly Sections 42 (3) and 79). There are general rules specifying the minimum content, which has to be included in the legal action.

Important precondition for bringing an action successfully is to preserve the limitation period, which is four years (Section 397 of the Commercial Code) from the moment the injured party learns or could have learned of the damage and of the party liable therefore. In addition to this subjective deadline, an objective deadline of ten years starts to run from the moment when the breach that ultimately caused the damage took place. The objective deadline applies also to ongoing breaches and may, consequently, lead to the impossibility by the injured party to recover damages for the entire duration of the anti-competitive behaviour.

As far as the substance of a legal action is concerned, the plaintiff must claim (and support with evidence) that the three essential elements are fulfilled: a breach of antitrust rule by defendant, occurrence of injury or loss of profit and a causal link between the breach and the occurrence of injury or loss of profit.

There is no need to have any preceding decision of competition authority (the Commission or the Office). Both follow-on actions and stand-alone actions are allowed in the Czech Republic.

- Are collective actions available in your jurisdiction? Is the current system satisfactory? Should the possibility to bring class actions be introduced/developed? What about other types of collective actions (consumer associations, other)? Are you in favour of an “opt-in” system (action brought on behalf of identified victims) or an “opt-out” system (action brought on behalf of non individually identified victims)?

Czech law does not recognise collective or class actions. However, there are some applicable instruments going in similar direction. Under Section 91 (1) of the Civil Procedure Code, it is possible for several plaintiffs to bring an action jointly. Further, under Section 92 (1) of the Civil Procedure Code, the court may - upon application of the plaintiff - admit further plaintiffs to pending proceedings. In addition, Section 93 of the Civil Procedure Code enables a person who has a legal interest in the outcome of the dispute to join the plaintiff as a „supporting participant“.

Furthermore, for reasons of procedural economy, the court has, under Section 112 (1) of the Civil Procedure Code, the right to join cases for the purpose of joint proceedings, if the facts of the cases concerned are linked, or if they involve the same parties.

It will be definitely convenient to introduce also some form of collective action for this purpose. It is clear, that there is a notable possibility of occurrence of high number of injured persons in these kinds of cases, especially if consumers are involved (and it is significantly connected with the problem of allowance of indirect victims’ actions). Then it will be useful to have proper possibility to apply relevant instrument dealing with this high number of participants.

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3 As regards the description of existing law, the above-mentioned study was used.
As for the antitrust damages actions, the suitable system (under today’s Czech legal provisions and judicature) could be an “opt-in” system of collective actions, which enables to bring an action on behalf of identified victims; victims are not bound unless they affirmatively consent to join the collective action. The victims should claim the damage they suffered and apply for being included in the list of victims with potential right to compensation. However, the “opt-in” system would not, in our opinion, overcome the current problems with the strict requirement to prove the exact amount of damages suffered by every individual victim that is currently applied in the Czech courts. From the point of view of the possible future regulation the “opt-out” system of consumer association actions could be, at the first stage, more appropriate, because this system resembles conditions, under which such actions are available in unfair competition cases in the Czech Republic. However, this would presuppose substantial changes in legal regulation in the area of both substantive and procedural rules, such as the possibility of adjudicating lump sum damages by the court. One of the unresolved issues connected with the “opt out system” is the distribution of compensation to individual victims in case of successful consumer association action.

Consumer associations (or similar associations of injured producers for example) could be engaged, with the precondition of being legal person with required capacity. The damages, if calculated on the basis of the individual damage suffered by the victims, could go to the members (victims). If calculated on the basis of the illegal gain of the defendant damages could go to the association itself and the resultant amount of money could be distributed proportionally among the victims or it could be distributed to the limit of the real damage suffered and the exceeding sum of money (if there is some) could be used for the benefit of consumers by the involved association.

Consumer associations’ actions are available only in restricted number of cases in the Czech law (for some kinds of actions against so called unfair competition behaviour - under conditions set in the Commercial Code), but not in antitrust cases. Thus, according to present procedural rules, principally only individual persons can file an action with the court seeking damages and, on contrary, consumer associations cannot bring an action on behalf of individual victims (either identified or not).

The current system seems to be unsatisfactory, because it provides only a few incentives for persons having suffered only small damage to bring an action to the court. The absence of class action might be overcome by the admissibility of consumer associations’ actions; however, these are not available yet in the Czech legal system as well. The introduction of at least one of these mechanisms can bring the necessary incentive for further development of private enforcement.
2.2 Difficulties encountered when establishing the legal conditions for the award of damages

(a) As regard the proof of the fault / of the violation of competition law

- What are the powers of the judges in the research of evidence? Should judges be able to request the production by the parties of “all documents relating to the case”, or only of documents that were previously identified (comparison with US discovery, UK disclosure)?

