Claiming compensation for harm resulting from breach of competition law: offender's and injured party's perspective 3/33/21

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The Competition Council's decisions on a number of recently completed controversial investigations have raised the question of recovering damages caused by an infringement of competition law. What circumstances should the injured party and the offender take into account if anyone harmed by a competition offence has the right to claim compensation for that harm?

Legislation applicable in Latvia

Section 21(1) of the Competition Act lays down a general principle of loss compensation: a person that has suffered a loss through a competition offence has the right to claim compensation from the offender in order to restore the injured party to the position that would exist if the offence had not been committed.

Adopted on 26 November 2014, Directive 2014/104/EU makes it easy to recover damages from competition offenders in Latvia and the EU in order to enhance the role that consumers and market participants play in disciplining potential competition offenders. Latvia has transposed the directive into amendments to the Civil Procedure Act and to the Competition Act (effective from 1 November 2017).

The injured party's perspective

As an additional preventive remedy, an action for damages may deter companies from committing competition offences and restore the market situation and the position the injured party would be in had the breach not been committed. Yet the existence and amount of loss are still to be determined, and this certainly requires proof.

While it is often difficult to obtain evidence in order to establish causality and measure damages, the injured party has the option of obtaining information from the offender, from the competition authority, and from third parties, thereby initially assessing whether it is possible and financially advantageous to bring an action for damages, and in order to obtain the evidence required to measure damages.

The Civil Procedure Act and the Competition Act contain a number of provisions that make it easy to bring an action for damages, such as grounds for releasing the injured party from the burden of proof, the opportunity to establish adverse facts, and the harm extent presumption.

It is important to note that the general preconditions for loss compensation apply also in this category of matters, namely a company's unlawful behaviour (a competition offence) and a causal connection, as well as the existence and amount of loss. The important thing is that a competition offence established by a valid decision of the Competition Council or by a valid court ruling need not be proved again.

The injured party can bring an action for damages for a breach of competition law in the Economic Court.

The offender's perspective

The parties to a competition offence often look at penalty levels prescribed by the Competition Act, forgetting about an action for damages that follows the offence. In practice the process of paying damages is often more severe and financially disadvantageous than the investigation and the penalty.

Claiming compensation for a loss arising from a competition offence is governed by the general ten-year period of limitation laid down by section 1895 of the Civil Code. This is the period both the injured party and the offender should expect will apply to an action for damages. Of course, damages can be paid out of court by the parties reaching a settlement.

Although the injured party is not required to prove a competition offence again, it is the scope of the competition authority's decision (the characteristics, period, episodes of the offence etc) and its quality (how careful and detailed the investigation was) that play a key role in determining the existence of loss and causality. The unfortunate conclusion is that in the course of investigation, competition authorities fail to attach proper significance to circumstances that may be crucial to bringing an action for damages. This may hinder the process and create information asymmetry.

Determining the level of loss

We have seen in practice that the parties to an action for damages often struggle to determine the amount of loss because it is difficult to measure and justify. Yet there are a number of methods and techniques for solving this problem, such as comparison methods, regression analysis, imitation models, and establishing market changes.

When it comes to measuring overcharges caused by cartel activities, section 21(3) of the Competition Act contains the presumption that this offence has caused harm and resulted in a 10% price increase, unless the contrary is proved, in order to encourage an action for damages and make it easy for the injured party to claim damages. However, the courts will primarily assess damages on the basis of evidence of the cartel's influence and apply the 10% price increase presumption only in the absence of other indications. And each party has the right and opportunity to prove a different (higher or lower) amount of loss.

Offenders are held jointly and severally liable for losses arising from a joint competition offence, with certain exceptions in the Competition Act (e.g. for small and medium companies and for offenders released from a fine under the leniency programme). This factor matters if the immediate business partner is insolvent or has been liquidated.

To prevent further harm and efficiently devise a strategy, the offender and the injured party should carry out an analysis identifying available evidence, potential claims and claimants, the amount of loss, and other risks associated with paying damages for competition offences. In EU-funded projects the implications of potential financial adjustments for the recipient of funding should also be taken into account.

If you have any questions please reach out to our experts.