



NEWSLETTER 8/2017

New legislation regarding compensation for damages in competition law

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- **As of 1st September 2017 the new Act No. 262/2017 Coll., on compensation for damages connected with competition law, became effective.**
- The new Act implements the **Directive 2014/104/EU¹** (the implementation period elapsed on 26th December 2016!) **aimed** to unify fundamental principles of enforcement of compensation of damages caused by an infringement of competition law provisions across the EU member states.
- The Act introduces **special legislation** in relation to the general legislation contained in the Czech Civil Code (Act No. 89/2012 Coll.) and the Czech Civil Procedural Code (Act No. 99/1963 Coll.).

Subject of the new legislation

- The new Act regulates (i) the obligation to compensate damages caused by the infringement of the Czech, the national member states and the EU competition law, and (ii) the application claims procedure.

¹ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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

- As the Directive 2014/104/EU the Act relates only to two forms of the prohibited behaviour, i.e. to (i) the **prohibited agreements between competitors (cartel)** and (ii) **any abuse of a dominant position** (other types of infringement of competition law are not regulated by the Act or the Directive).

Definitions

- The Act as well as the Directive defines **cartel** as an agreement or concerted practice between two or more competitors aimed at coordinating their behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets and customers, restriction of imports or exports or anti-competitive actions against other competitors.
- **Dominant position** according to the Competition Protection Act means that one or more competitors are able in respect to their market power to behave to a large extent independently of other competitors or consumers. An abuse of a dominant position may especially consist in: (i) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions, (ii) concluding contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts, (iii) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at

a competitive disadvantage and (iv) limiting production, markets or technical development to the prejudice of consumers.

Right to full compensation

- One of the most important aspects of the new legislation is the implementation of **the principle of full compensation**, which means that any natural person or legal entity who has suffered damage caused by the infringement of the competition law (either in the form of a cartel or an abuse of dominant position) **is entitled to claim and to obtain full compensation** of those damages.
- Compensation according to this principle covers the right to compensation for (i) actual loss, (ii) loss of profit, and (iii) various interest payments (i.e. **time value of money** needs to be respected!). Nevertheless, full compensation shall not lead to overcompensation.
- If there is no possibility **to determine the precise value of the damage**, then **the court** is entitled to estimate the value pursuant to its fair discretion of individual circumstances of the particular case. The aim of this new legislation is to reinforce the procedural position of the damaged party.

Multiple infringers

- The new legislation adopts **general rules** regarding compensation for damage caused by **multiple infringers** (already contained in the Civil Code) and sets out that:
 - (i) in cases of an infringement of competition law caused by a joint action of multiple infringers (e.g. cartel), these infringers are obliged to compensate for damages **jointly and severally**; and
 - (ii) infringers, who are obliged to compensate for damages jointly and severally, are **obliged to settle with each other** according to **their participation in damages**.

- The new Act also introduces some **exceptions** from the general rules stated above, which relate to:
 - (i) **so-called cooperating infringer in leniency programme** (i.e. the participant in a secret cartel who voluntarily and independently of the other undertakings involved in the cartel cooperates with an investigation of the competition authority and who in return for it receives immunity from, or a reduction in, fines for its involvement in the cartel);
 - (ii) **so-called small or medium-sized enterprises**² (i.e. enterprises with less than 250 employees; with annual turnover not exceeding the sum of 40 million euros or with annual balance sheet not exceeding the sum of 27 million euros; and fulfilling the criteria of independence);

² pursuant Sec. 2 of the Act No. 47/2002 Coll., on aid to small and medium-sized enterprises and on amendment of the Act No. 2/1969 Coll., on the Establishment of Ministries and Other Central Government Authorities of the Czech Republic; and Commission Regulation (EC) No. 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises.

(iii) **an infringer** participating in **an amicable settlement** with the damaged party (i.e. the person who concludes an out-of-court settlement or a court settlement with the damaged party).

Within the jointly and severally obligation to compensate for damage, these infringers are **privileged** in comparison with other infringers. In most cases they have to compensate for damage only in relation to their direct or indirect customers or suppliers, in relation to other damaged persons only in exceptional cases.

Presumption of damage caused by a cartel

- The new Act embodies a **rebuttable presumption** that if there is an infringement of competition law in the form of a cartel, then damage is always assumed. This presumption applies **only in relation to cartels (!)**, not in other cases of an infringement of competition law provisions.
- Due to this legislation, **the burden of proof is transferred from the damaged party** (petitioner) **to the infringer** (defendant), i.e. the infringer shall be obliged to prove that the damage has not occurred. The procedural position of the damaged party shall be thereby simplified and reinforced.

Special legislation regarding time limitation

- **Statute of limitation period** regarding claims for damages **is 5 years.**

Disclosure of evidence

- The new Act introduces a **new type of proceedings** which aims to simplify the access of damaged party to the evidence and thereby to enable the performance of right to compensation for damages.
- **Damaged party** that is short of evidence, but has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, **may propose that the court orders** to the defendant or a third party **to disclose relevant evidence** which lies in their control, or to provide information, where such evidence is. (In exceptional cases it is possible to impose this obligation also to a relevant competition authority!).
- The proposal may either **precede the initiation of the proceedings for compensation of damages**, so that the damaged party may become acquainted with all necessary evidence before submitting the legal action, or be made **later during the actual proceedings**.
- In order to protect the new legal institute against its abuse and to protect the relevant entities from possible damages, which may occur due to the disclosure of evidence, the applicant has a **statutory obligation to pay a security deposit in the amount of CZK 100,000**.
- The right to claim any compensation for damages caused by the disclosure of evidence must be exercised with the court within the period of 6 months from disclosure.

- When deciding about the scope of the evidence to be disclosed to the applicant, the court has to respect *inter alia* the fact, whether the required documents may contain any commercial, bank or equivalent secrecy protected by law. If so, the court shall impose the obligation to maintain the confidentiality with respect to the party gaining the access to it.
- An entity which refuses to disclose the court ordered evidence may be **fined up to CZK 10,000,000** or **1%** of its net turnover for the last accounting period.
- In case of breach of confidentiality with respect to any commercial, bank or other equivalent secrecy, the court is entitled to impose **a fine up to the sum of CZK 1,000,000**.

Proceedings for compensation of damages caused by an infringement of competition law

- The **regional courts** will newly have their material competence to decide in the first instance.
- Failure to disclose evidence ordered by the court will lead to legal fiction that the relevant fact had **been proven**. In case of breach of any mandatory confidentiality duty, the court may rule that such evidence relating to this breach will not be admitted.
- Courts shall apply the **Civil Procedural Code** (unless the law determines something else).

We hope the above summary will ease your orientation in the new legislation. We are available for any of your additional requests or information or legal assistance in the area.

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