Under Sections 128 and 129 of the Civil Procedure Code, any court has the right during the proceedings to request any natural or legal person to submit specific information or document that is important for the proceedings. The addressee of such request is obliged to provide the relevant information and/or document.

If a party fails to produce a document, a disciplinary penalty up to CZK 50,000 may be imposed to him/her (Section 53 of the Civil Procedure Code). Criminal sanctions may be also imposed for repeated obstructing to judicial proceedings (the offence of a contempt of court) under Section 169b of the Criminal Code.

*Discovery* as such does not exist in Czech civil procedure. A party may only request the judge to order the opponent to produce certain documents that are relevant evidence for his argumentation. The question, whether an order for disclosure of certain document or information is made or not, lies within the discretion of the court, even if disclosure has been requested by a party. When exercising its discretion, the court has to take into account the legitimate interests of the parties, such as the interest in discovering the true facts and winning the case or, on the other hand, the confidentiality of personal or business information.

Should the confidentiality obligation be released, the court must take certain measures. It may exclude the public from the hearing if such publicity would or could threaten protection of classified information, business secrets, an important interest of a party or the public order.

“Discovery” as a procedural institute is potentially dangerous while there is a probability of abusing this tool by the party wanting only to get internal business information concerning the defendant. It is treacherous to force somebody to produce “all documents relating to the case”. At least there should be a possibility for the defendant to ask the court to decide, whether the nature of a certain document is so specific concerning these matters of confidentiality, that it is justifiable not able to be provided to the other party. The compulsory disclosure should be proportionate and targeted.

There have to be sufficient guaranties preventing the abusive behaviour of the plaintiff. At least commercial information the disclosure of which would or might significantly harm the legitimate business of the undertaking and information relating to the private affairs of an individual the disclosure of which would, or might significantly harm his interests have to be protected from malicious conduct.

*Disclosure* should be available once a party has set out in detail the relevant facts of the case ad has presented reasonably available evidence in support of its allegations (similar to
Options 1 and following proposed in the Green Paper). Disclosure should be limited to relevant and reasonably identified individual documents and should be ordered by a court.

On the other hand, problematic issue is the practical difficulty with antitrust actions, especially if the claimant is a non-professional (consumer); relevant evidence being the key to make the claim successful is not easily available. Thus there should be an obligation (ordered by court according to pleading) imposed to a defendant to provide the other party with a list of relevant documents in his/her possessions.

This feature could be strengthened by an obligation to preserve relevant evidence before a civil action actually begins; a court could order this preservation if the party asking for it presents reasonably available evidence supporting rightfulness of the pleading. The system should be also supplemented by the introduction of sanctions (like the above-mentioned penalty) for the destruction of evidence.

Unjustified refusal by the defendant to turn over evidence might in the future have also some influence on the burden of proof; for example, it could lead to a rebbutable presumption of proof (Option 10 in the Green paper).

- What is the role played by competition authorities in action for damages? Do you think cooperation between competition authorities and courts is favourable? What kind of cooperation? Should courts have access to the competition authorities’ files?

The role of competition authorities in actions for damages differs according to the timing of such action. If it is a case of “follow-on action”, the decision of the Commission of the Office that an administrative offence was committed and who committed is binding upon court. That means that a judge deciding the dispute involving damage claims is bound by the decision of the competition authority that the specified person, or the action of this person, has breached Article 81 (1) or Article 82 of the EC Treaty. The judge cannot doubt the findings of the administrative decision declaring the infringement of the competition law. This rule thus shall ensure the conformity of the judicial ruling with the prior decision of the Commission or the Office in the same case. On contrary, the judge is not bound by any other decisions of the competition authority. Therefore, the decision to suspend the administrative proceeding because the infringement of the EC Treaty has not been established does not mean that the judge is released of the duty to find out, whether the plaintiff succeed to prove such a breach of competition law.

If it is a case of “stand-alone action”, the infringement of competition law is so-called preliminary question for the court. In such circumstances, the judge may either decide this issue on his/her own (to assess compatibility of individual behaviour with the competition law) or initiate the proceeding before competition authority, stay the proceeding and await the contemplated decision of the relevant authority [Section 135 (2) and Section.109 (2) (c) CPC]. The first option could be applicable in cases where there is any similar previous decision of the Commission (the Office) or where there are no doubts as to what the decision of the competition authority will be. The Czech court shall be empowered even to file a motion to the Commission (or to the Czech competition authority) in order to initiate the proceedings.

