

NEW RULES ON PRIVATE ENFORCEMENT OF COMPETITION LAWS IN THE CZECH REPUBLIC APPLY FROM 1 SEPT 2017 ON

1. Applicability of the new Act

As in the other EU countries, the term for transposition of the Directive 2014/104/EU on antitrust damages actions (the “**Directive**”) ended shortly after Christmas 2016. Most of the EU countries have already passed their national laws in the first half of 2017, the Czech Parliament finally also passed the Act in July and the President signed the Act on the 1st August 2017. Within few days the Act will be published in the Collection of Laws and will become **effective as of 1st September 2017**.

Unlike most other EU countries, the Czech Republic did not only amend existing (competition) legislation, but created entirely new and separate law mainly dealing with the transposition of the Directive. The new Act will also apply to cartel damage proceedings started after 25 December 2014.

2. New approaches and rules

Section 3 of the Act formulates the assumption, that any infringement of competition rules causes damage. Such damage has to be compensated in the full amount, eventually with interest and any and all limitations usually considerable for damage compensation in accordance with the Czech civil code cannot be applied.

Cartel members are jointly and severally liable for any caused damages, nevertheless the court may rule that each of the infringers has to contribute a different amount, adequately to the gravity of their violation of competition rules. Infringers who were granted leniency are only liable towards their direct or indirect suppliers or customers. The concept of punitive damages still remains unfamiliar with Czech law. Maybe in order to avoid US-like litigation, the Act expressly states that the awarding of damages must not lead to excessive compensation. If it is not possible or only with inadequate difficulties to quantify the amount of damages, the court may state them on base of equitable assessment of the circumstances.

The passing-on defense will remain to be accepted by Czech courts. Now, the Act states this expressly in its Section 29 – the defendant may object, that the plaintiff has passed-on the price increase to the next level of the supply chain.

But in Section 30, the Act assumes that a plaintiff suffered from a passing-on of prices increases, if the following three criteria were met: (i) infringement of competition by the

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defendant, (ii) this infringement led to a direct price increase for the direct customer of the defendant, and (iii) the plaintiff has obtained goods or services from this direct (or a subsequent) customer already.

Such actions are also still unfamiliar with the Czech legal thinking. Class actions are not possible for breach of competition law, only representative actions for instance by consumer organizations but without the possibility to obtain damages; see section 2989 Czech Civil Code, section 25 Consumer Protection Act.

Terms of limitation under the Civil Code have been replaced completely by new (and longer) terms for filing damages.

3. Discovery and a new proceeding for obtaining proof

Information asymmetry between the damaged party and the cartelists/infringers is one of the main reasons for the low number of private enforcement cases in the Czech Republic so far. The Act introduces a new independent court ruling procedure while keeping, sometimes exceeding, the requirements of the Art. 5,6 of the Directive: the Proceedings on access to proof, to a certain degree similar to the concept of discovery in US procedural law..

Proceedings are opened before the complaint itself is filed, most elements are known from the civil procedure for obtaining an injunction. A security of 100.000 Czech crowns – about EUR 3.600 - is to be provided by the plaintiff who also has to claim a probable right to damages with sufficient information on the facts. The plaintiff has to specify the documents expected, at least by their characteristics and a final test of proportionality by the judge must confirm the need to obtain the requested documents and the extent of presentation as well as the cost caused to the defendant.

The judge then may order the defendant to provide the plaintiff with the documents and in case he does not dispose of them anymore with the place of potential discovery. In particular for confidential matters, the court may also restrict the persons with access to these documents or may name an independent person to prepare a “sanitized version” of such discovery.

Interesting are consequences for breach of such discovery order, certainly qualifying as deterrent in the meaning of Art. 8 of the Directive: first a penalty of up to 10.000.000 Czech crowns - about EUR 360.000 – or 1 % of the turnover can be levied. Mainly however, the non-compliance with such order without substantial reason leads to the fact deemed to be considered as proven.

Correspondingly, a plaintiff who breaches business secrets may be fined with a penalty of 1.000.000 Czech crowns and is himself liable for damages. Proof obtained by such breach may not be used in Czech civil proceedings.

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4. Procedural aspects and forum

Already now, some EU-countries are trying to establish themselves as the best forum for damage claims under competition law. So far the Czech Republic had just a minuscule track record for private enforcement of damages for anticompetitive behavior (only two cases were reported for abuse cases, none of them in legal force yet). There are various reasons why the Czech Republic will not become the prime forum for such actions, for instance internationally still very long duration of court proceedings, the despite all the improvement of the last years still low trust of the business community into the quality of Czech Courts and internationally high court fees (5% of the value of the dispute for each instance).

5. Local Jurisdiction

The Act shifted away from the originally proposed sole jurisdiction of one court in Brno (conveniently at the seat of the Antitrust Office). The Act now defines regional courts (Krajský soud) as competent courts -for handling proceedings under the Act.

This decision by the Czech lawmaker is of course in accordance with the Directive but will mean that probably only few Czech judges if any will invest any time to get acquainted with that new and difficult topic, leading to a further decrease of the attractiveness of the Czech Republic as forum for damage claims.

Should you need any further information, please do not hesitate to contact us.

bpv BRAUN PARTNERS s.r.o.

Palác Myslbek

Ovocný trh 8

CZ-110 00 Prague 1

Tel.: (+420) 224 490 000

Fax: (+420) 224 490 033

www.bpv-bp.comprague@bpv-bp.com

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