

## Private Enforcement of Competition Law in Slovenia: A New Field to Be Developed by Slovenian Courts\*

by

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\* This article is based on the national report for Slovenia, written in the framework of the project 'Comparative Private Enforcement and Consumer Redress in the EU', led by Professor Barry Rodger, Strathclyde University Law School and financed by Arts & Humanities Research Council (UK). The details of the project as well as the national report can be found at [www.clpecreu.co.uk](http://www.clpecreu.co.uk).

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### ***Abstract***

This contribution aims to demonstrate the legal framework that can shape and influence private enforcement in Slovenia. This includes, in particular, conditions for damage claims, collective redress mechanisms, legal costs and fees as well as discovery and burden of proof. It is shown which legislative changes may be needed in order to improve the effectiveness of private enforcement and the practical obstacles that will have to be overcome in the future. Furthermore, the article analyses the jurisprudence of Slovenian courts concerning private enforcement. Although there was practically no jurisprudence in this area only a few years ago, Slovenian courts have now ruled on a few such cases already. The number of private enforcement proceedings will most likely increase in the future. Therefore, it can be stated that private enforcement of competition law is an area that is slowly, but steadily, gaining importance in the Slovenian legal system.

### ***Résumé***

La présente contribution vise à démontrer le cadre juridique susceptible de former et d'influencer la mise en œuvre des règles de concurrence de l'UE à l'initiative de la sphère privée (« *private enforcement* ») en Slovénie. Les conditions pour des recours en dommages et intérêts, des mécanismes des recours collectifs, des règles sur des dépenses ainsi que la divulgation des preuves et la charge de la preuve y sont analysés. La contribution démontre quelles modifications législatives seraient nécessaires et quelles obstacles pratiques devront être surmontés à l'avenir afin d'améliorer l'effectivité de ce type de mise en œuvre du droit de la concurrence. La jurisprudence des juridictions slovènes dans ce domaine-là est également analysée.

Même si cette jurisprudence a été pratiquement inexistante il y a quelques années, les juridictions slovènes ont déjà rendu quelques arrêts dans ce domaine et il est à attendre que le nombre de ce type d'affaires accroîtra dans le futur. Ainsi, il est possible de constater que l'importance de ce type de mise en œuvre du droit de la concurrence augmentera lentement – sûrement dans l'ordre juridique slovène.

**Classifications and key words:** antitrust damage; collective redress; evidence; nullity; private enforcement of competition law; public enforcement of competition law; Slovenia.

## I. Introduction

Private enforcement of competition law is a relatively new issue for Slovenian courts, most likely because the market economy, as well as the legislation concerning competition law, was introduced only after the country gained its independence in 1991. The development of private enforcement of competition law in Slovenia has been gradual and is still in the process of development. Seen from this viewpoint, it was necessary to not only develop markets but also mechanisms of monitoring the effectiveness of competition. The legal framework governing these monitoring mechanisms, both public and private is certainly an important factor in this regard. This article aims to show, on the one hand, the legal framework that can shape and influence private enforcement in Slovenia. This includes, in particular, conditions for damage claims, collective redress mechanisms, legal costs and fees as well as discovery and burden of proof. It is shown which legislative changes may be needed in order to improve the effectiveness of private enforcement and the practical obstacles that will have to be overcome in the future. On the other hand, the article analyses the jurisprudence of Slovenian courts concerning private enforcement.

## II. National legal framework regarding private enforcement

### 1. Legal basis and legislative changes

Slovenia reformed its competition law in April 2008 by adopting a new competition act<sup>1</sup> – the Prevention of the Restriction of Competition Act

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<sup>1</sup> The National Assembly adopted the Act on 01/04/08. The Act was published in the Official Journal of the Republic of Slovenia (hereafter, OJ RS) on 11/04/08 and, according to its Art. 84, entered into force on the fifteenth day after the publication in the OJ RS.

(in Slovenian: *Zakon o preprečevanju omejevanja konkurence*; hereafter, Competition Act)<sup>2</sup> which entered into force on 26 April 2008. The Competition Act introduced important changes to the field of private enforcement of Slovenian competition rules (Art. 6 and 9 of Competition Act), as well as of EU competition law (Articles 101 and 102 TFEU). According to Art. 62 of Competition Act:

Article 62

(Compensation)

- (1) Anyone violating, either deliberately or negligently, the provisions of Articles 6 or 9 of this Act or Articles 81 or 82 of the EC Treaty [Articles 101 and 102 TFEU] shall be liable for any damages arising from such an infringement.
- (2) If the damage was caused by an infringement of Articles 6 or 9 of this Act or Articles 81 or 82 of the EC Treaty [Articles 101 and 102 TFEU], the court is bound by the final decision finding an infringement rendered by the [Competition Protection] Agency and the European Commission. This obligation does not influence the rights and obligations stipulated in Article 234 of the EC Treaty [Article 267 TFEU].
- (3) The statute of limitations for damage claims referred to in the first paragraph of this Article shall be suspended from the date of initiating proceedings before the [Competition Protection] Agency or the European Commission to the date when such proceedings are given a final conclusion.
- (4) The court must immediately inform the [Competition Protection] Agency of any action brought before it, demanding compensation on the grounds of infringement of Articles 6 or 9 of this Act or Articles 81 or 82 of the EC Treaty [Articles 101 and 102 of the TFEU]<sup>3</sup>.

This provision was introduced in accordance with EU competition policy; it is in line with the recommendations of the Commission's White Paper<sup>4</sup> and Commission Staff Working Paper on Damages Action for Breach of the EC antitrust rules<sup>5</sup>.

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<sup>2</sup> OJ RS, No. 36/2008, 40/2009, 26/2011, 57/2012, 39/2013 Odl.US: U-I-40/12-31, 63/2013-ZS-K.

<sup>3</sup> This unofficial translation of the Competition Act can be found at [www.uvk.gov.si/fileadmin/uvk.gov.si/pageuploads/ZPOMk-1\\_-\\_ang.pdf](http://www.uvk.gov.si/fileadmin/uvk.gov.si/pageuploads/ZPOMk-1_-_ang.pdf). Note that this translation erroneously contains the indication 'Treaty on the European Union' instead of 'EC Treaty'. This has been changed for the purposes of this citation. Furthermore, the terminology from this translation has been partially changed for the purposes of this article to correspond with the terminology used in EU competition law.

<sup>4</sup> White Paper on Damages Actions for Breach of the EC antitrust rules (COM(2008) 165, 2.4.2008).

<sup>5</sup> Commission staff working paper accompanying the White paper on damages actions for breach of the EC antitrust rules (SEC(2008) 404, 2.4.2008).

## 2. Conditions for the award of damages

According to Slovenian law, damages are awarded if four conditions are fulfilled:

1. infringement of competition rules (Article 6 or 9 of Competition Act or Article 101 or 102 TFEU);
2. damage;
3. fault (intentional or negligent);
4. a causal link between the infringement and the damage claimed.

### 2.1. Infringement of national or EU competition rules and fault

Slovenian provisions on private enforcement allows claims for damages for both the infringement of EU competition rules, Article 101 and 102 TFEU, as well as for their national equivalents, Article 6<sup>6</sup> and 9 of Competition Act<sup>7</sup>.

Article 62(1) of Competition Act states: 'Anyone violating, either deliberately or negligently, the provisions of Art. 6 or 9 of this Act or Art. 101 or 102 TFEU shall be liable for any damages arising from such an infringement'. According to general civil law rules, it is the *damage* that must be caused deliberately or negligently<sup>8</sup>, while Competition Act clearly states that the *infringement* (and not the damage) must be committed deliberately or negligently to permit a claim for damages. If the damage is caused by several persons jointly, or where there is no doubt that the damage was caused by one of two or more concerned persons, who are somehow linked to each other, but it is impossible to establish who among them actually caused the damage, these persons shall be jointly and severally liable<sup>9</sup>.

### 2.2. Damages and casual link

Slovenian law on damages, the function of which is reparatory and preventive rather than punitive, rests on the principle of full and single compensa-

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<sup>6</sup> Art. 6 Competition Act prohibits restrictive agreements, that is, '[a]greements between undertakings, decisions by associations of undertakings and concerted practices of undertakings [...] whose object or effect is the prevention, restriction or distortion of competition in the Republic of Slovenia'.

<sup>7</sup> Art. 9 Competition Act prohibits the abuse of a dominant position. Accordingly, '[a]n undertaking or several undertakings shall be deemed to have a dominant position when they can act independently of competitors, clients or consumers to a significant degree'.

<sup>8</sup> Fault exists, when the person causes the damage deliberately or with negligence. Art. 135 Code of Obligations (*Obligacijski zakonik (OZ)*), OJ RS, No. 97/2007 (official consolidated version).

<sup>9</sup> Art. 186(1) and (4) Code of Obligations.

tion<sup>10</sup>. The general principle of full compensation for material damages is found in the Code of Obligations. The Code states that, by taking into account the circumstances arising after the damage, the court should award compensation in the amount that is necessary to restore the claimant's financial situation to what would have existed if the act causing the damage had not been committed<sup>11</sup>. Defendants can rely on the passing-on defence seeing as the focus lies on the position of the person that suffered damage or, better said, with the damage itself, and the compensation should not exceed it<sup>12</sup>.

