

DANA ONDREJOVÁ*

CAN A LEGAL ENTITY CLAIM ADEQUATE COMPENSATION UNDER CZECH LAW IN THE EVENT OF INFRINGEMENT OF ITS GOOD REPUTATION?

1. INTRODUCTION

Under Czech law, a legal person has legal personality¹ and the right to protection of its name, reputation and privacy².

This paper discusses possible means of protection available to a legal person if its reputation is harmed. The study focuses specifically on two possible grounds, based on which the legal person may file a complaint: unfair competition and general private-law protection of reputation. The author points out the differences between those, especially in terms of the right to claim compensation for non-pecuniary damage caused by the interference with the legal person's reputation, both in the light of legislation and current case law of Czech courts.

The paper primarily aims to highlight certain shortcomings in the Czech legal framework concerning the possibility for legal persons to seek compensation resulting from the protection of their reputation under general private law. Although in the author's view a reasonable interpretation of the relevant legal provisions offers a way to overcome these shortcomings, Czech courts do not approach this issue consistently. The author emphasizes this point and argues which of possible approaches she believes is correct.

* The author is Doctor of Law (doc. JUDr.) working at the Department of Commercial Law, Faculty of Law, Masaryk University in Brno.

¹ Sections 15 and 18 of the Czech Act No. 89/2012 Coll., the Civil Code, as amended (hereafter the Civil Code).

² Section 135 of the Civil Code.

2. REPUTATION OF A LEGAL PERSON AND POSSIBLE MEANS OF PROTECTION IN THE CASE OF INTERFERENCE WITH ITS REPUTATION

A legal person's reputation can be interfered with by a variety of actions. These may include defamation concerning the quality of services provided by the legal person, its attitude towards customers or its own employees, the composition, origin or effectiveness of its products, personal issues of the owner or managers of the legal person, etc.³

According to the current case law of the Czech Supreme Court⁴, good reputation is presumed and does not need to be proven in court proceedings. It is true that good reputation of a legal person arises at the moment of its establishment and lasts throughout its operation (by analogy, in the case of a natural person, it arises at birth or upon obtaining a business licence and lasts until death or termination of activity as a competitor). Goodwill of a legal person is a personal right which is inalienable. It is understood that, in accordance with the generally accepted presumption of good faith in the conduct of legal persons, a person is also presumed to be in good repute until the moment when evidence to the contrary is successfully provided. At the same time, it must be borne in mind that good reputation of a legal person must be assessed in a particular case by reference to its conduct in business relations. If a business entity does not fulfil its obligations properly and on time (or does so only exceptionally), it cannot be concluded that it is a competitor in good repute. The reputation of a particular person is primarily established based on the experiences of its business partners, customers, and other parties that interact with it.

If a legal person's reputation is harmed, Czech law offers basically two options for asserting its rights, both of which are laid down in the Civil Code.

The first option is the protection of the legal person's reputation under the provisions of Section 135(1) of the Civil Code⁵, which is used particularly in the case where the interference with the reputation of the legal person does not have a competitive aspect (the person interfering with the legal person's reputation is not driven by a competitive aim or purpose). This is commonly referred to as the protection of a legal person's reputation.

³ For example, the Regional Court in Brno (Case No. 17 Cm 9/2020 of 24 October 2021) found that statements that "the plaintiff is a sect, does not pay its leaders and prefers to fire them in order to save money, blackmails its business partners, its people are snitches and crooked characters" were an infringement on the reputation of that legal person.

⁴ In the remainder of the paper, all decisions of the Czech Supreme Court will be referred to as 'decisions of the Supreme Court'; decisions of other Czech courts will be referred to similarly. Cf. the decision Supreme Court decision of 18 March 2008, Case No. 30 Cdo 1385/2006, or of 15 November 2000, Case No. 29 Cdo 630/99.

⁵ According to Section 135(1) of the Civil Code, "a legal person who has been affected by a challenge to their right to a name or who has suffered damage because of an unauthorised interference with that right or who is threatened with such damage, in particular by the unauthorised use of a name, may demand that the unauthorised interference be refrained from or that its effect be eliminated".