This mechanism seems to be sufficient for implementing duties of national courts aimed at uniform application, as set in Article 16 of Regulation 1/2003; the Czech Civil Procedure Code seems to be at least to a great extent compatible with the directly applicable rules concerning the parallel and uniform application of the EC Competition law contained in
Regulation 1/2003. In that context the main task should be to keep all the judges informed about those rules and about their direct application and supremacy over possibly conflicting national rules, which is still a new phenomenon in the Czech legal system.

The cooperation between courts and competition authorities is not only favourable, but also necessary. In case of “follow-on actions”, the court shall be guaranteed the access to the files of the competition authority concerning the same behaviour. In case of “stand-alone action”, the cooperation between a court and the Commission or the Office should be exercised along with the AMICUS CURIAE concept. It shall be emphasized that this kind of cooperation has to be restricted to the provision of general information, opinions and information about the interpretation and application of competition law; the competition authority shall not give the specific opinions on the particular case unless it starts its own investigation.

As regard rules on cooperation between the national courts and the Commission or the Office (especially three main pillars of AMICUS CURIAE concept – i.e. provision of information, opinions and observations), we can make following observations:

Even though the rules concerning AMICUS CURIAE contained in Regulation 1/2003 seem to provide concrete rights of the Commission, the procedural framework, in which they are exercised, should be set at a national level. However, there are no specific procedural rules ensuring the fulfilment of all functions of the Commission as AMICUS CURIAE in the Czech Republic. Nevertheless, the Czech civil judge can use generally applicable rules concerning collection and assessment of evidence. Section 125 CPC stipulates that the court shall accept as an evidence any means by which it is possible to ascertain the state of affairs, incl. reports and statements of relevant bodies. The same provision states that if the law does not prescribe the method of presenting an item of evidence, the court shall determine it on its own. According to this provision, the Czech court applying the EC Competition law in particular case can ask for and accept as evidence any piece of information and opinions from the Commission or the Office, and accept written and oral observations from the Commission and the Office, too. At the same time the drawback of such system is that it is up to every particular court, how it will enable the competition authority to fulfil its function, e.g. to make oral observations as provided in Article 15 (3) Regulation 1/2003.

There has not been introduced yet any – even subsidiary – procedural rule in the Czech Civil Procedure Act that would set an explicit duty of a national court to provide the Commission or the Office with copies of documents contained in the court file (for the preparation of their observations) as provided in Art. 15 (3) Regulation 1/2003, and procedural rules for that. However, in practice no major problems could be envisaged in case the Commission or the Office will refer in its request to the relevant provision of the Regulation, where the specific right of that body to obtain such document is explicitly established. This could be enough for the national judge to provide such copies.

The main friction between the Regulation 1/2003 and the Czech civil procedure rules is thus connected with the fact that the practice may differ at different courts, which might lead to an “inconsistency” of the Commission’s or the Office’s procedural position before Czech national courts.

As an option, an extensive-cooperation model could possibly be taken into consideration in the future. A possibility should be preserved for the courts to give rise to the competition authority to open an administrative proceeding immediately after the legal action had been
brought and to examine whether it is not manifestly unreasonable and groundless, and then to await the final decision about whether the antitrust conduct was committed or not. This would not apply in instances where the nature and complexity of the case allow to resolve the court the case itself, e.g. due to the previously published judicature or if the case is obviously lucid and perspicuous).

- **Particular issue arising in relation to leniency programmes:** how do leniency procedures and actions for damages coexist in a given case? What is your view on a possible (partial or total) immunity as regard damages for leniency applicants? What would you suggest?

There is *no explicit* legal provision regarding interaction between leniency procedures and actions for damages. The leniency programme only prevents or reduces the administrative sanctions that may be imposed by the competition authority. It is a tool of public enforcement of competition law; the *civil sphere remains untouched* by it. The injured person cannot suffer only because of the application of leniency procedure; its *real losses have to be compensated*.

A difficult question is whether the disclosure of documents that were specifically produced for the purposes of a leniency program, such as detailed descriptions of anti-competitive conduct, can be demanded in a civil proceeding.

Principal issue is to *preserve the effectiveness* of the program as an indispensable tool for disclosure secret cartels. On the other hand, if there is a too munificent leniency in both public and private enforcement, a deterrent function of the antitrust law could be endangered. Thus, any possible link between leniency programmes and civil damages actions might be refused.

Possible solution is preserving unchanged liability to damages and, at the same time, exclusion of discoverability of the leniency application and protecting confidentiality of submissions made to the competition authority.