The claimant has the right to compensation for three types of damages: ordinary damage (lessening of assets – *damnum emergens*), lost profit (prevention of the augmentation of assets – *lucrum cessans*) and non-material damage (harm to the reputation of a legal person)<sup>13</sup>.

It is difficult to prove lost profit in the context of damage actions for the breach of competition rules. The Code of Obligations contains a broad definition of lost profit. In its assessment, the profit that should be taken into consideration is that which could have been justifiably expected to occur taking into account an ordinary course of events or special circumstances, but which was not achieved because of the act of the person who caused the damage<sup>14</sup>. The notion of profit is a typical economic category and is close to the notion of net profit as revealed in an income statement. It reflects the difference between the revenues that the person suffering a damage would have acquired in the absence of the offence, and the expenses that he/she would have incurred in order to accumulate these revenues<sup>15</sup>. The degree of likelihood expected in this context must exceed 50 per cent. Furthermore, to calculate the profit, an ordinary course of events (business as it could have been foreseen in view of past operations) or special circumstances (e.g. opening-up of markets, recession) should be considered. It is thus very difficult to prove the amount of expected business (ordinary course of events) where the claimant intended to merely start his/her activities but the contested practice prevented the realisation of such plans. In such cases, an appropriately detailed analysis of the situation of the market will be needed<sup>16</sup>.

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<sup>10</sup> Compare Plavšak, [in:] Plavšak, Juhart, Vrenčur, *Obligacijsko pravo. Splošni del*, GV Založba, Ljubljana, 2009, p. 617.

<sup>11</sup> Art. 169 Code of Obligations.

<sup>12</sup> Jadek Pensa, [in:] Plavšak, Juhart, Jadek Pensa, Kranjc, Grilc, Polajnar Pavčnik, Dolenc, Pavčnik, *Obligacijski zakonik s komentarjem*, Vol. 1, GV Založba, Ljubljana 2003, p. 919.

<sup>13</sup> Art. 132 Code of Obligations.

<sup>14</sup> Art. 168(3) Code of Obligations.

<sup>15</sup> For more on lost profit, see Plavšak, [in:] Plavšak, Juhart, Vrenčur, *Obligacijsko pravo...*, p. 622 et seq.

<sup>16</sup> Plavšak, [in:] *Obligacijski zakonik s komentarjem*, p. 948–951.

The burden of proof with regard to damages lies with the claimant. However, when a claim is well-founded, and it is only the exact amount of the compensation that cannot be determined, or if the determination thereof would cause unreasonable difficulties, setting the amount shall be left to judicial discretion<sup>17</sup>. Judicial discretion is not based upon guess-work, however, but on the presented facts instead. Facts cannot be merely hypothetical; the claimant must present them very clearly so that a discretionary calculation of the amount of damage is possible<sup>18</sup>. Case-law indicates that courts do refer to judicial discretion when it is not possible to calculate with mathematical precision the actual amount of damage<sup>19</sup>.

Finally, the casual link between the infringement and the damage must be established. The Slovenian Code of Obligations does not contain any specific rules on the causal link. The determination of a causal link requires, according to Slovenian doctrine, the assessment of the (un)predictability of certain consequences, of the adequacy of the consequences in relation to the cause (the theory of adequate causation), of the protective purpose of the norm (the theory of *ratio legis* causation), an interruption of the causal link (*novus actus* or *nova causa interveniens*) and of direct and indirect causation<sup>20</sup>.

### 3. Jurisdiction

#### 3.1. Territorial jurisdiction: civil procedure

The Slovenian legal system does not have specialised courts to decide private enforcement cases. Consequently, they should be brought before ordinary civil courts. The jurisdiction to decide civil procedures (in the first instance) is vested in district (*okrajna*) and circuit (*okrožna*) courts<sup>21</sup>. The general delineation of their competences is based on the value of the dispute: those up to the value of 20.000 EUR are decided by district courts, all other disputes by circuit

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<sup>17</sup> Art. 216 Civil Procedure Act (*Zakon o pravdnem postopku (ZPP)*), OJ RS, No. 73/2007 (official consolidated version).

<sup>18</sup> II Ips 769/2006 and II Ips 770/2006, judgment of the Supreme Court of 25/09/08, II Ips 82/2005 judgment of the Supreme Court of 25/01/07.

<sup>19</sup> Wedam Lukić, [in:] Ude, Betetto, Galič, Rijavec, Wedam Lukić, Zobec, *Pravdni postopek, zakon s komentarjem*, Vol. 2, GV Založba, Ljubljana 2006, p. 398.

<sup>20</sup> Jadek Pensa, [in:] *Obligacijski zakonik s komentarjem*, p. 672. Compare, in the older theory, also Strohsack, *Odškodninsko pravo in druge neposlovne obveznosti*, ČZ Uradni list RS, 1990, p. 33 et seq.

<sup>21</sup> Art. 99 and 101 Courts Act (*Zakon o sodiščih (ZS)*), OJ RS, No. 94/2007 (official consolidated version), 45/2008. According to Art. 114 and 115 of the Courts Act, there are 44 district and 11 circuit courts.

courts<sup>22</sup>. However, circuit courts have jurisdiction irrespective of the value of the subject-matter in disputes concerning the protection of competition<sup>23</sup>. These jurisdictional rules are applicable in cases where competition law is applied *à titre principal*. Even if the circumstances upon which jurisdiction is based change during the course of the proceedings, the court that assumed jurisdiction upon the filing of the action shall retain it, even though the changes concerned would otherwise confer jurisdiction on another court of the same type<sup>24</sup>. Furthermore, circuit court decide competition disputes always as a panel<sup>25</sup>. A circuit court panel consists of one professional judge, who is the presiding judge, and two lay judges<sup>26</sup>.

A judgment rendered in the first instance in a civil case can be appealed before a High Court<sup>27</sup> within fifteen days from the day of the delivery of a copy of the judgment<sup>28</sup>. The High Court rules on the case in a panel consisting of three judges<sup>29</sup>. It is also possible to fill for an extraordinary judicial review, provided that certain conditions are fulfilled (revision and petition for protection of legality which are decided by the Supreme Court, and the reopening of the proceeding).

### 3.2. Potential inconsistencies between civil and administrative procedures

Decisions of the Competition Protection Agency (previously known as Competition Protection Office<sup>30</sup>), which can be used by the claimants as the basis for a follow-up action, can also be appealed. This is true for decision issued via the administrative procedure and those delivered via the minor offences procedure. Such an appeal model can lead to inconsistencies concerning substantive questions of competition law because jurisdiction for

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<sup>22</sup> Art. 30 and 32 Civil Procedure Act. The delineation line of 20.000 EUR began to be applied on 01/01/10; before that date the delineation line was 8.345,85 EUR.

<sup>23</sup> Art. 32(2) Civil Procedure Act.

<sup>24</sup> Art. 32(3) Civil Procedure Act.

<sup>25</sup> Art. 34 Civil Procedure Act.

<sup>26</sup> Art. 33(3) Civil Procedure Act.

<sup>27</sup> There are four high courts in Slovenia: High Court in Celje, High Court in Ljubljana, High Court in Koper and High Court in Maribor. See Art. 116 Courts Act.

<sup>28</sup> Art. 333(1) Civil Procedure Act.

<sup>29</sup> Art. 36 Civil Procedure Act.

<sup>30</sup> The Competition Protection Office was transformed into the Competition Protection Agency with the Ruling on the establishment of the Slovenian Competition Protection Agency (*Sklep o ustanovitvi Javne agencije Republike Slovenije za varstvo konkurence*, OJ RS Nos. 61/2011, 105/2011, 64/2012). The Agency started to operate on 01/01/13 and took over all the competences and cases of the Office. This article refers thus to the notion of 'Agency', except when expressly noting a decision of the Office issued before 01/01/13.

administrative procedures is conferred to the Administrative Court<sup>31</sup>, and oversight over the minor offences procedures is lodged with the District Court in Ljubljana<sup>32</sup>. The decision of the District Court in Ljubljana can be further appealed to the High Court in Ljubljana (division for minor offences).

It is difficult to avoid inconsistencies in a system in which three different courts are competent to review competition matters: the High Court in civil cases, the Administrative Court in administrative cases, and the District Court in Ljubljana/High Court in Ljubljana in minor offence cases. One potential mechanism to avoid these inconsistencies is for a party to request extraordinary judicial review if particular conditions are fulfilled. Another, and possibly more important, mechanism lies in the fact that the Competition Protection Agency is served with the court rulings in both the administrative and minor offences procedures while civil courts must immediately inform the Agency of any damage actions submitted for the breach of competition rules<sup>33</sup>.

### 3.3. International jurisdiction

The provisions of the Brussels I Regulation<sup>34</sup> are applicable to damages suffered either in another Member State or by a company or a consumer resident in another Member State. According to its Article 2(1)<sup>35</sup>, the general jurisdictional rule is *actor sequitur forum rei*. Seeing as this is clearly a general rule only, it is likely that claimants will try to establish jurisdiction in their Member State on the basis of specific provisions regarding jurisdiction for damage claims. The jurisdiction for damage claims is regulated by Article 5(3) of the Brussels I Regulation. Accordingly, a person domiciled in a Member State may, in another Member State, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur<sup>36</sup>. The most important factor in determining jurisdiction is the

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<sup>31</sup> Art. 56 Competition Act.