The other option is to protect the legal person's reputation under the provisions of Section 2988 of the Civil Code, i.e. under the provisions on unfair competition (Section 2976 et seq. of the Civil Code). This is only applicable if all the conditions of the general unfair competition clause under Section 2976(1) of the Civil Code are cumulatively met, i.e. if the interference with reputation is of a competitive nature. The conditions of the general unfair competition clause are as follows: (1) the conduct must take place in the course of a commercial relationship⁶, (2) it must be contrary to the principles of fair competition⁷, and (3) it must potentially cause injury to other competitors or customers^{8,9}. Such conduct will generally meet the features of the specific (statutory) offence of unfair competition, i.e. parasitising reputation (Section 2982 of the Civil Code), disparagement (Section 2984 of the Civil Code)¹⁰ or creating a risk of confusion (Section 2981 of the Civil Code), but it may also be the conduct falling only under the general unfair competition clause (Section 2976(1) of the Civil Code), namely the so-called unnamed (judicial) unfair competition clause referred to as 'free riding'¹¹.

3. SUBSTANCE OF THE ADEQUATE COMPENSATION CLAIM

The award of adequate compensation by the court in relation to unfair competition is possible if it is proven that non-pecuniary damage has occurred (cf. Section 2951(2) of the Civil Code). This is emphasised by the Supreme Court¹²: "the interference with the non-material sphere and the resulting damage, which is primarily manifested in the non-material sphere, is a prerequisite for compensation being awarded at all".

Non-pecuniary damage may be, for example, damage to reputation, goodwill, the loss of prestige, trust, downgrading in the eyes of customers, lost or reduced competitiveness, presenting someone in a bad light, distortion of achievements or abilities, etc.¹³

⁶ Decisions of the Supreme Court of 18 January 2006, Case No. 32 Odo 1642/2005, and of 30 May 2007, Case No. 32 Odo 229/2006.

⁷ Decisions of the Supreme Court of 15 February 2006, Case No. 32 Odo 267/2005, and of 26 March 2013, Case No. 23 Cdo 1757/2012.

⁸ Decision of the Supreme Court of 29 April 2008, Case No. 32 Cdo 139/2008.

⁹ For more details on these conditions, see e.g. D. Ondřejová: *Nekalá soutěž v novém občanském zákoníku* (in: *Občanský zákoník: Komentář, Svazek VI (§ 2521–3081)*), M. Hulmák (ed.), Prague 2014, p. 40.

¹⁰ This act of unfair competition is typically aimed at defamation (i.e. stating or disseminating false information about a competitor), but it also applies to stating and disseminating true information (e.g. an evaluation of the quality of a competitor's services) that can cause harm to the competitor.

¹¹ Decision of the Supreme Court of 31 August 2021, Case No. 23 Cdo 2793/2020.

¹² Decision of the Supreme Court of 28 March 2018, Case No. 23 Cdo 2415/2017.

¹³ For more details, see e.g. I. Telecom: *Priměřené zadostiučinění*, *Právní rozhledy* 2010, Issue 4, p. 149.

Adequate compensation is therefore understood as an instrument to remedy non-pecuniary harm, not as compensation for material harm. It is not possible to take account of the material nature of facts when claiming adequate compensation, since that remedy does not serve to compensate for them, unlike the claim for damages¹⁴. Negative non-pecuniary damage can therefore be defined as any impact of the tort on non-pecuniary values¹⁵.

Adequate compensation fulfils several functions. The first is redress, since adequate compensation represents partial compensation for the harm suffered by the person concerned¹⁶. In the case of non-pecuniary harm, there cannot, by the nature of the case, be ‘actual’ compensation¹⁷ but rather ‘satisfactory or sufficient’ compensation. This is the stand of the Constitutional Court¹⁸ which stated that “harm caused by the violation of non-pecuniary rights cannot even be fully ‘compensated’ in the general sense of the word, and the extent of the non-pecuniary harm caused cannot be precisely determined and can only be compensated for”. A similar conclusion can be found in the Slovak case law: “Unlike a claim for damages, where the compensation awarded in principle is a redress for all the damage caused, the compensation granted will compensate for the damage caused only in proportion”¹⁹. As stated in V. Janeček, “it is a kind of over-compensation, which allows the injured party to claim an amount of money for the mere interference with its fundamental rights”²⁰.