A question may be raised, whether it is just for the participant in a cartel agreement to be excepted from the public law liability due to the leniency programme and in addition not to be charged for the private damage being caused by the cartel to others. On the other hand, in the case of “non whistling” the cartel by the leniency applicant, the private litigants would hardly have any chance to sue at all and even the public interest (undistorted competition) would not be better off. Therefore, a compromise solution is possible: to enable the courts an equitable consideration as to the liability of the leniency applicant, i.e. moderation or total exclusion of the duty to pay damages according to the merits of the leniency applicant on the discovery of the cartel. This may happen quite often, as a rule, for leniency applicants are assessed positively only if they “whistle” on time. In particular, the participation of the leniency applicant on the damages caused and the time between closing the cartel and announcing it to the competition authority should be taken into consideration. It has to be considered that the barriers for the plaintiff to achieve the real compensation (in addition to its burden of proof) might be too high.
• Issue of binding nature of the decisions of competition authorities: what is the legal value of decisions rendered by (national, foreign) competition authorities in your jurisdiction? Should they bind the court before which an action for damages is brought?

As already mentioned above, if the Competition Office decides in administrative proceedings that a competitor has breached a statutory duty and has thus committed an administrative offence, these findings bind courts. Courts are also bound by the similar decision of the European Commission and foreign competition authorities.

However, any other decisions - not stating that an administrative offence was committed - are not binding. The court can make its own opinion and decision about the conduct in question.

The courts are bound by the decision stating that an administrative offence was committed. It will enhance the deterrent effect of the enforcement as a whole if the damages claims immediately come after the administrative proceeding.

• What are the difficulties encountered by the victims when they have to prove the fault of the defendant or the reality of the anticompetitive practices? What concrete measures would you suggest to remedy these difficulties?

It is sufficient to prove the infringement; the antitrust law is based on the objective (strict) liability conception. This approach should be preserved for the future (Option 11 in the Green Paper).

That makes the position of the plaintiff theoretically easier, because the burden of proof that there are so called circumstances excluding the liability available (Sec. 374 of Commercial Code), lies on the defendant. However, the difficult position of victim (plaintiff) is connected with the very nature of competition law and competition analysis. The competition law is based on general provisions where the particular rules are established by the decisional practice of the competition authorities and case law of the ECJ and CFI. Moreover, the same behaviour could be permitted in some circumstances whereas in others the same practice is illegal. The competition analysis is thus very broad and covers numerous aspects, many of them are of economic nature. It could be difficult to persuade the court, which is not specialized in competition matters, that the competition law has been infringed, especially when the defending party produces lot of legal and economic arguments doubting the legal assessment made by plaintiffs. This issue seems to be strongly related to the questions of the court expertise and the factual unequal positions of individual victim and defendant, often big company with enough resources to be able to rent top lawyers and to present expensive studies.
(b) As regard causal link and injury

- Can indirect victims of a breach of competition law (e.g.: indirect purchaser) bring an action for damages against the person responsible for the breach? Should such actions by indirect victims be available?

The “indirect purchaser” is not a special issue in Czech competition law. To date there are no published judgements concerning indirect purchasers, whether granting or dismissing damages.

In a general private law, the indirect purchaser is entitled to damages provided that he/she has suffered damage as a result of the infringement, and that the damage has been adequately caused. If the direct purchaser passes the injury on his/her customers, they could become the only category of persons eligible for being awarded damages (see further).

As mentioned in the national study, neither legal theory nor legal practice in the Czech Republic distinguishes clearly between direct and indirect causation. Therefore, the fact alone that the damaged party is not a direct contractual partner of the defendant does not prevent the damaged party from claiming damages.

Law should not restrict indirect purchasers from claiming; such purchasers shall remain effectively protected. However, they need to prove the occurrence of a loss and causation in order to succeed.

- Is the “passing on defence” available to the defendant in your jurisdiction? Should the availability of this defence be limited?

If the direct purchaser compensated all the injury caused by higher prices in a way of charging higher prices for his/her products to his/her customers, he/she is not able to prove the occurrence of actual injury. Passing on defence could be therefore successful in the Czech law.

On the other hand, it is very clear, that this kind of defence makes private enforcement of competition rules more complicated, because it might be very difficult to prove the exact distribution of damages between the direct purchaser and the end consumer. Limitation of availability of such defence might be useful, but at the same time all the drawbacks of such steps should be carefully considered (the issue of double damages and all the procedural complications associated with further allocation of awarded damages among all direct and indirect victims).

However, the main goal and purpose of damages is a compensational function. Damages awarded to an injured party cannot exceed the amount of loss incurred, and compensation cannot enrich the injured party. On the other side, infringer should not be able to benefit from its infringing activity.

The passing on should thus have no impact concerning the obligation of the infringer to pay the full amount of the unjust enrichment resulting from the anticompetitive conduct; however the amount exceeding the real loss suffered by the direct purchaser should be distributed between all indirect victims.
As for the question of evidence, there should be no presumption that higher prices have been passed on; the defendant could prove that the loss has been passed on. As stated above, the direct purchaser should be under a duty to prove that he will not be unjustly enriched by identifying all customers to whom he has passed on his potential loss caused by the infringer and to notify these indirect purchasers so that their claims against the direct purchaser may be joined to the direct purchaser’s claim.