<sup>32</sup> Art. 214(5) Minor Offences Act (*Zakon o prekrških (ZP-1)*), OJ RS, No. 3/2007 (official consolidated version), 17/2008.

<sup>33</sup> Art. 62(4) Competition Act.

<sup>34</sup> Council Regulation (EC) No 44/2001 of 22/12/00 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ [2001] L 12/1). As of 10/01/15, the new Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12/12/12 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ [2012] L 351/1.

<sup>35</sup> According to Art. 2(1) of this regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

<sup>36</sup> The jurisprudence of the ECJ on the interpretation of Art. 5(3) of the Brussels I Regulation is well developed. See, e.g., cases: C-509/09 *eDate Advertising e.a.*, not yet reported; C-523/10 *Wintersteiger*, not yet reported; C-133/11 *Folien Fischer and Fofitec*, not yet reported.

place where the action was committed or where the damage occurred<sup>37</sup>. If either of the two takes place on Slovenian territory, Slovenian courts acquire jurisdiction. This means in practice that if a cartel was ‘committed’ in Slovenia, but the claimant suffered damages in another Member States, he/she can bring an action before a Slovenian court. In cases where the claim comes from consumers, the specific rules stemming from Articles 15 to 17 of the Brussels I Regulation apply<sup>38</sup>.

#### 4. Procedural standing

The general provisions of the Civil Procedure Act on procedural standing apply also in competition law cases. There are no special provisions concerning standing in the area of competition law or with regard to private enforcement issues, despite the fact that the Civil Procedure Act allows for a special provision to define parties to the procedure other than natural or legal persons. The same conditions apply also to domestic or foreign companies or consumers.

##### 4.1. Collective redress mechanisms

With regard to collective redress mechanisms, neither class actions nor representative actions are allowed by the Slovenian legal system. Bodies representing public interests or consumer associations cannot intervene in private enforcement proceedings also because they cannot prove their legal interest<sup>39</sup>. The existence of a party’s legal interest can be proven only if the judgment rendered in a dispute between other parties would also indirectly affect the party’s legal position<sup>40</sup>. However, according to Article 76(3) of the Civil Procedure Act, the court may in exceptional cases and with legal effect limited to a specific case award procedural standing also to other forms of associations, when they meet the essential conditions to sue or to be sued, especially if they have assets that can be subject to enforcement.

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<sup>37</sup> For a more in-depth analysis of the possibility of determining jurisdiction on the basis of Art. 5(3) of the Brussels I Regulation, see for example D.-P. Tzakas, ‘Effective collective redress in antitrust and consumer protection matters: A panacea or a chimera?’ (2011) 48(4) *Common Market Law Review* 1161 et seq.

<sup>38</sup> For jurisprudential interpretation of specific rules on jurisdiction in consumer cases, see e.g. cases: C-180/06 *Ilseger*, ECR [2009] I-03961; C-585/08 *Pammer in Hotel Alpenhof*, ECR [2010] I-2527; C-190/11 *Mühlheimer*, not yet reported; C-419/11 *Česká spořitelna*, not yet reported.

<sup>39</sup> According to Art. 199(1) of the Civil Procedure Act, only a person who has a legal interest with respect to the subject of the proceedings between the parties may join the litigation in favour of the party whose interest in victory he/she shares.

<sup>40</sup> Ude, [in:] *Pravdni postopek...*, p. 266.

Nevertheless, in case of multiple actions against the same defendant, there are two ways to group them. On one hand, courts may join cases with the same subject matter. In other words, if there are several cases in which the same entity is the defendant of several plaintiffs before the same court, the court may adopt a decision that those cases should be heard jointly to speed up the proceedings or to reduce costs<sup>41</sup>. On the other hand, the Slovenian legal system offers the claimants the system of 'co-litigation' (*litis consortium*), which is a form of aggregation of individual claims where several persons sue or are sued in the same action. According to the Civil Procedure Act, several claimants may sue in the same action if two conditions are fulfilled: the disputed claims are of the same type and are based upon substantially homogeneous factual and legal grounds, and if the same court has jurisdiction to hear all of the claims<sup>42</sup>. However, there are as many procedural relationships as there are claimants, since each of the co-litigants acts as an independent party to the litigation<sup>43</sup>.

#### 4.2. Indirect purchasers

According to general rules on damage liability in Slovenian law, an indirectly injured person does, in principle, enjoy legal protection<sup>44</sup>. However, it is unclear how such an indirect purchaser would prove the existence of a causal link between the damage suffered and the supposedly illegal conduct of a competition law offender. Just as in any other case concerning damages, the burden of proof to evidence the existence of a causal link must be borne by the indirect purchaser him/herself. The court will then determine whether the given end effect necessarily results from a given cause<sup>45</sup>.

### 5. Evidence and burden of proof

Producing evidence plays the most important role in damage actions, but unfortunately there are no provisions which would facilitate collecting evidence in cases involving breaches of competition rules. The decision on which facts are considered to be proven is taken by the court after carefully and thoroughly evaluating every individual piece of evidence, as well as the evidence as a whole, and after considering the outcome of the entire proceedings<sup>46</sup>.

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<sup>41</sup> Art. 300(1) Civil Procedure Act.

<sup>42</sup> Art. 191(1) Civil Procedure Act. In theory, see Betetto, [in:] *Pravdni postopek...*, p. 240.

<sup>43</sup> Art. 195 Civil Procedure Act. See also [in:] *Pravdni postopek...*, p. 238.

<sup>44</sup> II Ips 875/2006, judgment of the Supreme Court of 07/12/06.

<sup>45</sup> II Ips 875/2006, judgment of the Supreme Court of 07/12/06.

<sup>46</sup> Art. 8 Civil Procedure Act.

### 5.1. Discovery and obtaining evidence from the opposing party

The general rule on presenting facts and producing evidence is contained in Article 7 of the Civil Procedure Act, which states, in paragraph 1, that the parties shall state all facts giving rise to their cause of action and shall adduce evidence proving these facts.

With regard to obtaining evidence from the opposing party, the latter is obliged to produce evidence even if it is not in his/her favour<sup>47</sup>. If a party identifies a document as evidence that supports its statements, asserting that such a document is in the possession of the opposing party, the court orders the latter to submit the document within a specified time<sup>48</sup>. The opposing party can defend him/herself by asserting that such a document is not in his/her possession and may produce evidence to determine the truth of this assertion<sup>49</sup>. Importantly also, it can refuse to produce such a document for the same reasons as a witness can refuse to testify<sup>50</sup>. However, the opposing party has an absolute duty to supply evidence in three situations<sup>51</sup>: (1) if the opposing party relies on the same evidence in support of his/her allegations in the same litigation (even if the motion for the admission of evidence was withdrawn afterwards<sup>52</sup>); (2) if the document has to be presented according to the law; and (3) if the content of the document relates to both parties to the litigation (i.e. when the document is produced for the benefit of both parties<sup>53</sup>).

As the court cannot force the opposing party to produce a requested document, the aforementioned court order is not a very effective mechanism for obtaining evidence from the opposing party. However, the court shall assess, taking into account all of the circumstances of the case, the significance of the fact that a party holding a document failed to comply with such order, or if the party asserts, contrary to the belief of the court, that he/she is not in possession of such document<sup>54</sup>. Failure to produce the document could be an indication that its content is unfavourable to the refusing party. Consequently, the court may conclude that the statements of the party referring to the content of that document are true<sup>55</sup>.

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<sup>47</sup> Zobec, [in:] *Pravdni postopek...*, p. 227.

<sup>48</sup> Art. 227(1) Civil Procedure Act.

<sup>49</sup> Art. 227(4) Civil Procedure Act.

<sup>50</sup> Art. 227(3) Civil Procedure Act.

<sup>51</sup> Art. 227(2) Civil Procedure Act.

<sup>52</sup> Zobec, [in:] *Pravdni postopek...*, p. 430.

<sup>53</sup> Zobec, [in:] *Pravdni postopek...*, p. 430.

<sup>54</sup> Art. 227(5) Civil Procedure Act.

<sup>55</sup> Zobec, [in:] *Pravdni postopek...*, p. 431.

Finally, entities other than parties to the proceedings may also be ordered to submit documents, but only if they are so obliged by law, or if the content of the requested document relates both to the person in possession thereof and to the party adducing it as evidence<sup>56</sup>.

## 5.2. Access to administrative file

The access of third persons to the administrative file is governed by the Act on the Access to Information of Public Character<sup>57</sup>, which ensures free access by anyone to public information held by, *inter alia*, state bodies and the reuse of such information<sup>58</sup>.

However, Competition Act contains special provisions that contradict the Act on the Access to Information of Public Character and enable the Competition Protection Agency to reject an applicants' request for information to protect the secrecy of sources and business secrets<sup>59</sup>.

## 5.3. Burden of proof

According to the Civil Procedure Act, the party that brings an action before a court shall state the facts and provide the evidence upon which his/her claims are based<sup>60</sup>. However, with regard to actions for damages, Article 131 of the Code of Obligations establishes liability of fault with a reversed burden of proof<sup>61</sup> – a person who causes damages to another has an obligation to remedy it unless he/she can prove that the damage occurred without his/her fault. Accordingly, the burden of proof for the three prerequisites of a damage claim (illegality, causation, and damage) lies with the claimant<sup>62</sup>, whereas the burden of proof for fault lies with the defendant.