The punitive function of adequate compensation²¹ may at first sight appear questionable, especially because adequate compensation should serve mainly as compensation for the harm caused, i.e. as redress for the non-pecuniary harm actually caused (similar to compensation for damages). However, in view of the complexity of proving the actual non-pecuniary damage suffered, the case law has established a fairly fixed punitive concept of adequate compensation, which is intended not only to compensate for the non-pecuniary damage suffered but also to punish the infringer for its unfair competitive conduct. “The financial compensation awarded here does not reflect the actual harm suffered by the injured party but is

¹⁴ Cf. D. Ondřejová: *Nekalá soutěž v novém občanském zákoníku. Komentář*, § 2972–2990, Prague 2014, p. 259.

¹⁵ P. Vojtek, F. Půry: *Aktuální otázky náhrady nemajetkové újmy*, Soudní rozhledy 2017, Issue 11–12, p. 346.

¹⁶ Cf. decision of the Supreme Court of 25 June 2008, Case No. 32 Odo 1568/2006.

¹⁷ It is not conceivable that damaged reputation could always be fully and genuinely redressed by an apology or a sum of money. This would be realistic, for example, in a situation where interferer sends a derogatory letter about a particular competitor is sent to a business partner and the competitor subsequently tells the interferer that it made up all the facts and apologises for this. However, this would be more difficult to imagine in the case of communication to an unspecified number of persons (for example, through the press or television).

¹⁸ Decision of the Constitutional Court of 6 March 2012, Case No. I ÚS 1586/09.

¹⁹ Decision of the Regional Court in Bratislava of 26 October 2017, Case No. 4 Cob 97/2015.

²⁰ V. Janeček: *Kdy lze de lege lata poškozenému přiznat preventivně-sankční složku přiměřeného zadostiučinění*, Právní rozhledy 2016, Issue 22, p. 767.

²¹ Similarly e.g. in D. Ondřejová: *Přiměřené zadostiučinění v nekalé soutěži I. Podstata, funkce a nepeněžitá podoba přiměřeného zadostiučinění*, Bulletin advokacie 2018, Issue 12, p. 23; V. Janeček: *Sankční náhrada škody*, Právník 2013, Issue 10, p. 989; M. Ryška: *Výše a účel náhrady nemajetkové újmy v penězích při ochraně osobnosti*, Právní rozhledy 2009, Issue 9, p. 305.

awarded to punish and deter the wrongdoer, in an amount that ensures the redress of violated rights, taking into account all the circumstances increasing or decreasing the gravity of the tort committed”²². The Czech Constitutional Court emphasized the punitive character of adequate compensation in its decision in Case No. I ÚS 1586/09²³: “adequate compensation is one of the civil law sanctions which is intended to deter the infringer of protected rights and its possible followers from unlawful conduct”²⁴. The Supreme Court takes a similar approach to adequate compensation treating it as a kind of civil sanction²⁵, and so does the Slovakian case law²⁶. I consider the mentioned approach to be correct. For completeness sake, however, it is necessary to add that in expert literature²⁷ and case law²⁸, there are some rather minority opinions suggesting that adequate compensation should not serve a punitive function but should only provide compensation.

The preventive or educative function of adequate compensation is derived from the above-mentioned punitive function. According to the Constitutional Court²⁹, adequate compensation is intended to deter the infringer of the protected rights and its possible followers from committing unlawful acts and it is considered “an instrument of special and general prevention.” Similarly, the Supreme Court³⁰, which has awarded the highest rate of adequate compensation (CZK 5 million) in the Czech legal environment to date, stated *inter alia* that “the court must always be guided in its specific decision imposing obligations on the infringer by the simultaneous aim to ‘educate’ the infringer and all potential infringer(s), so that neither the infringer nor anyone else can get the impression that ‘unfair competition still pays’”. The Slovak case law also follows the same idea that: “Adequate compensation not only has a punitive function, i.e. it is intended to deter the infringer from continuing such unlawful conduct, but also a preventive function, because the award of compensation makes it clear that unfair competition does not pay and that the morality of competition must be respected”³¹.

²² V. Janeček, *Sankční náhrada škody*, op. cit., p. 1003.

²³ Decision of the Constitutional Court of 20 February 2018, Case No. I ÚS 1586/09.