- Is the evaluation by the courts of the injury suffered satisfactory? How can this evaluation be improved? Do you support the use of econometric or financial analysis models in order to facilitate the calculation? Should experts be granted imperative powers enabling them to have access to all necessary documentation for the evaluation of the injury? Do you favour a system allowing the award of damages to an amount exceeding the mere proven injury (punitive damages, multiple damages)? When evaluating the injury suffered, should interests be granted from the day of the breach? What other measures do you suggest?

In the process of evaluation of the injury suffered or the amount of illegal gain of the infringer, the court should have the widest possible range of tools at its disposal, including usage of econometric or financial analysis models and expert advice. The court should decide, according to the nature and complexity of the individual case which method would be the most appropriate. The publishing (by the Commission) of the non-binding guidelines should only help in this task (as Option 19 of the Green paper proposes). Such guidelines should be drafted on the basis of experience both at the national and European level. There should be single guidelines adopted at the Community level. Econometric and financial models included in these guidelines would help the judges to solve the complex problem. The calculation itself could be entrusted to an expert (economist, econometrist); such calculation could not be done without access granted to the expert to all important documentation, otherwise such expert opinion is unreliable. Adoption of single guidelines on the calculation of damages would significantly improve the perspective of victim to win their case while at the same time considerably increase the legal certainty of all parties concerned.

Another possible solution might be the introduction of lump sum damages in some suitable cases. The concept, however not even partially developed, is based on the idea, that in some cases the victim gets a lump sum of money, if he/she is able to prove the anticompetitive behaviour, that he/she incurred the injury and that there is causal link between the anticompetitive behaviour and the injury, however without the necessity to prove the exact amount of injury. The lump damages could be introduced also as an alternative to the standard damages with the possibility for the plaintiff to opt for one of those two systems.

The damages should be defined with reference both to the illegal gain made by the infringer (for infringer cannot benefit from its infringing activity) and the loss suffered by the claimant (compensation cannot enrich the injured party). In the case of these two amounts not being equal, the overcharge should be distributed to indirect victims. Alternatively, in the case there are no indirect victims or none of them has claimed damages, it should figure in the calculation of the penalty being imposed and be included in the calculation or (if no penalty is being imposed) it should cover the costs of proceeding as an income of the state budget.

Experts should be granted imperative powers enabling them to have access to all necessary documentation for the evaluation of the injury, if the question of the existence of infringement has been already resolved. In the case of commercial information the disclosure of which would or might significantly harm the legitimate business of the undertaking and
information relating to the private affairs of an individual the disclosure of which would, or might significantly harm his interests, the expert should be bound to preserve the confidentiality of these facts and the court only should have full access to them. Subject to fact pleading the court could order that the other party is entitled to have access only to the outcome of a certain task, not to the whole documentary evidence. Thus e.g. if the task is to find out the gain from certain contracts or businesses of the defendant, the expert will examine all possible evidence, provide a result grounded on it to the court and the court will decide, whether the other party will be allowed to be made acquainted with the result only or with the whole documentation, contracts, accountant records etc.

If the exact amount of damages cannot be objectively proven, there should be enacted a possibility for the court to assess the amount of awarded damages by free equitable deliberation if the anticompetitive conduct has been proven.

As regard multiple damages, the purpose of the damages is to compensate the loss suffered only, not to punish the perpetrator - punishment is the aim of public enforcement with its system of sanctions. At the same time, there is no reason for awarding the claimant extra windfall exceeding the real loss. Total amount of awarded damages should thus be limited by the total amount of damages suffered.

Interests shall be granted in compliance with their economic meaning, from the date of the occurrence of the injury. The absence of multiple damages might be overcome especially by the fact, that the victim is eligible to receive interests. In some cases where there is a longer interval between occurrence of injury and court decision, the actual amount of money awarded by the court might be very similar as if the treble (multiple) damages were available. In addition, the multiple damages have as primary goal the punishment of the infringer and not the restitution of the injury.

3. PRACTICAL ISSUES

● Are the courts before which actions for damages are brought able to appropriately deal with this kind of cases? Are these courts specialised? Do you support the specialisation of the judges or courts in this field?

The courts before which these actions are brought are not specialised; however, they are specialized in wider sense to issues of commercial law. The actions for damages are dealt with by the Regional Courts being placed on the second stage of the Czech court hierarchy. It is presumed, that judges at Regional Courts has bigger expertise and longer experience to deal with more complicated cases. However, due to the lack of decided cases and only several pending cases it is difficult to evaluate, whether these courts are able to deal with actions for damages caused by infringement of competition law.