## 6. Limitation periods

The statute of limitations is regulated in the Code of Obligations that distinguishes between the limitation periods for claiming damages resulting from

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<sup>56</sup> Art. 228(1) Civil Procedure Act.

<sup>57</sup> *Zakon o dostopu do informacij javnega značaja (ZDIJZ)*, OJ RS, No. 51/2006 (official consolidated version).

<sup>58</sup> Art. 1(1) Act on the Access to Information of Public Character.

<sup>59</sup> Art. 13b(4) Competition Act.

<sup>60</sup> Art. 212 Civil Procedure Act.

<sup>61</sup> I Cp 460/2008, judgment of the High court in Celje of 08/12/08.

<sup>62</sup> II Ips 874/93, judgment of the Supreme Court of 16/03/95, II Ips 626/96, judgment of the Supreme Court of 29/10/97.

non-contractual obligations and those resulting from contractual obligations. In the first case, the right of compensation is statute-barred three years after the injured party became aware of the damage and the identity of the person responsible<sup>63</sup>. In any event, this right becomes statute-barred five years after the occurrence of the damage<sup>64</sup>. In the case of damage resulting from contractual obligations, the right to compensation is statute-barred after a period of time fixed for the prescription of such contractual obligation<sup>65</sup>. Moreover, settled jurisprudence states that with respect to repeated practices, where multiple completed practices following each other within a short period of time, the limitation period shall commence from the day on which these practices entirely cease<sup>66</sup>.

However, Competition Act contains a provision which states that the limitation period is suspended from the day of the commencement of administrative proceedings before the Competition Protection Agency or the European Commission until the day on which the procedure is given a final conclusion<sup>67</sup>.

## 7. Legal costs and fees

With regard to procedural fees, it is important to analyse both court fees and attorney's fees.

### 7.1. Court fees

With regard to court fees, it is important to stress the difference between administrative and judicial procedures. No costs are associated with filing a complaint in administrative proceedings before the Competition Protection Agency. Court fees do apply in civil judicial procedures. The final amount of court fees will depend on two factors: the value and the type of the claim (quotient). For example, if a claim has a value of up to 300 EUR, the court fee will be 18 EUR. If the value of the subject matter of the dispute exceeds 500.000 EUR, the court fee increases to 110 EUR for each additional amount of 50.000 EUR<sup>68</sup>. These

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<sup>63</sup> Art. 352(1) Code of Obligations.

<sup>64</sup> Art. 352(2) Code of Obligations.

<sup>65</sup> Art. 352(3) Code of Obligations.

<sup>66</sup> Cp 991/99, judgment of the High court in Celje of 16/02/00.

<sup>67</sup> Art. 62(3) Competition Act.

<sup>68</sup> Art. 16 Court Fees Act. It is to be noted that the maximum court fee with the quotient 1.0 is 60.975 EUR. For the calculation of court fees with the quotient 1.0, see Appendix 1 of the Court Fees Act.

are the amounts for the calculation of court fees with the quotient 1.0. However, in filing an action for damages, the quotient is 3.0. Therefore, the court fee for filing an action for damages reflects a calculation of the amount of the court fee based on the value of the action multiplied by the quotient 3.0<sup>69</sup>. For example, if the value of the subject matter of the dispute is up to 300 EUR, the court fee is 54 EUR (3 x 18 EUR); if the value is up to 600 EUR, the court fee is 78 EUR (3 x 26 EUR), etc. However, if the parties reach a settlement, the quotient is 1.0 instead of 3.0<sup>70</sup>. This system is thus meant to promote settlement. The Court Fees Act also includes provisions that allow the financial situation of the parties to be taken into consideration<sup>71</sup>.

**Table 1: Amount of court fees with the quotient 1.0**

Value of the subject matter of the dispute up to ... EUR	Court fee [EUR]	Value of the subject matter of the dispute up to ... EUR	Court fee [EUR]
300	18	40.000	291
600	26	45.000	313
900	34	50.000	335
1.200	42	65.000	409
1.500	50	80.000	483
2.000	55	95.000	557
2.500	60	110.000	631
3.000	65	125.000	705
3.500	70	140.000	779
4.000	75	155.000	853
4.500	80	170.000	927
5.000	85	185.000	1.001
6.000	95	200.000	1.075
7.000	105	230.000	1.185
8.000	115	260.000	1.295
9.000	125	290.000	1.405
10.000	135	320.000	1.515
13.000	153	350.000	1.625
16.000	171	380.000	1.735
19.000	189	410.000	1.845
22.000	207	440.000	1.955
25.000	225	470.000	2.065
30.000	247	500.000	2.175
35.000	269		

<sup>69</sup> Tariff heading no. 1111 of the Court Fees Act.

<sup>70</sup> Tariff heading no. 1112 of the Court Fees Act.

<sup>71</sup> See Art. 11 Court Fees Act.

## 7.2. Attorney's fees

The claimant must bear his/her own attorney's fees should he/she be represented by one. Attorney's fees in civil proceedings are usually considerably higher than attorney's fees for representation given before the Competition Protection Agency. In a stand-alone action, the majority of the burden of proof will remain on the claimant, which results in an increased work load for an attorney. In administrative procedures by contrast, the Agency has the power to inspect, which enables it to investigate the infringement by itself.

Until 2009, attorney's fees were regulated by the Attorneys' price list<sup>72</sup> that was repealed on 1 January 2009 by the Attorney's Fee Act<sup>73</sup>. However, if the judicial procedure in the first instance was initiated before the Attorney's Fee Act entered into force, attorney's fees and other service costs in this, as well as further procedures with legal remedies were to be calculated in accordance with the Attorneys' price list<sup>74</sup>. The Attorney's Fee Act was repealed approximately 4 months after it entered into force (on 9 May 2009) by the Act Amending the Attorneys Act<sup>75</sup>. The power to adopt an act to regulate attorney's fees was once again conferred to the Bar Association of Slovenia. Attorney's fees presented in this article will thus be based on the Attorneys' price list.

The amount of the fee for bringing an action for damages is calculated in the same manner as the amount of the court fee: it depends on the value of the subject matter of the dispute. The only difference is that the value of the subject matter of the dispute is not expressed in euros but in points, whereby the value of 1 point is associated with 0,459 EUR. If the value of the subject matter of the dispute exceeds 120.000 points, the value of the service increases by 100 points for each further initial amount of 40.000 points, where the maximum value is 2.000 points (i.e. 918 EUR) or 3.000 points (i.e. 1377 EUR) in economic disputes<sup>76</sup>.

Alternatively, the Slovenian legal system makes it possible to grant the attorney a part of the damages awarded to the client. Instead of charging an attorney's fee for the service performed, an attorney and his/her client can conclude a written agreement by which they agree on the given attorney's reward, which can amount to up to 15% of the sum awarded to the client<sup>77</sup>.

<sup>72</sup> *Odvetniška tarifa*, OJ RS, No. 67/03 and 70/03.

<sup>73</sup> *Zakon o odvetniški tarifi (ZOdvT)*, OJ RS, No. 67/2008, 35/2009.

<sup>74</sup> Art. 41(1) Attorneys Act (*Zakon o odvetništvu (ZOdv)*), OJ RS, No. 18/1993, 24/2001, 54/2008, 35/2009.

<sup>75</sup> Act Amending the Attorneys Act (*Zakon o spremembah in dopolnitvah Zakona o odvetništvu (ZOdv-C)*), OJ RS, No. 35/2009.

<sup>76</sup> Tariff heading no. 18, point 1 of the Attorney's Tariff.

<sup>77</sup> Art. 17(3) of the Attorneys Act.

This type of payment is made by the party that was condemned to pay damages. It thus reflects the principle that the loser pays the winning attorney's fees. It is important to stress, however, that this type of solution is used extremely rarely in practice.

**Table 2: Amount of attorney's fees for bringing an action**

Value of the subject matter of the dispute		Value of the service in points
above points	up to points	
	750	100
750	3.000	200
3.000	10.000	300
10.000	20.000	400
20.000	35.000	500
35.000	50.000	600
50.000	65.000	700
65.000	80.000	800
80.000	100.000	900
100.000	120.000	1.000

## 8. The possibilities of judicial settlement and ADR

In the Slovenian legal system, judicial settlement is regulated by the Civil Procedure Act<sup>78</sup>, the provisions of which apply also to cases for damages due to competition law infringements. Accordingly, the court invites the parties to a so-called 'settlement hearing' that takes place before the oral hearing. The purpose of a settlement hearing, which is closed to the public<sup>79</sup>, is to examine the possibility for a judicial settlement between the parties in an attempt to reach such a settlement<sup>80</sup>. However, a judicial settlement can be reached not only during the settlement hearing but also at any other time during the proceedings<sup>81</sup>. It can concern all or any part of the whole claim, or any of the contentious issues between the parties<sup>82</sup>.

<sup>78</sup> See Art. 305a to 309a Civil Procedure Act.

<sup>79</sup> Art. 305a(3) Civil Procedure Act.

<sup>80</sup> Art. 305a(1) and (2) Civil Procedure Act. The court may decide not to carry out the settlement hearing, if an ADR has been unsuccessful or if the court estimates that there is no possibility of judicial settlement or that it is not appropriate in a particular case (Art. 305a(4) Civil Procedure Act).

<sup>81</sup> Art. 306(1) Civil Procedure Act.

