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Legal Alert

Compensation for breach of competition law easier to pursue

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The act of 21 April 2017 on the claims for compensation for damage caused by infringement of the competition law only awaits the signature of the President. Its entry into force will change the balance of power between the parties to disputes concerning damages for the breach of competition laws.

Although the principles of tort liability in the civil code already provide the possibility of seeking compensation for infringements of competition law (the so-called *private enforcement*), the effectiveness of such proceedings is, however, very limited. This is primarily due to procedural difficulties, the complexity of cases with an antitrust element and limited access to evidence by the claimants.

The new act of 21 April 2017 on claims for compensation for damage caused by infringement of the competition law is to change this state of affairs. Facilitating the claims for such damages is on the one hand a chance for the claimants, but inevitably also a greater risk for the defendants, who may become the addressees of a growing number of claims for damages.

Opportunities for claimants

The act introduces a number of facilitations for claimants seeking compensation, thereby making the possibility of obtaining compensation for infringements of the competition law more realistic.

Among the most important solutions the following should be mentioned:

- presumption of fault on the part of the offender
- presumption of causing harm through infringement of the competition law (irrespective of the infringement's nature, i.e. horizontal or vertical agreement or abuse of a dominant position)
- presumption of passing-on overcharges to indirect purchaser
- extending limitation periods for claims for damages (from 3 to 5 years)
- facilitation of access to evidence

If we also include amendments to the rules governing group litigation that came into force on 1 June 2017, we may soon be faced with an increase in private enforcement proceedings in Poland. This in turn means a significant increase in the risk for the companies committing an infringement of the competition law.

Risks to the defendants

Opening the door to easier compensation for breaches of the competition law will most likely increase the number of lawsuits (not always justified) against entrepreneurs. For many defendants this will mean having to undertake comprehensive and often costly actions, e.g. for the purpose of rebutting a number of legal assumptions. The entry into force of the act also means extending access to documents relating to the alleged infringement held by the defendants, competition authorities or third parties. Despite the introduction of certain mechanisms to protect against the uncontrolled disclosure of such documents (court supervision, protection of business secrets, financial penalties for unauthorised use of a document), it is easy to spot potential abuse cases and

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lawsuits only to obtain documents or information that could be used for other purposes, such as business. Lastly, the adoption of similar solutions across the EU could intensify the *forum shopping* phenomenon, i.e. suing entrepreneurs before courts of the Member States where claiming compensation is most advantageous, such as the Netherlands or Germany, where further facilitations than those adopted in Poland are made.

What's next?

The entities injured by the breach of the competition law should consider the possibility of taking advantage of the mechanisms offered by the new law, which in real terms increase the chances of effective compensation. However, it should be noted that the provisions of the act will apply only to those violations that occurred after its entry into force. Exceptions are procedural provisions (such as access to evidence), which can also be used in the case of compensation proceedings relating to damage caused before the date of entry into force of the act.

Due to the entry into force of the act, entrepreneurs who can be the addressees of claims for damages - particularly those who frequently interact with competitors or have dominant position - should take appropriate preventive measures. The assessment of the risk of infringement of the competition law can no longer be limited to the issue of high penalties imposed by the competent competition authority or the nullity of the legal actions contested by it, but it must take into account the increased risk of claims for damages.

The natural response to the new act seems to be the development or improvement of *competition compliance* programmes. Through the use of tools such as audits or whistleblowing, it will be possible to prevent or detect early violations. It is also extremely important to properly safeguard the documents that may be disclosed in the course of the proceedings for damages. In this context, the earliest possible involvement of external lawyers in cases likely to infringe competition law may be the key. Their correspondence enjoys legal professional privilege and, as such, cannot be disclosed. Finally, in the context of the defence strategy, leniency applications and applications for ending of antitrust proceedings by issuing a commitment decision can be important to better protect the interests of traders in the event of follow-on actions.

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