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# The New Act on Actions for Damages for Infringements of Competition Law

On 27 June 2017, the Act on Actions for Damages for Infringements of Competition Law comes into force (the "**Act**"). The Act implements the so-called Damages Directive[1].

The Act is to facilitate actions for damages for competition law torts. It therefore introduces new measures (such as the disclosure of evidence) or modifies the existing rules (e.g. by introducing the presumption of the infringer's guilt). We discuss them briefly below. The Act lays down specific rules of liability for infringements of competition law, but only those based on tort and only in respect of claims for damages (e.g. excluding cessation claims). The Civil Code ("**CC**") applies within the scope not regulated by the new Act. Claims based on contractual liability or liability for unjust enrichment will continue to be subject to the CC. Unlike the Directive that concentrates on cartels, many provisions of the Act will apply to vertical agreements and abuse of a dominant position. The Act also applies to infringements of a purely domestic nature (that are outside of the Directive's scope).

[1] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2016 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 (the "**Directive**").

# Does the Act apply to past practices?

In principle, the Act applies to future practices (infringements that occur after the Act comes into force). Therefore, liability for any harm that occurs after 27 June 2017 but was caused by an earlier infringement will be assessed according to previous rules. The actions relating to practices that commenced before and are continuing after the Act's entry into force will most likely cause problems in practice.

The situation is different in relation to the new procedural rules (introduced in Chapter 3 of the Act – see section "*New rules on proceedings*" below). These rules will apply to proceedings initiated from 27 June 2017 onwards. Therefore, in this respect the Act will also apply to infringements that occurred before it comes into force. The previous rules will continue to apply only to the proceedings initiated but not completed before 27 June 2017. Furthermore, the Act modifies to some extent the limitation periods of claims relating to infringements predating the Act (see section "*Limitation and infringements predating 27 June 2017*" below).

# New rules on tort liability for antitrust infringements

## Any person that has suffered damage may claim compensation.

This applies to direct and indirect purchasers and suppliers of an infringer. Hence, for example, compensation may be claimed not only by the party purchasing products directly from a dominant entity at an inflated price, but also by a customer of such direct purchaser (if the latter has passed on the overcharge). The Act does not exclude actions for damages caused by umbrella pricing, e.g. actions relating to purchases from non-cartelists at a price that was adjusted to the levels inflated by the cartel.

## Right to full compensation and statutory interest.

As previously, a plaintiff may seek compensation for both actual loss and loss of profit. Additionally, the court will award compulsory statutory interest if it calculates compensation based on market prices in force at a time other than the judgment date. Interest will be due from the price reference date until the maturity date and is independent of default interest.

## Fault-based liability and presumption of fault.

The defendant continues to be liable only if it is guilty of an infringement. The Act has, however, reversed the burden of proof applicable under the general rules of tortious liability (where such burden rests on the plaintiff). Pursuant to the justification of the Act, a defendant will be able to rebut the presumption by demonstrating that despite exercising "due diligence he [was] not able to foresee and avoid an infringement." It remains to be clarified by the case law what kind of circumstances will exclude the fault. The key difference is that now the burden of proof is on the defendant.

## Presumption that every anticompetitive practice causes harm and quantification of such harm.

This is yet another example of the reversed burden of proof (as compared to the general rules) and extended application of measures provided for in the Directive. Contrary to the Directive, this rule will not only apply to cartels that may affect intracommunity trade. It will also apply to the "domestic" cartels, as well as vertical agreements and abuse of a dominant position, whether "domestic" or not. This is controversial to some extent. Courts (as previously) will be able to estimate the harm, including in the case of passing-on. This power will be of greater importance once combined with presumption of harm and fault.

## Presumption of passing of overcharges on to indirect purchaser.

This solution is to facilitate actions for damages by indirect purchasers, i.e. purchasers of goods originating from infringers (or derived from or containing such goods). Until now, the indirect purchasers had to demonstrate that the overcharge had been passed on to them. This presumption is rebuttable and does not apply for the benefit of an infringer, i.e. the infringer may rebut it (including by demonstrating that the overcharge was passed on only partly), but may not invoke it in a dispute with a direct purchaser.

### Restrictions on joint and several liability - protection of SMEs, immunity recipients and settling parties.

Under certain conditions (i) small and medium-sized enterprises ("**SMEs**") and (ii) recipients of full immunity under leniency programmes will be liable only to their customers or suppliers (direct or indirect). (The Directive limits the liability of SMEs even further, i.e. it excludes their liability also towards their suppliers). Additionally, the recipient of immunity: (i) in clearing with co-infringers, is liable only up to the amount of the harm it caused to its suppliers or customers (with minor exceptions); (ii) is liable towards injured parties other than its customers or suppliers only if such parties cannot obtain full compensation from other co-infringers. Despite criticism, these privileges do not apply to the parties to agreements other than a cartel. In Poland, such parties also qualify for immunity under leniency. The Act also provides for certain privileges for infringers who have settled with the aggrieved party.

### Limitation periods applicable to "new" infringements.

The claims in question will become time-barred upon the lapse of 5 years from the date on which the aggrieved party became aware (or by applying due care could have become aware) about both the harm and the person responsible for it. This (5-year) limitation period will not begin until the infringement has ceased (it may begin later, e.g. if the aggrieved party could have become aware about the harm and the person responsible after the end of the infringement). In any case, the claims will be time-barred 10 years from the end of the infringement at the latest. It is therefore apparent that the continuity of an infringement will be of key importance (e.g. answering questions such as whether it is one and the same infringement that changed over time or several different infringements that occurred in sequence or how to treat repetitive infringements of the same nature). The Act does not clarify whether the prescription periods start to run in the case of individual discontinuation, i.e. individually for each party depending on when it ends its involvement in the practice (the latter approach seems correct).