<sup>82</sup> Art. 306(2) Civil Procedure Act.

During the settlement hearing, the parties may agree to try to solve the case by way of alternative dispute resolution (ADR) – arbitration or mediation. In that event, the court will suspend the proceedings for no longer than three months<sup>83</sup>. It is to be noted that arbitration and mediation are regulated by separate acts in Slovenia<sup>84</sup>. The Arbitration Act regulates the appointment of arbitrators, the arbitrage procedure, the legal value of the final decision<sup>85</sup> and other issues<sup>86</sup>. Arbitrage can be conducted for all contractual and non-contractual claims between the parties<sup>87</sup>. According to the Mediation in Civil and Commercial Matters Act, a mediator, which must be independent and impartial, is appointed by the parties by mutual consent, unless the parties agree on another appointment procedure<sup>88</sup>. Parties may, or may not agree on the mediation procedure. If they do, they can do so by reference to the existing rules on mediation<sup>89</sup>. If they do not agree on the meditation procedure, the mediator conducts the procedure as he/she deems appropriate, taking into account all of the circumstances of the case, the requests of the parties and the need for a rapid and durable solution to the case<sup>90</sup>. The mediator can give suggestions how to solve the case but they do not have a binding effect on the parties<sup>91</sup>. Mediation is brought to an end if the parties reach an agreement. Mediation can be terminated if the parties do not appoint a mediator within 30 days from the beginning of the process; if the mediator, after consulting the parties, establishes that mediation would not be reasonable; if the parties submit to the mediator a written agreement that the mediation is terminated; or by an unilateral act of one of the parties by which the latter informs the other(s) and the mediator that the mediation is terminated<sup>92</sup>.

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<sup>83</sup> Art. 305b(3) Civil Procedure Act.

<sup>84</sup> Mediation in Civil and Commercial Matters Act (*Zakon o mediaciji v civilnih in gospodarskih zadevah (ZMCGZ)*), OJ RS, No. 56/2008; Arbitration Act (*Zakon o arbitraži (ZArbit)*), OJ RS, No. 45/2008.

<sup>85</sup> According to Art. 38 of the Arbitration Act, the decision is deemed to have the same value as a final judgment.

<sup>86</sup> Such as the competence of the Arbitration Act (Art. 19) and its possibility to issue interim measures (Art. 20).

<sup>87</sup> See Art. 10(1) Arbitration Act.

<sup>88</sup> Art. 7(1) Mediation in Civil and Commercial Matters Act.

<sup>89</sup> Art. 8(1) Mediation in Civil and Commercial Matters Act.

<sup>90</sup> Art. 8(2) Mediation in Civil and Commercial Matters Act.

<sup>91</sup> Art. 8(3) and (4) Mediation in Civil and Commercial Matters Act.

<sup>92</sup> Art. 13 Mediation in Civil and Commercial Matters Act.

## 9. Cooperation between the Competition Protection Agency, the European Commission and national courts

### 9.1. Binding and non-binding effect of administrative decisions

To ensure consistency between judicial and administrative decisions, national courts are bound by final decisions of the Competition Protection Agency stating that a company violated national or EU rules of competition<sup>93</sup>. However, although national courts are bound by such decisions, they may still address a preliminary reference to the CoJ on the interpretation of Article 101 or 102 TFEU. Therefore, the obligatory nature of a national antitrust decisions does not in any way influence the rights and obligations of the courts as stipulated in Article 267 TFEU<sup>94</sup>.

If, however, the Competition Protection Agency in the course of its proceedings finds no infringement of Article 6 or 9 of Competition Act or of Article 101 or 102 TFEU, or if special circumstances indicate that it would not be reasonable to conduct proceedings, and thus terminates the proceedings by way of an order<sup>95</sup>, a national court is not bound by such order<sup>96</sup>. Termination of antitrust proceedings without finding a breach of competition rules does not necessarily mean that there was no infringement; it could also mean that there was, for example, not enough evidence to prove the violation. If proceedings were thus to be opened concerning claims for damages due to antitrust infringements, a national court can come to a different conclusion<sup>97</sup>. In accordance with Regulation 1/2003, commitment decisions have the same non-binding effect for national courts<sup>98</sup>. As to the notification duty, a national court must immediately inform the Competition Protection Agency of any action brought before it that demands compensation on the grounds of an infringement of Article 6 or 9 of Competition Act or Article 101 or 102 TFEU<sup>99</sup>.

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<sup>93</sup> According to the first sentence of Art. 62(2) of Competition Act, 'if the damage was caused through an infringement of Art. 6 or 9 of this Act or Art. 81 or 82 of the EC Treaty, the court is bound by the final decision finding an infringement rendered by the Agency [...]'.  
<sup>94</sup> Second sentence of Art. 62(2) Competition Act.  
<sup>95</sup> Art. 40(1) Competition Act.  
<sup>96</sup> Vlahek, [in:] Grilc, Bratina, Galič, Kerševan, Kocmut, Podobnik, Vlahek, Zabel, *Zakon o preprečevanju omejevanja konkurence s komentarjem (ZPOmK-1)*, GV Založba, Ljubljana 2009, p. 509.  
<sup>97</sup> Ibidem.  
<sup>98</sup> Ibidem.  
<sup>99</sup> Art. 62(4) Competition Act.

National courts are also bound by decisions of the European Commission<sup>100</sup>. This, however, does not influence the rights and obligations stipulated in Article 267 TFEU<sup>101</sup>. Doctrine suggests that the provisions of the Competition Act are not, in this regard, entirely in line with Article 16(1) Regulation 1/2003 seeing as Slovakian legislation binds national courts to a *final* decision of the European Commission only, whereas Article 16(1) Regulation 1/2003 speaks only of ‘a decision’<sup>102</sup>, suggesting that not-final decisions are also binding.

## 9.2. Other forms of cooperation

The Competition Act contains other provisions concerning the cooperation between national courts and the Competition Protection Agency. National courts are obliged to inform the Agency of all court proceedings linked to the application of Article 101 and 102 TFEU<sup>103</sup>. If the Agency files a written opinion regarding the application of these EU rules according to Article 15(3) Regulation 1/2003, the national court concerned has a duty to send, without delay, a copy of such written opinion to the parties<sup>104</sup>. Such a non-binding written opinion may be filed at any time until a judgment is rendered<sup>105</sup>. National court must send the Competition Protection Agency (as well as the European Commission) copies of all rulings involving the application of Article 101 and 102 TFEU<sup>106</sup>.

The Competition Act does not, however, contain specific rules on whether national courts must stay proceedings, if the Competition Protection Agency has initiated proceedings on the same matter, until the Agency reaches its decision. Nor does it contain any rules on whether the Agency must stay its proceedings until a national court decides the matter.

The Competition Act also regulates cooperation between national courts and the European Commission. Whenever the Commission files a written opinion regarding the application of Article 101 and 102 TFEU in accordance with Article 15(3) Regulation 1/2003, the court must immediately forward it the Agency and the parties involved<sup>107</sup>. The Commission may file a non-binding

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<sup>100</sup> first sentence of Art. 62(2) of Competition Act states that, ‘if the damage was caused through an infringement of Art. 6 or 9 of this Act or Art. 81 or 82 of the EC Treaty, the court is bound by the final decision finding an infringement rendered by [...] the European Commission’.

<sup>101</sup> Second sentence of Art. 62(2) Competition Act.

<sup>102</sup> Vlahek, [in:] *Zakon o preprečevanju omejevanja konkurence...*, p. 506.

<sup>103</sup> Art. 63(1) Competition Act.

<sup>104</sup> Art. 63(3) Competition Act.

<sup>105</sup> Art. 63(4) Competition Act.

<sup>106</sup> Art. 63(6) Competition Act.

<sup>107</sup> Art. 63(2) Competition Act.

written opinion at any point in time until a judgment is rendered<sup>108</sup>. Where a national court requests the Commission to issue a non-binding opinion in accordance with the first paragraph of Article 15 Regulation 1/2003, the court shall inform the parties of that fact. After receiving the opinion, it shall send a copy of that opinion to the Agency and the parties<sup>109</sup>. National courts must supply the Commission with copies of all rulings involving the application of Article 101 and 102 TFEU<sup>110</sup>. Communication between courts and the European Commission may be conducted directly or through the Agency<sup>111</sup>.

## 10. Remedies

Private actions for damages for the breach of competition rules do not have a special status in Slovakia and are not afforded special remedies under national law. In principle, there are several categories of decisions that the court may issue. First, if it is found that the conditions for awarding damages are fulfilled, a court can issue a judgment awarding damages. Second, if it is found that these conditions are not met, it can issue a judgment rejecting the claim. Third, the court may also issue interim orders according to the Enforcement and Securing of Civil Claims Act in every civil procedure<sup>112</sup>. It issues an interim order to secure a monetary claim (such as a claim for damages) if the creditor proves that it is possible that the debt exists or that it will exist in the future<sup>113</sup>. The creditor must also prove the existence of the risk that, in the absence of an interim order, debt recovery will be impossible or difficult due to the debtor's acts, such as alienating or concealing property<sup>114</sup>. The creditor does not have to prove the existence of such risk if it is probable that the debtor would suffer only a minor prejudice due to the interim order<sup>115</sup>. It is presumed that the risk exists if the debt is to be recovered abroad, unless the recovery takes place in one of the EU Member States<sup>116</sup>.

