

BULGARIA: PRIVATE DAMAGES DIRECTIVE IMPLEMENTED

BACKGROUND

On 3 January 2018, a new Law for Amendment and Supplementation ("New Law") of the Competition Protection Act ("**CPA**") was published in the Bulgarian Official Gazette. The New Law implements the European Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of national or EU competition law (the "**Damages Directive**"). EU Member States were required to implement the Damages Directive in their national legal systems by 27 December 2016.

The Damages Directive was adopted with the aim to facilitate obtaining compensation for infringements of EU or national competition law, by harmonizing relevant provisions in the EU Member States. In particular, the Damages Directive envisaged easier access to evidence needed to prove suffered damages or provides for longer statutes of limitations to benefit potential claimants.

THE IMPLEMENTATION IN BULGARIAN LAW

In Bulgaria, the Damages Directive was transposed by way of amendments to the CPA. It largely follows the structure of the Damages Directive and entered into force three days following its publication - i.e. on 7 January 2018.

The material scope of the New Law follows that of the Damages Directive and will apply to both breaches of Articles 101 and 102 of the Treaty on the Functioning of the European Union ("**TFEU**") and of the national provisions of Article 15 (prohibited agreements) and Article 21 (abuse of dominance) of the CPA.

The new provisions will not apply to infringements of other provisions of Bulgarian competition law specific to Bulgaria, such as the abuse of a stronger bargaining power and unfair competition practices.

The new provisions will apply to all proceedings initiated after 26 December 2014. This follows the Damages Directive, which prohibits Member States from applying the above-mentioned provisions to proceedings initiated before that date.

BINDING EFFECT OF DECISIONS BY COMPETITION AUTHORITIES

The new law introduces a binding effect of decisions made by courts and competition authorities of other Member States and the European Commission, thereby removing the

need to prove one of the elements of the breach – the infringement (fault). This is one of the three elements, alongside harm and causal link, which a victim must prove in order to obtain compensation under Bulgarian law.

In the event of "follow-on" actions, decisions rendered by the European Commission or the Bulgarian Competition Protection Commission ("**CPC**") that establish breaches of competition law will constitute an irrefutable presumption of breach. Decisions rendered by competition authorities in other EU Member States will have evidential value in relation to proving an infringement, but could be rebutted by defendants.

With respect to "stand alone" actions – i.e. actions initiated without a prior decision by the EC or a national competition authority – there is naturally no decision that could have a binding effect and the claimant will have to prove that an infringement of competition law has occurred. It should be noted in that regard that until now Bulgarian courts have generally rejected "stand-alone" claims based on the understanding that under the CPA, the CPC was the only authority having competence to determine a breach of Bulgarian competition law. It is regrettable that the New Law does not explicitly address this issue.

PROOF OF DAMAGES SUFFERED

The New Law provides for a rebuttable presumption that cartel infringements, unlike abuses of a dominant position, always cause harm. Since such presumptions are unusual under Bulgarian law, the courts will have to decide the applicable standard of proof, which defendants will have to meet to rebut that presumption.

The New Law expands the role of the judge in the determination of the amount of damages. In addition, for assessment of damages caused, judges are authorized to seek the assistance of the CPC. This is a novelty under Bulgarian law to involve administrative bodies in the process of determining damages and in obtaining an assessment by independent experts. Moreover, in this case the CPC is a party to the proceedings where it would have originally established the breach of competition law. Therefore, it will take some time for the administration to build the necessary structure to efficiently assist the courts. Unfortunately, the New Law does not explain what the evidentiary value of such an evaluation of damages by the CPC would be. Considering this is a new function, it will be yet another challenge before the competition watchdog, which is already overloaded to review not only anticompetitive practices, but also challenges to public procurement procedures.

JOINT LIABILITY

The New Law also introduces joint liability when multiple companies carry out a breach of competition law. It provides for some limitations of this principle in favor of small and medium enterprises, while at the same time explicitly providing that this should not prevent victims from acquiring full compensation for breaches caused. This would increase the burden on large market players to cover any differences.