²⁴ Here, however, it is necessary to point out the dissenting opinion of Judge I of the Constitutional Court, Janů, who objected to the punitive nature of adequate compensation — “in accordance with the nature of private law, a civil sanction can only aim to restore the disturbed balance not to punish the responsible party. Adequate pecuniary compensation can therefore only serve to mitigate the non-pecuniary damage caused and not to punish the person who has interfered with personality rights”.

²⁵ Cf. e.g. decisions of the Supreme Court of 27 July 2012, Case No. 23 Cdo 3704/2011, or of 18 September 2002, Case No. 29 Odo 652/2001.

²⁶ Cf. e.g. decision of the Slovak Constitutional Court of 12 April 2016, Case No. III. ÚS 211/2016.

²⁷ T. Doležal, F. Melzer: *Závazky z deliktů a z jiných právních důvodů* (in: *Občanský zákoník — velký komentář. Svazek IX*, F. Melzer, P. Tégl (ed.), Prague 2018, pp. 953, 954.

²⁸ Decision of the Supreme Court of 17 February 2016, Case No. 30 Cdo 520/2014 or decision of the Supreme Court of 15 December 2020, Case No. 25 Cdo 27/2020, which was subsequently annulled due to its incorrectness by the decision of the Constitutional Court of 2 November 2021, Case No. I. ÚS 668/21.

²⁹ Decision of the Constitutional Court of 6 March 2012, Case No. I ÚS 1586/09.

³⁰ Cf. e.g. decision of the Supreme Court of 27 July 2012, Case No. 23 Cdo 3704/2011.

³¹ Cf. e.g. decision of the Regional Court in Bratislava of 26 October 2017, Case No. 4 Cob 97/2015, or similarly decision of the Regional Court in Banská Bystrica of 20 September 2012, Case No. 43 Cob 174/2012.

In deciding on the adequate compensation claim, the courts base their decisions on the conditions of the general regulation of compensation for damages under Section 2984 et seq. of the Civil Code, which provides for the compensation for damages caused by violation of the law. Its award is linked to the fault of the infringer, with negligence being presumed (Sections 2910 and 2911 of the Civil Code)³².

Adequate compensation consists in the provision of some redress which should compensate at least in a relatively equivalent manner for the non-pecuniary damage caused by unjustified interference with reputation, either morally (in the case of an apology for such conduct) or financially (in the case of pecuniary compensation).

The courts primarily award adequate compensation in a non-pecuniary form (non-material remedy). However, compensation must be awarded in money if no other means of compensation can provide real and sufficiently effective redress for the harm caused (cf. Section 2951(2) of the Civil Code). It follows from the foregoing that the law favours non-material compensation for non-pecuniary damage. Non-pecuniary compensation will typically consist in a (public or personal) apology or retraction of the unlawfully spread statement in a manner and at a place commensurate with the intensity and reach of the previous unlawful act (including, for example, on television or on the internet, if the reach of the previous act has been nationwide³³). However, it is of course unacceptable that it should be carried out in such a way that only through the apology a substantial part of the public will become aware of the unlawful interference³⁴. Nor does an apology made, for example, in a magazine (where the harmful information about the entrepreneur has been published) in small, hard to read font on the last page in the bottom corner fulfil the purpose of an apology. If the plaintiff seeks adequate non-pecuniary compensation, the petition must specify the exact wording of the apology, including where (e.g. in a specific newspaper, a personal letter), in what size (e.g. A4), number (e.g. two consecutive editions), font (e.g. Times New Roman, size 12), and location (e.g. front cover of a magazine) the apology should be published. The court may deviate to some extent from the text of the apology defined in the petition, but only in the sense that it may stipulate other words than those suggested in the petition, yet not altering the statement of the claim^{35, 36}.

If the damage is not actually and sufficiently remedied in the form of non-pecuniary compensation, especially with regard to the intensity, duration, extent of the adverse consequences suffered by the plaintiff, the behaviour of the infringer after receiving the notice to stop its unlawful conduct, the consequences for inter-

³² D. Ondřejová: *Přiměřené zadostiučnění...*, op. cit., p. 23.

³³ Decision of the Supreme Court of 30 August 2017, Case No. 23 Cdo 2941/2015.