Moreover, the court may, upon the request of the claimant, declare a contractual clause null and void if it infringes competition rules. The court

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<sup>108</sup> Art. 63(4) Competition Act.

<sup>109</sup> Art. 63(5) Competition Act.

<sup>110</sup> Art. 63(6) Competition Act.

<sup>111</sup> Art. 63(7) Competition Act.

<sup>112</sup> *Zakon o izvršbi in zavarovanju (ZIZ)*, Official consolidated version: OJ RS, no. 3/2007, with changes: 93/2007, 28/2009, 47 and 48/2009, 51/2010, 26/2011, 17/2013.

<sup>113</sup> Art. 270(1) Enforcement and Securing of Civil Claims Act.

<sup>114</sup> Art. 270(2) Enforcement and Securing of Civil Claims Act.

<sup>115</sup> Art. 270(3) Enforcement and Securing of Civil Claims Act.

<sup>116</sup> Art. 270(4) Enforcement and Securing of Civil Claims Act.

may also order other relief, such as, for example, that access to an essential facility is given to a competitor filing a claim in this regard<sup>117</sup>.

## II. Jurisprudence of Slovenian courts

### 1. Methodology

Three types of research tools had to be relied upon in order to identify existing Slovenian jurisprudence relevant to this article. First, the paper is based on online research via the database 'sodisce.si'. This database, however, does not contain all rulings of all Slovenian courts, but only those that the database considers to be of most importance. Consequently, rulings of first instance courts in particular are not available through this web portal. Since the database is not exhaustive, it could not be used as the sole research method. The second methodological tool used was an analysis of the media followed by direct contact with the appropriate courts to obtain a copy of pre-identified rulings. Pending cases were found in the same way. The third method was a questionnaire sent to all circuit courts in Slovenia<sup>118</sup>. The questionnaire essentially tried to establish whether the courts have dealt with cases relating to private enforcement of competition law. Four out of the eleven circuit courts/particular judges sent back a negative response stating that they have not yet dealt with private enforcement<sup>119</sup>. No response was received from any of the other courts. It is thus difficult to determine whether other private enforcement cases exist aside from those identified for the purposes of this article.

### 2. Analysis of existing jurisprudence

Four rulings will be analysed here in detail, two of them were decided by the High Court (court of appeal) and two by the circuit court (court of first instance).

The first case concerns the judgment II Pg 485/2006 of 9 March 2010 rendered by the Circuit Court of Ljubljana. The claimant, an undertaking active

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<sup>117</sup> See, for example, Vlahek, [in:] *Zakon o preprečevanju omejevanja konkurence...*, p. 521.

<sup>118</sup> Circuit courts in Celje, Koper, Nova Gorica, Kranj, Krško, Ljubljana, Novo mesto, Maribor, Murska Sobota, Ptuj and Slovenj Gradec.

<sup>119</sup> Responses were received from the courts/judges in Celje, Krško, Gornja Radgona, Maribor and Slovenj Gradec.

in the field of telecommunications service (hereafter: telecommunications undertaking), was not seeking compensation based on a damage claim due to a competition law violation, but filed an action for the payment due on the basis of the contract of lease against his contractual party who was leasing data cables (hereafter: lessee of data cables) from the telecommunications undertaking.<sup>120</sup> In this case, the Court was asked to determine whether a specific contractual clause of the contract of lease, concluded by the two companies, was null and void because of an alleged breach of competition rules. The Court established that the contested provision infringes the statutory rule that prohibits the abuse of a dominant position. It was thus concluded that the clause was in fact null and void.

The Court found that the telecommunications undertaking was dominant in the market for data lines and that by imposing additional obligations (which were by their nature unrelated to the content of the contract), this undertaking abused its dominant position. The telecommunications undertaking had charged the lessee of data cables for the service performed – the lease of data lines. In the contractual price, the claimant had however also included the lease of modems, which were used in connection with the data lines, despite the fact that the modems were technically an incidental aspect of the data lines. The court found that this additional obligation (lease of modems), which was imposed by the telecommunications undertaking on the lessee, was in breach of competition rules and represented an abuse of the dominant position by the telecommunications undertaking. In light of this finding, the telecommunications undertaking could not demand the payment on the basis of such a contractual clause.

The telecommunications undertaking appealed, asserting that the lessee's contentions about its dominant position were without merit and that the Court could not assess whether there was a dominant position or its abuse based on such contentions. The telecommunications undertaking claimed that, in order to determine whether it has abused its dominant position, the Court would have had to determine first what the relevant product and geographic market was, establish its dominance in that market, and assess whether its dominant position was abused.

The appeal was upheld by the Court of appeal in its judgment I Cpg 845/2010 of 2 December 2010. The Court of appeal took the position that establishing dominance is not a fact, but a legal standard, which must be established by the court on the basis of legally-based relevant facts and circumstances. Therefore, for a legal conclusion to arise that an undertaking holds a dominant position, the relevant (product/service/geographical) market must be defined first, as

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<sup>120</sup> The names of the parties are not disclosed in the judgment.

dominance can only be found on a given relevant market. The party that claims that abuse has taken place must put forward the facts and propose evidence, based upon which the relevant market can be defined and upon which it can be determined whether the scrutinised undertaking has indeed a dominant position in that market. Therefore, the Court of appeal concluded that, as the defendant did not state these facts, the Court of first instance could not determine the relevant market or the existence of dominance.

The second ruling to be considered is the judgment of the Circuit Court of Ljubljana in case No. VII Pg 473/2004 delivered on 14 September 2010. In this case, an undertaking selling home phone switchboards filed an action for damages in the amount of 354.440,41 EUR against a telecommunications undertaking, claiming that it suffered damages (lost profit) due to an abuse of dominant position by the telecommunications undertaking.<sup>121</sup> The telecommunications undertaking, dominant in the market of verbal telephony, allegedly excluded the undertaking selling home phone switchboards from the market, due to its abuse of dominant position relating to the DDI (direct dial-in) services. In technical terms, the home phone switchboards are technically dependent on the DDI service, meaning that they cannot be used in the absence of this service. In the case at hand, the undertaking selling home phone switchboards claimed that the telecommunications undertaking increased the prices of the DDI service, withdrew the DDI from its offer and thus prevented the purchase of the DDI service by the end-consumers. In addition, the telecommunications undertaking allegedly charged a too low price for its own service that performed the same function as the DDI service, i.e. his own product that was in competition with the DDI service. The undertaking selling home phone switchboards alleged that the telecommunications undertaking lowered the prices of its own product below costs in order to increase its sales and to decrease the sales of the DDI service (to which the activity of the undertaking selling home phone switchboards was closely linked). The Court of first instance found that the telecommunications undertaking had indeed abused its dominant position but the court nevertheless rejected the damage claim because the claimant, the undertaking selling home phone switchboards, had not proved the existence of an actual damage. The undertaking selling home phone switchboards filed an appeal, which was declared unfounded by the Court of appeal.

The Court of appeal (High Court of Ljubljana, decision No. I Cpg 1473/2010 from 18<sup>th</sup> May 2011) upheld the position of the Court of first instance. It agreed that the claimant, the undertaking selling home phone switchboards, was indeed obliged to prove the damage sustained and that it failed to prove the

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<sup>121</sup> The names of the parties are not disclosed in the judgment.

actual amount of lost profit (profit which could have been justifiably expected taking into account an ordinary course of events or special circumstances, but which was not achieved because of the act of the person who caused the damage). Lost profit represents the difference between the economic situation of the person suffering damage after the damaging act and the economic situation in which that person would have been without the damaging act. The claimant did not provide the courts with sufficiently detailed information on the factual background of the case nor provide sufficient evidence to prove the worsening in its economic situation resulting from the abuse.

According to the Court of appeal, the simple mathematical calculation presented by the claimant was not enough to prove lost profit. Claims concerning the termination of contracts with its business partners and the non-conclusion of new contracts with potential clients were also insufficient and not specific enough to prove the damage, without proving the content of that business relationship and the difference between the revenues that the person suffering damage would have acquired in the absence of the damaging act and the expenses that would have occurred due to the accumulation of these revenues. The submitted claims were too abstract to even be challenged by the defendant.

The lacking factual basis could also not be replaced by an expert's opinion. The prerequisite for the appointment of an expert, who is a professional assistant of the court, is that the claimant presents and proves a factual basis from which the expert can make conclusions concerning the expected future. In the context of determining lost profit, an expert could be needed to help choose the most appropriate method and to assess the exact past business data, from which conclusions could be made about the business activities during the relevant period. However, the task of an expert is not to identify the factual basis of the claim from the claimant's business and accounting documentation. This would represent inadmissible evidence that would help the claimant replace the missing factual basis. An expert's opinion, which was provided by the claimant, included no data on the basis on which the expert made his calculations. The claim did, therefore, not provide a sufficient factual basis for such calculations to be made, not even in conjunction with publicly available data provided in annual reports. Only a more concrete factual basis for the calculation of lost profit would have provided a sufficient basis upon which the court, with the assistance of an expert, could assess the amount of lost profit. As the claimant did not provide such a factual basis, it did not prove the damages, and the High Court of Ljubljana rejected his appeal.