Another open issue is whether the two High Courts deciding on appeals against decisions of Regional Courts will satisfactorily play the integrative role, i.e. to ensure the homogenous (uniform) application of the competition law by the Regional Courts. As concerns the EC competition law, the role of the Commission and the Office as the AMICUS CURIAE (see above) can help.
However, we support the specialisation and centralisation of judiciary in the competition matters in the Czech Republic. Specialization will be favourable, for antitrust cases are markedly specific and even for specialized antitrust bodies often represent tasks for several months of intensive work. As regards institutional matters, the specialisation can go either in the direction of creating new special judicial body, or engaging (appointing to the current courts) experts on competition law or engaging the antitrust authorities.

In our opinion, there is number of strong arguments for specialisation and centralisation of judiciary in the competition matters in the Czech Republic. The Czech Republic is too small to have enough expert judges for ten civil courts and two administrative courts competent to deal with antitrust cases. The lack of expertise could theoretically hamper the uniformity of competition law (strongly based on case law). The specialisation of several judges at one court at the first instance dealing with both civil cases and judicial review of administrative decisions might be a viable solution. These judges could be trained in competition law and could be able to follow the development of the competition law. Such specialisation is unusual in the Czech Republic’s judicial system, but it is common in other countries, and the reasons for establishing it are very clear.

- Do the costs of action for damages deter the victims of breaches of competition law from bringing such action? How can these costs be reduced (e.g.: by limiting the sums the claimant has to pay prior to the proceedings, by developing success fees etc.)?

The costs of action for damages is one of the main factors deterring the victims of breaches of competition law from bringing such action, along with anticipated length of the trial and possible scepticism about the success of the claim (as to the calculating the fees, we refer tu subquestion 2.1., first point). As a general rule, the party having lost the case must pay all the expenses incurred by the winner connected with civil litigation (court fees, costs of legal representation by attorney etc.). Both duties can deter individual victims to bring an action to the court (however, there are more effective deterrents).

As a remedy, we would suggest introduction of class actions or other way of joining more individual victims together to pursue their claims collectively. This could lead to concentration of resources for effective participation in the civil proceeding as well as distribution of the costs. On the other hand, the scepticism is justifiable as regards the introduction of one-way shifting of costs of private litigation. This could lead to unsubstantiated or even abusive filings.

As regards these costs, several measures could be taken into consideration. Similar to Option 27 of the Green Paper, there should be a discretion power of the court, especially if the claimant is consumer or an organisation of consumers, to order at the beginning of the trial that the claimant not be exposed to any cost recovery even if the action were to be unsuccessful in the precondition that the brought action is not manifestly unreasonable.

It is also possible not to demand court fees (at least as regard consumers) in the antitrust damages actions (if the action is not manifestly unreasonable) or to widen the reasons allowing the court to relief claimant from the fee.

Concerning reducing the costs, the above-proposed liaison with public enforcement could help - joint proceeding concerning commitment of the infringement may reduce
excessive usage of competing expert evidence brought by the parties, probably very expensive and potentially not fully credible. It is the expert evidence, which is the most expensive part of the trial, connected with related protraction of the trial.

● In your view, what other concrete measures could help encourage this kind of actions?

Important issue is sufficient public awareness and information about the possibility of private claiming antitrust damages itself and the way to achieve it among relevant business participants, including consumers. The antitrust law is (especially among the non-professionals) connected primarily with the public enforcement and administrative sanctions; there is maybe too poor knowledge among consumers or even businesspersons of the possibility to effectively compensate their own losses thanks to private claims.

Anticipated length of the proceeding is also an important deterrent factor. If the intention of the whole project is to encourage damages actions, it is clear that the agenda of competent bodies will potentially be extended; corresponding measures regarding personal and technical equipment are thus necessary, with respect to the length of the proceedings too.

4. SPECIFIC ISSUES

Invalidity of clauses or agreements which restrict competition.

● Can judge before which the matter has been brought pronounce the invalidity of clauses or agreements that restrict competition?

Yes, such a clause or the whole agreement is absolutely invalid for incompatibility and conflict with legal provision and so the judge can pronounce this invalidity in a declaratory way.

● What are the consequences of such decision? Can the injured party claim for damages? Does the “nemo auditur” saying prevent the party, which signed the agreement to invoke invalidity or to claim for damages?