³⁴ Decision of the Regional Court in Ostrava of 15 April 1997, Case No. 23 C 3/97; J. Lasák (in:) *Občanský zákoník I. Obecná část (§ 1–654). Komentář*, P. Lavický (ed.), Prague 2014, p. 1681.

³⁵ Cf. decision of the Supreme Court of 28 August 2012, Case No. 23 Cdo 4669/2010.

³⁶ D. Ondřejová: *Přiměřené zadostiučnění...*, op. cit., pp. 21–26.

personal and business relations, etc.³⁷, the court would be obliged to award compensation in the financial form (material satisfaction). In contrast to a claim for damages, the plaintiff is not obliged to prove the exact extent of the adequate compensation, as this is not realistically possible, nor is it sufficient to merely allege that one has suffered non-pecuniary damage (e.g. the plaintiff has suffered incalculable non-pecuniary damage as a result of the defendant's prolonged and serious action, the compensation for the damage in the form of an apology is not sufficient, and therefore the sum of CZK 500,000 is claimed as adequate compensation). The actual occurrence of non-pecuniary damage, not its exact value, must be proved³⁸.

Both forms of adequate compensation (pecuniary and non-pecuniary) may be awarded cumulatively.

4. CLAIM OF A LEGAL PERSON FOR REASONABLE COMPENSATION IN UNFAIR COMPETITION

In the case of claims arising from unfair competition, there is no doubt that the legal person is entitled to such a claim. This is also due to the unambiguous wording of the catalogue of rights under Section 2988 of the Civil Code, which expressly grants all claims, including reasonable compensation (i.e. also a claim for damages, a claim for restraint, elimination or unjust enrichment) to all persons whose "right has been threatened or infringed by unfair competition".

Legal persons entitled to defend the interests of competitors or consumers have a special status (e.g. various consumer protection associations or professional organisations such as the Confederation of Industry and Commerce, the Association of Commercial Television, the Association of Insurance Companies, etc.). These persons do not have legal standing for the aforementioned offences of defamation (Section 2982 of the Civil Code) and disparagement (Section 2984 of the Civil Code), as is clear from Section 2989(1) of the Civil Code. Similarly, a legal person entitled to defend the interests of competitors or consumers is expressly excluded from the possibility of claiming adequate compensation (as well as damages or unjust enrichment)³⁹ as a person eligible to sue for unfair competition in respect of the other statutory and judicial acts of unfair competition (see Section 2989(1) of the Civil Code).

Therefore, legal persons are both actively and passively legitimate persons in unfair competition (with the exception mentioned above) in relation to the claim for adequate compensation (in general terms).

³⁷ Cf. D. Ondřejová: *Přiměřené zadostiučinění v nekalé soutěži II. Peněžitá podoba přiměřeného zadostiučinění*, Bulletin advokacie 2019, Issue 1–2, pp. 13–17.

³⁸ D. Ondřejová: *Nekalá soutěž v novém občanském zákoníku. Komentář*. § 2972–2990, Prague 2014, p. 262.

³⁹ This leaves it only the right to claim refraining from the harmful conduct or remedying the defective condition.

5. CLAIM OF A LEGAL PERSON FOR REASONABLE COMPENSATION FOR DAMAGE TO REPUTATION UNDER SECTION 135 OF THE CIVIL CODE

Under the Czech legislation in force until 31 December 2013, there was no doubt that a legal person was entitled to reasonable compensation when seeking to protect its reputation⁴⁰.

However, an interpretative problem arose after the Civil Code came into force (i.e. from 1 January 2014). The new wording of the regulation on the protection of the reputation and privacy of legal persons under Section 135 of the Civil Code is as follows: “A legal person which has been affected by a challenge to its right to a name or which has suffered damage because of unjustified interference with that right or which is threatened with such damage, in particular by the unauthorised use of a name, may demand that the unjustified interference be refrained from or that its effect be eliminated”. This provision, in contrast to the previous legislation and to the settled case law of the courts, does not contain the part of the original provision of Article 19b(2) of the previous Civil Code of 1964⁴¹, according to which, in the event of interference, a legal person could also claim “adequate compensation, which may be claimed in money”. In other words, the current legislation is silent about the possibility for a legal person to claim adequate compensation (in contrast to the unfair competition legislation which grants such a claim without delay; cf. Section 2988 of the Civil Code).

