Topics in our issue:

The new EU Damages Directive for competition law claims

The Directive is meant to facilitate the private enforcement of damage claims following competition law infringements for consumers and business operators, and to strike a balance between private and public law enforcement.

On 26 November 2014, EU Directive 2014/104/EU governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (hereinafter referred to as "the Directive") was adopted. The domestic legal obligations are to be implemented by 27 December 2016. The regulations of the Directive could also lead to adaptations of legal norms in Austria, particularly relating to disclosure orders, statute of limitations provisions and the provisions on joint and several liability.

The fundamental contents of the Directive

Member States are free to enact further regulations in addition to the Directive. However, such regulations must not violate the regulations of the Directive and must not be designed in such a way that they make the exercise of full compensation according to Union law practically impossible or excessively difficult. Regulations regarding the violation of Union law also must not be less favorably developed than the regulations for damage compensation claims due to breach of national competition law.

Scope and extent of damage compensation

Every natural and legal person, regardless of any existing direct contractual relationship with the injuring party and independent of the previous discovery of the infringement by a competition authority, has the right to complete damage compensation. Complete compensation comprises the actual financial loss as well as the lost profit and interest since the time the damage took place. With cartels, the cause of damage is refutably presumed. It is at the discretion of national courts "to estimate the amount of harm, if it is established that

MARCH 2015

P) PRESLMAYR RECHTSANWÄLTE

a claimant suffered harm but it is practically impossible or excessively difficult to precisely quantify the harm suffered on the basis of the evidence available."

Disclosure of evidence
National courts have the ability to order the defendant and third parties to disclose evidence, if there is a request by the claimant with reasoned justification that compellingly supports the claim for compensation. Disclosure of specific individual evidence as well as of categories of evidence can be ordered, as long as these are delimited as precisely as is possible with a reasonable effort. For disclosure, proportionality is to be taken into consideration.

Disclosure of evidence that is included in the file of a competition authority is also regulated. Particular evidence (such as withdrawn settlement submissions) may only be disclosed after the authority has closed its proceedings. Leniency statements and settlement submissions are completely exempted from the disclosure.

The utilization of evidence obtained through access to a file of a competition authority is limited. Thus, use of leniency statements and settlement submissions would be inadmissible in damage compensation proceedings. Further, the passing on of documents obtained in such a way is prohibited.

Statute of limitations
The statute of limitations begins only after the infringement has ended and only when the claimant becomes aware of the following issues, or reasonably should have become aware of them: (i) the identity of the infringer, (ii) the infringement of competition law and (iii) the occurrence of damage to the claimant. The limitation period is at least five years and is suspended at least for up to one year after the end of the competition authority's proceedings.

Other provisions
Claims for damages are possible, regardless of a previous decision by a competition authority. However, a previous decision by a national competition authority binds each national court with respect to the existence of a breach of competition law. Legally binding decisions from other Member States can be presented at least as prima facie evidence. The joint and several liability of businesses acting jointly is codified by the Directive; immunity recipients and SMEs are, in that respect, treated with privilege subject to particular preconditions.

The defendant has the right to argue that the claimant may have passed the surcharge arising from the competition breach on to its customers, entirely or in part.

The extent of such passing on of damages can likewise be estimated by the national court. Indirect customers are entitled to sue, but they carry the burden of proof for the existence and scope of such passing on of damages. Such evidence is produced when it has been demonstrated that (i) the defendant has committed the infringement, (ii) this entailed a surcharge for the direct customer and (iii) the indirect customer purchased goods or services that were the object of the infringement.

Requests to the Austrian legislative authority
Section 37a of the Austrian Cartel Act (Kartellgesetz, or KartG), which has been in effect since 2013, regulates damage compensation due to competition law violations. Some provisions of the Directive, such as the extent of damage compensation (incl. interest), as well as the possibility of estimating the extent of damage, have already been covered here. Nevertheless, there is a need for change as part of the implementation of the Directive.

Currently, the statute of limitations for damage compensation is generally set at three years, according to Section 1489 Austrian General Civil Code (Allgemeines Bürgerliches Gesetzbuch or ABGB). To date, there is no separate regulation for damage compensation in competition law. Section 37a para 4 KartG already provides for the suspension of the statute of limitations (it ends six months after the legally binding decision of a competition authority). Therefore, the existing regulation must be changed in accordance with the Directive – 5 year statute of limitations, 1 year suspension. There is also a need for change with respect to the disclosure of evidence.

THE AUTHORS:

***Mag. Dieter Hauck**, Attorney-at-Law and partner at Preslmayr Rechtsanwälte, and is primarily engaged with antitrust, damage compensation and procedural law.*

E hauck@preslmayr.at

***Mag. Elisa Kaplenig Bsc. (WU)**, associate at Preslmayr Rechtsanwälte, and is primarily engaged in competition law and antitrust law.*

E kaplenig@preslmayr.at

Alterations by the law amending the Austrian Financial Act 2014

With EU Directive 2013/34/EU from 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings (the Financial Statement Directive), the Fourth Council Directive 78/660/EEC on annual accounts and the Seventh Council Directive 83/349/EEC on consolidated accounts (the so-called Accounting Directives) are superseded and, in large parts, carried over into the Financial Statement Directive in a modernized form. This reform now leads to a wide-reaching amendment of the Austrian financial reporting standards by the amendment to the Financial Reporting Act published in the Austrian Federal Law Gazette (Bundesgesetzblatt or BGBl) on 13 January 2015 (Financial Reporting Act Amendment [Rechnungslegungs-Änderungsgesetz or RÄG] 2014).