Any injured party can generally claim for damages. However, the contribution of the claimant to the infringement of the antitrust proposition has to be taken into account. If the claimant co-induced the infringement, the amount of damages would be proportionally reduced, if not excluded at all. The right of the party to the agreement distorting competition to claim for damages depends on its role in negotiation and implementation of the anticompetitive behaviour. In the Czech law, it seems necessary to apply per analogiam the rule set by the Article 441 of the Civil Code. According to this provision, if the loss is partly caused by the injured person, the amount of damages is lowered accordingly. It is necessary to bear in mind, that both parties of the prohibited cartel agreement breached the Article 81 of the Treaty. In such cases, the contribution of the injured party to the infringement (whether the petitioner was forced to adopt such agreement or whether it was an instigator) has to be established and according to result of such analysis the appropriate amount of damage is awarded. Due to the application of the above rule, in some cases even a party being able to prove all the elements necessary for the award of damages (breach of competition law, loss and causal nexus) may not be awarded damages at all. We believe that such system is in

There is a provision involved in Czech Commercial Code (Section 268) that stipulates following: the person who caused invalidity of a legal act, is obliged to pay damages to the recipient of the act, unless this recipient knew about the invalidity of the legal act. That means that a mutual damages claims among the parties to the cartel agreement substantiated by the invalidity of the agreement do not seem available for the parties knowing (or at least having to know) about the invalidity of the agreements.

**International dimension: competent court and applicable law**

- In your jurisdiction, can action for damages be brought by foreign victims, or in respect of breaches of competition law committed abroad? Under which conditions? How can “forum shopping” be prevented?

It is possible to bring an action by foreign victim. With reference to the national study it can be said, that in accordance with Section 49 of Act no. 97/1963 Coll., on International Private and Procedural Law, as amended (“Zákon o mezinárodním právu soukromém a procesním”) (“IPL Act”) the standing of a foreign person in proceedings before Czech courts is governed by the rules of his/her jurisdiction. However, it is sufficient that the person has standing under Czech law.

Section 1 (5) of the Competition Act stipulates, that this Act shall be applied also to conduct committed abroad, if the consequences have or may have infringed the effective competition in the Czech Republic.

The Czech courts are competent to deal with the actions for damages caused by the breach of antitrust law (either Czech or EC) if at least one of the following conditions is met:
- the defendant has its place of residence, place of business or seat in the Czech Republic,
- the defendant has property in the Czech Republic,
- the defendant, which is a foreign person, has a business or a business branch in the Czech Republic,
- the event triggering the claim for damages occurred in the Czech Republic (see Articles 85, 86 and 87 of the CPC) or
- the parties to the dispute have agreed on the jurisdiction of Czech courts (see Article 37 of the Act No. 97/1963 Coll.).

The question of the applicable substantive law should be resolved in favour of the place where the damage occurs (as in Option 31 of the Green paper) while this could be apparently expedient primarily for the victim of the infringement. As proposed in Option 34 in the Green paper, the claimant should be given the choice to determine the law applicable to the dispute in cases in which the territory of more than one state is affected by the anticompetitive behaviour.

**Forum shopping** can be (to certain extent) prevented by consistent harmonisation of the conditions and unifying of the relevant both substantive and procedural rules as well as judicial practice. Due to the strict standard of proof previously described that is currently
applied by the Czech courts we do not deem the international forum shopping represents currently a real problem in the Czech Republic.

● What do you think of arbitration as an alternative means of resolution of actions for damages?

The settlement of the dispute, meditation or at least preserving confidentiality thanks to arbitration are important issues for the defendant. Sometimes the infringer may tend to settle the case, pay the damages and remain undiscovered rather than to face judicial trial with the risk of following administrative proceeding before the antitrust body.

So for the private enforcement arbitration represents a useful tool facilitating and potentially encouraging damages actions while for the public enforcement it is one of the possible ways of raising the chances to avoid imposing a penalty. Arbitration might become an alternative to judicial proceedings, especially in cases including parties from abroad. The arbitration is preferred by many companies due to its rapidness in comparison to lengthy judicial proceeding. The actual frequency of arbitration in damage claims will depend on the willingness of parties to agree on that mean of resolution.

Although arbitration plays a prominent role in business relations, the capability in antitrust cases may be limited.

At least two obstacles of broader use of arbitration in private enforcement of competition law are obvious. First: the reluctance of the arbitrators to answer a difficult question whether antitrust laws were infringed does not seem to be less intensive than the unwillingness of the judges to make so; second: an arbitration clause has to be concluded before the settlement. It is not probable that the parties to the cartel agreement will be ready to do so before the cartel will be officially revealed. And then the advantage of secrecy and confidentiality would disappear anyway and the possibility to achieve a settlement (even before a court) will remain. If the central and decisive role of antitrust authorities as to the detecting whether the anticompetitive infringement occurred will apply, then the same subordinated position, as the courts would have to the antitrust authorities, would have to be prescribed for the arbitrators and arbitration courts, as well.