LIMITATION PERIOD

The Bulgarian National Assembly has opted to apply the existing limitation period, which is 5 years for torts. In addition, the New Law introduces particularities regarding the starting point of the limitation period which are in favor of victims. The limitation period only starts running once the victim has acquired knowledge or it can be inferred that it had knowledge of the breach, the damages and the identity of the infringer(s). Further, the limitation period is interrupted when proceedings are initiated before a competition authority and a new period starts after completion of those proceedings.

COLLECTION OF EVIDENCE

The procedural rules governing the collection of evidence are largely consistent with the Bulgarian Civil Procedure Code. They enable Bulgarian courts to order the parties, and/or where relevant, a third party to disclose relevant evidence upon request of the defendant or the claimant. The New Law also provides that the courts may request evidence produced in the course of the competition proceedings with some exceptions, such as confidential documents, requests for leniency of settlement or internal documents of the competition authority.

The first draft of the New Law provided that courts may order the disclosure of "categories of evidence", which would have been the first application under Bulgarian law of a procedure similar to the Anglo-Saxon disclosure/discovery process. However, after the vote on first reading in the Parliament, this provision was amended and the New Law requires specific evidence to be requested for disclosure. This would limit the claimants in their evidentiary requests by requiring advanced knowledge by the victim of the particular documents which are claimed to be relevant in the case. This local particularity raises the question of whether the Damages Directive has been correctly transposed.

COMPETENT COURTS

Claims for compensation of private damages shall be brought before the competent courts based on the existing rules of the Civil Procedure Code. Generally, this means that the civil/commercial courts would be competent instead of the incorporation/residence of the defendant.

CHANGES IN THE DEFINITION OF A CARTEL

The New Law also makes a number of amendments to the existing provisions of the CPA. In particular, it introduces changes to the existing definition of "Cartel" under Bulgarian law, which previously covered only horizontal agreements. The new wording does not explicitly provide that those participating in the Cartel shall be competitors, i.e. present on the same market level.

January 2018

EFFECT ON THE MARKET

The implementation of the Damages Directive in Bulgaria is expected to substantially increase private enforcement claims in the country.

The new legislation is likely to encourage claimants to bring damages actions against antitrust infringements in Bulgaria. In particular, cases arising out of EU Commission decisions - such as the follow-on damages actions recently brought against truck manufacturers found to have participated in a cartel - are expected to become more frequent in Bulgaria following the adoption of the New Law. Similarly, it could be expected that such claims regarding decisions by the Bulgarian Competition Protection Commission would also be more frequent. In recent months, the CPC has been particularly active and has rendered a number of decisions which may well give rise to such claims. For example, decisions imposing sanctions on utility companies which potentially could have affected virtually every individual or business in Bulgaria.

Since the New Law took effect, companies are more exposed to claims for antitrust damages and face claimants who have a strengthened litigation position.

The increased risk of damages claims considerably increases the risks arising out of breaches of competition law for companies, as they may be subject not only to financial sanctions imposed by the EC/CPC, but also to long and potentially costly private damages claims.

COMMENT

The implementation of the Damages Directive in Bulgaria was long expected and it occurred during a period of increased activity of the CPC.

While key areas such as the validity of assignment, transfers and set-off of claims arising out of competition breaches, the legality of litigation vehicles and the financing of actions by third parties are still not addressed under Bulgarian law and are areas for discussion, the New Law is still a major breakthrough for private damages actions in Bulgaria. The new legislation is expected to open the door for damages claims arising from antitrust infringements in the country. In 2017 in cases of abuse of dominance, 8 new cases were initiated and 4 sanction decisions were imposed. Also in 2017 regarding antitrust cases, 7 cases were initiated and 1 sanction decision was rendered. The amount of fines is also increasing, reaching several millions of euros.

It is to be expected that the potentially increased number of private damages litigations will allow the courts to fill in some gaps in the Bulgarian framework, following the extensive experience in such claims by other EU member states.

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