The third case to be analysed here concerns the *ABM v. Telekom Slovenije* (IV Pg 55/2002) proceedings where the main Slovenian telecoms company, Telekom Slovenije, was condemned to pay 2,3 million EUR in damages to

ABM due to the incumbent's abuse of its dominant position. In 2002, ABM filed a claim for 4 million EUR, which the court ultimately lowered to 2,3 million on the basis of an expert's opinion.

The Circuit Court in Ljubljana delivered its judgment on 14 November 2011 stating that Telekom Slovenije abused between 1999 and 2002<sup>122</sup> the dominant position it held in the market of 'verbal telephony' (*govorna telefonija*). The effects of the abuse were evident in the closely related market of internet services<sup>123</sup>. The incumbent abused its dominant position by including, in its packages for ISDN dial-up Internet connections, solely the CDs of its own daughter company, SIOL, and refusing to include the CDs of a competitor, ABM, despite the latter's repeated offers in this regard. By excluding ABM from its dial-up package offers, Telekom Slovenije created different conditions for competitors in the internet services market and placed ABM in a less favourable position than its subsidiary. In the relevant period, dial-up Internet access was not possible without the use of Telekom Slovenije's infrastructure, since it was, at that time, the sole owner and manager of the relevant infrastructure<sup>124</sup>.

It is important to stress at the outset that the scrutinised damages claim was in fact a follow-up action. The Competition Protection Agency issued a decision stating that Telekom Slovenije abused its dominant position by refusing to include ABM's CDs into its ISDN dial-up packages<sup>125</sup>. The decision was appealed by Telekom Slovenije, but it was subsequently confirmed by the first instance court<sup>126</sup> and once again by the Supreme Court which decided the case in the last instance<sup>127</sup>. The civil court deciding the damages claim took into account the conclusions reached by the Supreme Court in the antitrust case considering the existence of abuse, the definition of the relevant market, and other particularities of the abuse<sup>128</sup>.

The second important characteristic of this private enforcement judgment is that the civil court paid great attention to an opinion submitted by an expert with respect to the calculation of the actual damages<sup>129</sup>. The claimant sued for

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<sup>122</sup> The abuse lasted only until 2002 since after that year, dial-up connections were only rarely used, as other types of Internet connection (such as broadband) entered the market. See the judgment in *ABM v. Telekom Slovenije* (IV Pg 55/2002), p. 17.

<sup>123</sup> The relevant geographic market was the entire territory of Slovenia. See the judgment in *ABM v. Telekom Slovenije* (IV Pg 55/2002), p. 5.

<sup>124</sup> See the judgment in *ABM v. Telekom Slovenije* (IV Pg 55/2002), pp. 2–5.

<sup>125</sup> See the Decision of the Competition Protection Office of the Republic of Slovenia no. 3073-9/02-4, available at: [www.abm.si/uvk/UVK-2004-05-04.pdf](http://www.abm.si/uvk/UVK-2004-05-04.pdf).

<sup>126</sup> See case U 1155/2004-70.

<sup>127</sup> See case X Ips 749/2007-28.

<sup>128</sup> See the judgment in *ABM v. Telekom Slovenije* (IV Pg 55/2002), pp. 5–6.

<sup>129</sup> See, in this regard, the judgment in *ABM v. Telekom Slovenije* (IV Pg 55/2002), p. 14.

more than 4 million EUR, which the Court lowered to about 2,3 million on the basis of the opinion of an expert. The parties submitted their own expert opinions, but the Court followed the views of an economist that it appointed on its own initiative. According to the latter's calculations, ABM suffered damages in the amount of 2.306.285,75 EUR. The first estimation provided by the court's expert was in fact more than a million higher (3.816.164,74 EUR), but after the oral hearing and on the basis of the comments submitted by the parties to the first estimate, the expert lowered the sum later in the procedure to 2,3 million EUR. This amount incorporated two types of damages: regular damage (*damnum emergens*) and lost profit (*lucrum cessans*). The actual damage resulted from lost subscribers; lost profit consisted of the profit that the claimant would likely have realized had it retained those subscribers. In determining the amount of damage, the expert took as a basis a hypothetical situation, in which ABM and SIOL were the only two providers of ISDN packages in Slovenia, taking into account that dial-up ISDN Internet services were, at the time, a new offer. The Slovenian court entirely accepted its expert's opinion with regard to the amount of damages to be awarded.

The third aspect of the case that must be analysed concerns fees. Court fees and attorney's fees totalled 21.369,53 EUR. The former covered the fee for filing the claim (1.585,71), the fee for the judgment (1.642,00), and the fee for the expert (1.447,75). However, because the claimant succeeded in recovering only 75% of the claim (100% regarding the abuse of dominance, but only 50% as to the amount of damages), the defendant had to pay the claimant 75% of the total amount of court fees. Consequently, the amount of fees owed by the incumbent to ABM was 16.027,15 EUR<sup>130</sup>.

Moreover, the procedure (only in the first instance) lasted nearly 9 years. The action was first filed in 2002, and the judgment was rendered in 2011. While it is well known that court cases in Slovenia may last several years, it is likely that the competent first instance court wanted to wait until the Supreme Court ultimately rules on the validity of the antitrust decision establishing Telekom Slovenije's abuse. By delivering its own judgment only after the final ruling of the antitrust case, the competent first instance court avoided potential inconsistencies in the case-law and contributed to its coherence.

Telekom appealed the first instance decision<sup>131</sup> and the Court of appeal lowered the amount of damages awarded to ABM to 62.000 EUR, by calculating the damage only in relation to its actual customers, but not as regards all the potential customers that ABM would or could have acquired

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<sup>130</sup> As to the exact calculations, see the judgment in *ABM v. Telekom Slovenije* (IV Pg 55/2002), p. 18.

<sup>131</sup> See its announcement in media, available at: [www.delo.si/gospodarstvo/podjetja/telekom-se-bo-pritozil-na-sodbo-v-zadevi-abm.html](http://www.delo.si/gospodarstvo/podjetja/telekom-se-bo-pritozil-na-sodbo-v-zadevi-abm.html).

if the abuse of dominant position had not taken place. The Court of appeal decided that the defendant did indeed abuse its dominant position, but that the amount of damages awarded by the Court of first instance exceeded the amount of damages actually suffered.

The fourth case pertinent for the purposes of this article is *T-2 v. Telekom Slovenije*, also filed in 2007, where T-2 requested 129,56 million EUR in damages<sup>132</sup> from Telekom Slovenije. T-2 claimed that the incumbent abused its dominant position. The Court of first instance rejected the claim of T-2 on 21 January 2013, stating that the claimant failed to submit proof with regard to the amount of damages<sup>133</sup>.

### 3. Pending cases

A few pending cases have been identified for the purposes of this article although Slovenian courts are currently also dealing with other cases in the field of private enforcement. The majority of damage claims caused by competition law infringements concern the telecoms sector, mostly mobile telecommunications services.

In *Tušmobil v. Telekom Slovenije* commenced in 2007, the telecoms operator Tušmobil, first claimed that it was entitled to compensation of 21,5 million EUR, but later increased its claim to 28,2 million<sup>134</sup>. The claimant stated that Telekom Slovenije favoured SIOL, a competing telecoms company controlled by the incumbent.

In 2008, a movie distributor, Blitz, filed an action against a cinema (*Blitz v. Kolosej Kinematografi*) claiming that the cinema abused its dominant position and requested damages of 943.449 EUR. This claim was a follow-up action to a decision issued in 2007 by the Competition Protection Office (now: Agency) where it stated that the cinema abused its dominant position in 2004 and 2005 by unduly refusing to show movies distributed by Blitz<sup>135</sup>.

With regard to *Simobil v. Telekom Slovenije* and *Tušmobil v. Telekom Slovenije*, the claimants were the second and the third largest Slovenian operators of mobile telecommunications respectively. Both filed claims in 2011 against the

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<sup>132</sup> See, for example: <http://24ur.com/novice/gospodarstvo/t-2-terja-odskodnino-od-telekoma.html>.

<sup>133</sup> See, for example: [www.delo.si/gospodarstvo/podjetja/sodisce-zavrnilo-130-milijonsko-tozbo-t-2-proti-telekomu.html](http://www.delo.si/gospodarstvo/podjetja/sodisce-zavrnilo-130-milijonsko-tozbo-t-2-proti-telekomu.html).

<sup>134</sup> See, for example: [www.delo.si/clanek/137898](http://www.delo.si/clanek/137898).

<sup>135</sup> Decision of the Competition Protection Office of the Republic of Slovenia no. 306-66/2006-52, 26 July 2007, available at: [www.uvk.gov.si/fileadmin/uvk.gov.si/pageuploads/informacija\\_javnega\\_znacaja/ijz108.pdf](http://www.uvk.gov.si/fileadmin/uvk.gov.si/pageuploads/informacija_javnega_znacaja/ijz108.pdf).

incumbent due to the presumable abuse committed by its daughter company, Mobitel. Whereas Tušmobil sought damages amounting to 68 million EUR<sup>136</sup>, Simobil estimated its damages to be 286,4 million EUR<sup>137</sup>. They claimed that the abuse was due to the introduction by Mobitel of predatory pricing in the framework of a special subscriber package ('Itak Džabest'). The cases are a follow-up action to an antitrust decision, which declared that Telekom Slovenije has committed the said abuse<sup>138</sup>.