5. CONCLUSION

● Do you think the applicable regime in your jurisdiction is satisfactory? If not, do you think it should be profoundly modified, or, on the contrary, only be modified as regard the main issues interfering with the development of actions for damages?

The applicable regime in the Czech Republic allows from theoretical point of view only damages actions based on the breach of competition law, or put it in a more realistic way, it does not exclude it. Czech law does not pose any utter obstacle to the private enforcement system. The attempt to make any practical steps would nevertheless lead to very uncertain results.

There is a broad range of issues that presumably discourages plaintiffs from claiming damages incurred as a result of violations of competition law. Several measures could be taken to modify the system to encourage victims in claiming damages. There surely are
victims with their certain losses as a result of existing antitrust breaches, so it is the right way to help to compensate these losses and recover the illegal gain.

Probably some important changes in the legal order would be inevitable, such as enabling the collective (representative) actions, probably establishing special competition courts or special competition senates (panels) of general courts, defining the competence lines between the courts and competition authority as to the decision on infringement of competition laws etc.

As stated above, modifications described in particular sections of this report should be made in harmony with the information campaign.

Generally, the current system seems to be unsatisfactory and offers small potential for private litigations. Should the private enforcement of the EC competition law become a real alternative in the Czech Republic, the system would need profound modifications, mainly as concerns procedural rules on the conduct of the judicial proceeding. Among others, the introduction of substantial incentives for private parties to bring their cases before courts, the preferential access to the evidence for the plaintiffs, modification of the rule that the exact amount of injury suffered must be in every single case calculated and proved might be highly recommended.

● In your jurisdiction, what are the three major difficulties (or legal obstacles) for the development of action for damages for breach of competition law, as well as the most appropriate measures to remedy these difficulties?

Resulting from the above described facts and introduced argumentation, if we are to produce the three major difficulties for the development of action for damages, as for the practical issues (not speaking of the poor public awareness) we have to mention primarily the general deterring factors of the whole damages actions area:

a) problems with the burden of proof and access to evidence,
b) the impossibility to bring a collective actions,
c) delimitation of range of powers between the courts and the competition authority as to the authoritative decision on infringement of antitrust laws

As regards the burden of proof (and costs of the trial), the remedies might be to a certain extent connected; a highly eminent aspect, especially for consumers, is that they often do not claim any damages (generally) because of the risk that the costs of the trial will be too high, in some cases even higher than the amount of damages claimed and that according to the (relatively) tiny amount of their injury it is not worth to endure the hassle of a judicial trial. Moreover, the inconvenience with evidence and proving all the allegations they brought in the action brings the danger of losing the trial without any success. It is extremely difficult to calculate and prove the exact amount of injury and loss of profit incurred, although both seem to be prerequisite of the successful private action. In this regard, the adoption of generally applicable guidelines for calculation of damages and introduction of lump sum damages could help.

Shifting the burden of proof onto the defendant seems to be a too hard measure. Under some conditions it is acceptable in follow-on cases where a final decision of antitrust body had been pronounced, but only hardly acceptable in a stand-alone cases before the court,
where the alleged infringer would be deprived of effective defence. Sometimes the only proof of not committing the infringement of antitrust laws might be a final decision of the antitrust authority after a complicated proceeding had been conducted. A dangerous reverse principle might occur, namely as concerns fault, unless proven the opposite. In addition, it is often impossible to prove someone’s innocence (unlike the fault); similarly it is possible to prove infidelity unlike fidelity. The danger of chicanery abuse of such possible shifting the burden of proof is obvious. The proceeding before the competition authority is not governed by the principle of compulsory opening the proceeding whenever any rise to proceeding is given; it is completely up to the competition authority whether it opens the proceedings or not.

The introduction of collective actions and actions of consumer associations specialized in the antitrust damages actions could significantly help.

The costs of the judicial proceeding should not be automatically born by the defendants – it is again an unsubstantiated reversal of the principle of innocence and an incentive to give raise to unduly substantiated and chicanery actions.

The court should be given the opportunity to dismiss any manifestly unsubstantiated action in order to avoid useless and chicanery disputes. Supposed that there will be no specialized competition courts or competition panels, for that reason it might suffice to have a decision of the competition authority as an answer to preliminary question.

As regards the length of the proceeding, the increasing number of claims would deserve the strengthening the personal and technical equipment of the competent machinery (whatever it will be).

Private enforcement is expensive for parties. An injured party considers the costs of the judicial proceeding and the likelihood whether it wins the case (and thus has all the costs recovered) or that it loses (and thus has to pay the costs of the defendant) before it brings an action. Introduction of class actions of consumer associations could mitigate this problem.