Size groups

The thresholds for the provision of size groups now amount to:

- Balance sheet total EUR 5 million for medium businesses and EUR 20 million for large businesses;
- sales revenue EUR 10 million for medium businesses and EUR 40 million for large businesses;
- the workforce size of 50 employees for medium businesses and 250 employees for large businesses remains unchanged.

"Public Interest Entities" are new; these are essentially companies listed on the stock exchange, credit institutions, insurance companies and businesses that are declared to be "PIE" by law. They are invariably considered to be large corporations.

Also new are "micro-enterprises", which are small companies that are not investment companies or holding companies and which do not exceed two of the three following criteria:

- Balance sheet total EUR 350,000.00;
- sales revenue EUR 700,000.00 and
- an average of ten employees per year.

Micro-enterprises must not prepare annexes when quoting the global amounts of contingencies and advances and credit to the chairman/chief executive and the supervisory board in the financial statement. The compulsory penalties associated with disclosure are halved for them.

Recognition and evaluation

The existing generally accepted accounting principles are codified, such as, in particular, the principles of economic substance, materiality, reliable estimation and consistency. A deviation from these principles is only permissible in case of special circumstances and must be justified in the annex, and it must be demonstrated how the deviation influences the asset, financial and income situation.

Business or company value

The new financial reporting law provides for a compulsory depreciation over ten years, provided the service life cannot be reliably evaluated. This can lead to a deterioration of the income, financial and asset situation if the fiscal service life of fifteen years was also previously used in the financial statement according to the commercial code.

Annex

Before, the information for large businesses had been taken as a basis for the annex, and exceptions were made for medium and small businesses; now, the annex information is taken as a starting point that applies to all businesses. While this reduces the information for small businesses (elimination of information about financial instruments and of the declaration of all active members of the executive and supervisory boards), medium and large businesses must now record in the annex, for instance, the declaration of the kind, and financial effects, of significant events occurring after the accounting date that are not taken into account either in the profit and loss statement or in the financial statement, as well as the proposal on the appropriation of earnings.

Consolidated Accounting

The obligation to compile a consolidated financial statement together with a group management report and consolidated corporate governance report as well as a consolidated report on payments to government authorities will in future only refer to uniform management by a corporation headquartered in Austria. The thresholds for the waiver of these obligations are raised.

Transitional rules

The large part of the new regulations is applicable for fiscal years with a balance sheet date from 31 December 2015 on. The changed thresholds for micro-enterprises can be used as early as the year-end statement for the fiscal year of 2016 if the company was already a micro-enterprise in 2014 and 2015.

THE AUTHOR:

***Dr. Rainer Herzig**, attorney-at-law and partner at Preslmayr Rechtsanwälte specializes in corporate, competition, and intellectual property law.*

(March 2015)

In brief

Petition instead of proposal

Since 1 January 2015, parties to civil or criminal proceedings have the possibility to request the repeal of an unlawful ordinance or an unconstitutional law from the Austrian Constitutional Court (Verfassungsgerichtshof or VfGH) themselves. Before, they could only propose that such petition be made by the Courts, but did not have a right to one.

The parties' present right to petition applies in a concurrent appeal against a first-instance decision. Up until the decision by the VfGH, the appellate court may only take measures that cannot be influenced by the VfGH verdict, which do not conclusively settle the matter at issue or which do not permit a deferral. In order to check the risk that the petition might be abused to delay proceedings, the petition is excluded from proceedings whose purpose is a quick clarification of the legal situation (e.g. for the preservation of evidence).

Torpedoes defused

On 10 January 2015, the new Regulation EC No. 1215/2012 (EuGVVO) came into effect. This will largely mitigate so-called "torpedo lawsuits", i.e. lawsuits brought in a court of incompetent jurisdiction in order to delay proceedings in the competent court of another EU Member State. If a court agreement is reached, then, according to the new Regulation, the designated court shall no longer decline jurisdiction just because it was called on later; on the contrary, the other court must stay proceedings until such time as the court seized on the basis of the agreement declares that it has no jurisdiction under the agreement. A verdict passed in one EU Member State can also now be enforced in another EU Member State without a specific declaration of enforceability.

IBAN – "Transposed digits" and liability

With bank transfers, the payer is well-advised to check the payee's stated "International Bank Account Number" (IBAN) carefully. The check digits contained within the IBAN do prevent further transmissions of incorrect orders due to "transposed digits", but if the payer inadvertently gives an existing IBAN that is simply assigned to another recipient, then it can be difficult to recover the transferred money.

While, according to previous case law, the receiving bank was obliged to check the consistency of the account number and recipient's information, according to the new legal situation, it now only has to execute the payment order on the basis of the stated IBAN. As the Austrian Supreme Court recently ruled, receiving banks can therefore ignore further information, such as the recipient's name, even when this information is also requested (e.g. during telebanking).

New associates

New to our legal team is **Boris Treml**, who, after several years of professional experience in various areas of the IT sector (and exploration of several continents on bicycle), was drawn into a career in law. With us, he will particularly dedicate himself to IT and data protection law. Competition and antitrust law as well as consumer rights, on the contrary, are the speciality of **Elisa Kaplenig,** who, along with studying law at the University of Vienna, also graduated from the Vienna University of Business and Economics with a degree in Business Administration.

Preslmayr Rechtsanwälte OG
Universitätsring 12, 1010 Vienna, Austria
Tel: (+431) 533 16 95
office@preslmayr.at www.preslmayr.at
FN 9795f, HG Wien
DVR: 07077411 UID: ATU10504104

PRESLMAYR
RECHTSANWÄLTE