The opening of proceedings by the competition authorities within the EU (domestic authorities or the European Commission) suspends the limitation periods. The explanatory proceedings before the Polish competition authority will also result in suspension. This is highly controversial due to the very preliminary nature of such proceedings. The suspension ends after a year from the date on which the infringement decision becomes final or proceedings are terminated otherwise. Therefore, the suspension will end, for example, a year after the decision of the President of the OCCP becomes final, including if it is upheld or changed by the court of appeal. It is unclear what happens if the court simply annuls the OCCP decision.

### Limitation and infringements predating 27 June 2017.

The above rules apply to practices that will occur after the Act comes into force. However, the current 3-year limitation period will be calculated pursuant to the new rules in respect of claims predating the Act as long as such claims were not yet time-barred on 27 June 2017. This means that the 3-year period may start to run (i) already from the moment the aggrieved party could have become aware of the harm and the person responsible if it had applied due care (even if it had no actual knowledge about them), but (ii) not earlier than from the date on which the Act came into force. For example, the 3-year limitation period applicable to a claim concerning a cartel that ended in January 2016 will start to run on 27 June 2017 even if the plaintiff could have learned about the harm and the cartelists earlier (e.g. in May 2016), had it applied due care. If the plaintiff could acquire such knowledge later, e.g. in May 2017, the 3-year limitation period will start from this date.

## NEW RULES ON PROCEEDINGS

The Act introduces several specific rules on proceedings. The general provisions, i.e. the Civil Procedure Code, apply in the remaining scope.

### Disclosure of evidence.

The most important in this respect is the introduction of the broad right to request disclosure of evidence. Both the aggrieved party (in the action for damages and provided that its claims have been shown to be plausible) and the infringer (during the proceedings) may request the court to order disclosure of evidence. It may concern the evidence at the disposal of the other party to the proceeding, a third party or the competition authority (including the President of the OCCP), such as correspondence (e-mails), agreements, internal notes or recordings of conference calls. The

evidence obtained in this way may be used only for the purposes of the action for antitrust damages. A violation of this restriction and other abuse of evidence will be subject to a fine of up to PLN 20,000. Additionally, the court will have to disregard such evidence in further proceedings. The disclosure order is subject to an appeal, but the final order will constitute an enforcement title. The disclosing party will have the right to be heard before the court decides on disclosure. If the party to the proceedings evades the disclosure or destroys the evidence, the court may (but is not obliged to) recognise as proven the circumstances to which such evidence relates. Such findings may however be rebutted.

All of the disclosure requests have to be proportionate but the evidence in the files of the competition authority is subject to special protection. The party may request this evidence only if obtaining it elsewhere is at least very difficult and provided that the disclosure does not undermine the effectiveness of public enforcement. Therefore the leniency statements (excluding those relating to vertical infringements) and settlement submissions will never be subject to disclosure. They may not constitute evidence in the proceedings for damages at all. This restriction does not apply to the enclosures to such statements. Correspondence with the authority (more precisely, information that was prepared specifically for the proceedings or prepared by the authority in course of the proceedings and sent to the parties) as well as withdrawn settlement statements may be disclosed only after the competition authority closes the file. Prior to that, even the party that obtained materials of this kind by way of a direct access to the competition authority files (e.g. the infringer as the party to the proceedings) may not rely on it.

Business secrets and other confidential information do not preclude the disclosure but may render the request disproportional. Should the court order the disclosure, it may limit the other parties' access to them or impose specific rules on reviewing and using them (e.g. by limiting or prohibiting copying or recording of the evidence). The Act does not modify or introduce new rules on protection of legal privilege.

### The effect of final infringement decisions.

The final infringement decisions of the President of the OCCP and the review court will be binding upon the courts seized with actions for damages. The scope of the binding effect has not been specified in the Act. The recitals to the Directive state that it should cover the findings on the nature of the infringement and its scope (material, personal, temporal and territorial). Thus the findings on causation or harm should not be binding in actions for damages. Final decisions of the competition authorities of other EU Member States will continue to be used pursuant to the general rules on evidence (i.e. as prima facie proof and foreign official documents).

### Other procedural rules.

The regional courts will hear the actions for damages in the first instance. A plaintiff will be able to sue in the regional court which has been already seized with the same matter in an action brought by another aggrieved party. The Act also makes it easier for the first instance courts to hear the actions brought by different plaintiffs jointly. The aim of the provisions is to prevent inconsistent judgments, e.g. the awarding of compensation to indirect and direct purchasers exceeding the total amount of the harm. Non-governmental organisations, subject to the claimant's (consumers' and companies') written consent, will be able to bring actions on their behalf or join pending proceedings. Courts will be able to request assistance from the President of the OCCP or other competition authority in quantifying the harm (the request will not be binding on the authority) and rely on the European Commission guidelines on the quantification of harm and the estimation of the overcharge.

## Assessment

Some solutions introduced by the Act are controversial, but the new law will certainly encourage plaintiffs to bring actions for antitrust damages. The broad right of disclosure is material in this respect. The plaintiffs will be able to rely on it even in respect of infringements that ended before 27 June 2017, as long as they decide to sue on this date at the earliest. The set of new presumptions and new limitation periods are equally important. These solutions will in principle apply to "new" practices. The hearing of the cases concerning infringements that started before the Act comes into force and continue afterwards will be problematic in practice.

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