The regulation of the non-pecuniary claim was treated as a general remedy and included in the regulation of compensation for damages (Section 2894(2) of the Civil Code). According to the relevant provision of Section 2894(2) of the Civil Code, the obligation to pay for non-pecuniary damage arises only if it has been agreed by both parties or if the law so provides. However, in the case of Section 2951(2) of the Civil Code, which is otherwise the title for the award of non-pecuniary damage in the event of interference with personal rights, the law only provides for an obligation to “compensate for the damage caused to a *person*” (emphasis by the author), i.e. a natural person and not to a “legal person”. In a significant part of the legal writings and commentary, this silence of the legislator is interpreted as no legal obligation to compensate for non-pecuniary damage in the case of unjustified interference with the reputation or privacy of a legal person⁴².

⁴⁰ Decision of the Supreme Court of 26 October 2011, Case No. 30 Cdo 5111/2009.

⁴¹ Act No. 40/1964 Coll., Civil Code, as amended until 31 December 2013.

⁴² J. Svejkský (in:) *Právnícké osoby v novém občanském zákoníku: komentář*, J. Svejkský (ed.), Prague 2013, pp. 43–44; H. Chaloupková (in:) *Mediální právo: komentář*, H. Chaloupková (ed.), Prague 2019, pp. 374–375; P. Hajn: *Může právnická osoba utrpět nemajetkovou újmu?*, Patria online, a.s. [online], 2020, available at: <https://www.patria.cz/pravo/2774534/muze-pravnicka-osoba-utrpet-nemajetkovou-ujmu.html> (accessed: 19 February 2020).

However, in my opinion, such an interpretation leads to the creation of unjustified differences between natural persons and legal persons, where, especially in the case of entrepreneurs, only the legal form of such business activity determines the existence of such a claim (this is especially true for sole traders). Given that there can be no doubt that legal persons may also suffer non-pecuniary damage⁴³, such a substantial loophole in the legislation would constitute a disproportionate restriction of the general principle of equal treatment of legal persons and the protection of their reputation, which is guaranteed by constitutional law⁴⁴, while the right to compensation for non-pecuniary damage to legal persons is also generally recognised in the case law of the European Court of Human Rights⁴⁵. In my opinion, there is an obvious gap in the legal standing in this case, which should be filled by interpretation; this standpoint is also supported by other legal experts⁴⁶.

In this respect, the Czech literature has suggested, by way of *argumentum a simile*, the application of Section 2988 of the Civil Code that governs the right to adequate compensation in the event of an unfair competition tort and, subsequently, determining the manner and amount of compensation by analogy with the provisions of Section 2957 of the Civil Code⁴⁷. Other authors have then considered the use of an elimination claim which, in their view, could also include moral satisfaction (i.e. an apology)⁴⁸.

Since the legislator has not resolved the above-mentioned problem in the course of the ten-year effectiveness of the new civil law, the Czech courts have had no choice but to address it in their decision-making practice.

The original decision-making practice of the general courts for almost ten years after the entry into force of the new Civil Code has been to continue awarding adequate compensation to legal persons to compensate for non-material damage resulting from unjustified interference with their reputation (or privacy). The first of these decisions, where the High Court in Prague followed the needs of practice and the meaning of the law, and thus eliminated the aforementioned gap in the legal regulation, was the decision of 19 July 2017 in Case No. 3 Cmo 226/2016. The Court established the right of a legal person to adequate compensation by, among other

⁴³ Cf. *inter alia* also the Bill: Working version of the draft law amending the Act No. 89/2012 Coll., the Civil Code. Part I, of 17 August 2014, attached to the update on the Ministry of Justice website dated 20 August 2014.

⁴⁴ Decision of the Constitutional Court of 20 February 2018, Case No. I. ÚS 3819/14.

⁴⁵ E.g. decision of the Grand Chamber of the European Court of Human Rights of 8 December 1999, Application No. 23885/94 (Freedom and Democracy Party /ÖZDEP/ v. Turkey), or the decision of the European Court of Human Rights of 19 December 1994, Application No. 15153/89 (Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria).

⁴⁶ T. Dvořák, § 135 (in:) *Občanský zákoník I. Komentář. Svazek I*, J. Švestka (ed.), Prague 2014, p. 437; or J. Zúbek, *K právu nástupce poškozeného na přiznání nemajetkové újmy v adhezním řízení*, *Trestní právo* 2021, Issue 2, p. 11.