#### 4. Potential follow-up actions

It is not likely that consumers will sue for damages when a cartel or an abuse of a dominant position causes them financial harm because of the lack of collective claims in Slovenian law, the length of the proceedings and the small amount of the damages suffered individually. That amount might, for a single consumer, be much smaller than the court or the attorney's fees.

The well-publicised in Slovenia concerted increase in electricity prices is an example of potential follow-up litigations by consumers in the private enforcement of competition law field. The Competition Protection Office (now: Agency) issued a decision in 2008 stating that 5 electricity distributors engaged in a concerted practice and raised household prices electricity<sup>139</sup>. This decision was later confirmed in part by the Slovenian Supreme Court<sup>140</sup>. The profits that the 5 companies made because of the infringement totalled about 10 million EUR, but the damage caused to each individual client was very small, less than 20 EUR. Given the small amount of damages caused, consumers did not file damages actions against the perpetrators because procedural costs would exceed the damages. It is not without relevance also that court proceedings in Slovenia can take longer than a decade to resolve.

<sup>136</sup> Data on this claim was found in the media. See, e.g.: [www.delo.si/gospodarstvo/makromonitor/telekom-slovenije-prejel-86-milijonsko-tozbo-tusmobila.html](http://www.delo.si/gospodarstvo/makromonitor/telekom-slovenije-prejel-86-milijonsko-tozbo-tusmobila.html).

<sup>137</sup> See, e.g.: <http://24ur.com/novice/slovenija/simobil-od-telekoma-zahteva-286-4-milijona-evrov.html>.

<sup>138</sup> Decision of the Competition Protection Office of the Republic of Slovenia no. 228/2012, 12/03/12, available at: [www.uvk.gov.si/si/zakonodaja\\_in\\_dokumenti/ostali\\_dokumenti/arhiv\\_odlocb/odlocba228](http://www.uvk.gov.si/si/zakonodaja_in_dokumenti/ostali_dokumenti/arhiv_odlocb/odlocba228).

<sup>139</sup> Decision of the Competition Protection Office of the Republic of Slovenia no. 306-168/2007-57, 06/08/08, available at: [www.uvk.gov.si/fileadmin/uvk.gov.si/pageuploads/ijz069.pdf](http://www.uvk.gov.si/fileadmin/uvk.gov.si/pageuploads/ijz069.pdf).

<sup>140</sup> The Supreme Court confirmed that part of the decision concerning the infringement of Slovenian law, but annulled the part that concerned EU rules. The Court decided that there was no infringement of EU law, but that Slovenian legislation had been violated. See, e.g., orders of the Supreme Court Sklep III Ips 111/2009, III Ips 117/2009, III Ips 118/2009, III Ips 116/2009, III Ips 115/2009. In theory, see T. Ivanc, 'Sklep Vrhovnega sodišča RS v zadevi Elektrodistributerji' (2010) 2(1) *Lexonomica* 129.

The Slovenian Consumer Association has issued a public notice in different media outlets calling upon the companies to repay what they owed. The Association noted also the related problem of legal costs, the absence of collective actions, and the absence of adequate ADR mechanisms<sup>141</sup>. A public information campaign does contribute to citizens' awareness of their rights to claim compensation in the field of competition law. The fact remains, however, that consumers are not likely to file damages claims if the amount of damage suffered by each claimant is small. The offending companies bowed down to public pressure and decided to issue a refund without forcing consumers to go to court<sup>142</sup>. It was not possible to determine, however, for the purpose of this article whether all of the dues were returned to all consumers. In other words, it remains unclear whether the voluntary reimbursement caused by public pressure was as effective as a court case would have been.

Another example of consumer damages lies in the concerted practice of several Slovenian banks whereby they charged their clients to withdraw money from other banks' ATMs. On 2 February 2006, four Slovenian banks, Nova Ljubljanska banka (NLB), Abanka, Nova Kreditna banka, and Maribor (NKBM) in Banka Celje, introduced a fee that their own clients had to pay to withdraw money from the ATMs of other banks. For example, a client of NLB had to pay a set fee when withdrawing money from an ATM belonging to Abanka. The banks all charged the same amount – 0,33 cents (or 80 SIT before the introduction of the EUR). The fact that all of the banks introduced the fee on the very same day is a strong indicator that this was the result of a concerted practice. The Slovenian Competition Protection Office (now: Agency) issued a decision in February 2007 establishing that the contested action represented a concerted practice and was thus banned by competition rules<sup>143</sup>. Although the banks appealed the antitrust decision, both the first instance court<sup>144</sup> and the Supreme Court agreed with the Office<sup>145</sup>.

This situation was similar to the damages caused by the concerted price increase implemented by the aforementioned electricity companies. Since consumers were once again reluctant to sue for damages, banks repaid the

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<sup>141</sup> Poziv ZPS nadzornim odborom elektrodistributerjem, [www.zps.si/trg-in-cene/potrosnik-in-konkurenca/poziv-zps-nadzornim-odborom-elektrodistributerjem.html?Itemid=308](http://www.zps.si/trg-in-cene/potrosnik-in-konkurenca/poziv-zps-nadzornim-odborom-elektrodistributerjem.html?Itemid=308).

<sup>142</sup> See, for example, in media: [www.energijadoma.si/znanje/zanimivosti/elektrodistributerji-z-razlicnimi-pogledi-na-preplacano-elek](http://www.energijadoma.si/znanje/zanimivosti/elektrodistributerji-z-razlicnimi-pogledi-na-preplacano-elek).

<sup>143</sup> Decision of the Competition Protection Office of the Republic of Slovenia no. 63/2007, 26/02/07, available at: [www.uvk.gov.si/si/zakonodaja\\_in\\_dokumenti/ostali\\_dokumenti/arhiv\\_odlocb/odloca63](http://www.uvk.gov.si/si/zakonodaja_in_dokumenti/ostali_dokumenti/arhiv_odlocb/odloca63).

<sup>144</sup> See judgment of the Administrative Court U 581/2007.

<sup>145</sup> See judgment of the Supreme Court X Ips 70/2010.

amounts due because of media and public pressured alone<sup>146</sup>. Still, while they announced that they would repay the money, it is impossible to tell if they have actually repaid the entire amount due to all consumers.

#### IV. Conclusion

Private enforcement of competition law is an area that is slowly, but steadily, gaining importance in the Slovenian legal system. Although there was practically no jurisprudence in this area only a few years ago, Slovenian courts have now ruled on a few such cases already. The number of private enforcement proceedings will most likely increase in the future. Slovenia is thus beginning to follow European trends in enhancing and stimulating the possibilities of private enforcement of competition law. The new Prevention of the Restriction of Competition Act of 2008 in particular, which regulates the area of damages claims in a comprehensive and more detailed manner, should cause positive results in this area. So far, the majority of private enforcement claims have been filed in the telecoms sector.

Notwithstanding this trend, however, certain features of the Slovenian legal system still hinder full effectiveness of private enforcement, particularly important among them is the absence of collective claims<sup>147</sup>. This lacunae is very clearly reflected by current jurisprudence which shows that so far, only companies, not consumers, have filed damages claims. Lack of collective or representative claims hinders consumers, who are unwilling or unable to sue for small amounts of damages. The most striking example in this regard is the case of consumer damages caused by the concerted price increase by electricity distributors. Due to the very small amounts of damage suffered by individual consumers, not a single damages claim was filed. It is unfortunate that there is no national equivalent of Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure<sup>148</sup> (the latter is applicable to cross-border claims only). Sadly, it is easier for a claimant from another Member State to get compensation from a Slovenian company on the basis of EU law than it is for a claimant from Slovenia on the basis of its own. Private enforcement in Slovenia is relatively ineffective also because courts lack specialization

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<sup>146</sup> See, e.g.: [www.zps.si/za-medije/izjave-za-javnost-2010/zps-poziva-banke-k-vracilu-nezakonito-zaracunanih-provizij.html?Itemid=456](http://www.zps.si/za-medije/izjave-za-javnost-2010/zps-poziva-banke-k-vracilu-nezakonito-zaracunanih-provizij.html?Itemid=456) or [www.dzp.si/domov/novice-projekti-aktualno/articleid/19/cbmoduleid/435.aspx](http://www.dzp.si/domov/novice-projekti-aktualno/articleid/19/cbmoduleid/435.aspx).

<sup>147</sup> See Vlahek, [in:] *Zakon o preprečevanju omejevanja konkurence...*, p. 493.

<sup>148</sup> OJ [2007] L 199/1.

deciding in competition matters, and because juridical proceedings take a very long time to resolve<sup>149</sup>.

Notwithstanding certain obstacles for private enforcement of competition law in Slovenia, current legislation already provides some incentives for its more effective development. The new Competition Act, that entered into force in April 2008, is already yielding positive results. While there is still much room for improvement, especially with regard to collective claims and ADR, the most important steps have already been taken to start private enforcement. It is also to be seen how the future Directive governing actions for damages under national law for infringements of competition law<sup>150</sup> – if it is adopted – will influence the effectiveness of private enforcement of competition law in Slovenia. With regard to future changes in this field, the Latin phrase *festina lente* is appropriate: it is important to adopt the necessary legislative changes as soon as possible, but always after due reflection and weighing the interests of all involved parties.

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<sup>149</sup> Vlahek, [in:] *Zakon o preprečevanju omejevanja konkurence...*, p. 493.

<sup>150</sup> Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM(2013) 404, 11.6.2013).