⁴⁷ V. Janošek (in:) *Občanský zákoník: komentář*, J. Petrov (ed.), Prague 2019, p. 209.

⁴⁸ V. Pilík, *Pojetí a úprava ochrany právní osobnosti právnických osob v občanském právu*, *Právní rozhledy* 2016, Issue 13–14, pp. 457–466.

things, referring to the case law of the European Court of Human Rights (1994, 18 E.H.R.R. 393), which recognised the possibility for legal persons to claim adequate compensation for non-pecuniary damage directly on the basis of Article 41 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Other decisions of general courts on the protection of a legal person's reputation issued under the new Civil Code include, for example, the decision of the High Court in Olomouc of 20 April 2017, Case No. 4 Cmo 28/2017, the decision of the Regional Court in Pilsen of 24 June 2019, Case No. 44 Cm 95/2017, or the decision of the Municipal Court in Prague of 4 March 2020, Case No. 21 Cm 43/2018.

In contrast to the above-mentioned consistent decision-making practice, the Supreme Court in its decision of 30 November 2021, Case No. 23 Cdo 327/2021, rejected the possibility of allowing a legal person to claim adequate compensation for damage to its reputation under Section 135 of the Civil Code, except in cases where such a claim is expressly agreed by the parties. According to the Supreme Court, such a right can be derived from neither Section 135(1) of the Civil Code nor from the constitutional guarantee of reputation under Article 10 of the Charter of Fundamental Rights and Freedoms⁴⁹, which does not imply the necessity of its statutory protection (precisely) through the private right of a legal person to compensation (adequate compensation) for non-pecuniary damage caused by unjustified interference with its reputation. Thus, it cannot be concluded that the constitutional protection of fundamental rights and freedoms requires that the absence of the specific statutory determination of such interference as grounds for the right of a legal person to compensation for non-pecuniary damage (Section 2894(2) of the Civil Code) be overcome by a constitutionally consistent interpretation. At the same time, this does not preclude the Supreme Court from ruling that, in cases where the obligation to compensate for non-pecuniary damage suffered by a legal person is specifically provided for by law within the meaning of Section 2894(1) of the Civil Code (as these cases are exemplified above), the adequate compensation for non-pecuniary damage also takes into account the damage to the reputation of the legal person that has occurred in this context (i.e., for example, damage to the reputation of the legal person in competition resulting from unfair conduct by another competitor).

The Supreme Court also referred to other European legislation in relation to the issue in question: "French legislation allows for the occurrence of non-pecuniary damage to a legal person, the compensation for which is provided either under the general provisions of Article 1240 of the French Civil Code, where, however, according to a case law interpretation, it is required that the wrongdoer and the injured party be in a competitive relationship, or under special provisions (in particular the 1981 Law on Freedom of the Press). The right to compensation for non-pecuniary damage for unjustified interference with the reputation of a legal person cannot

⁴⁹ Constitutional Act No. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms.

therefore be granted under that legislation if the injured party does not seek protection against unfair competition or protection within a specifically defined area granted under special legislation⁵⁰. German law recognises the private right of legal persons to protect their reputation. However, the main instrument of such protection is an action for injunctive relief. Under Article 253(1) of the German Civil Code, legal persons are not entitled to compensation for non-pecuniary damage, unless they also allege a breach of the rules on unfair competition or the existence of a tort under a special rule, which is a consequence of the function of adequate compensation to compensate the injured party⁵¹. Under Dutch law, compensation for non-pecuniary damage is available to the extent that the law expressly provides for such compensation (Articles 6:95 and 6:106 of the Dutch Civil Code). Although, generally speaking, non-pecuniary damages may be awarded for damage to reputation resulting from a breach of the rules of good conduct, in the case of damage caused to legal persons, the prevailing view is that only pecuniary damage may be considered. In Belgium, the issue is governed by the provisions of Article 1382 of the Belgian Civil Code. The case law recognises, in principle, the possibility of damage to the reputation of a legal person but has traditionally taken the view in relation to commercial companies that they cannot suffer damage other than damage to property. Purely non-pecuniary damage for such companies is not recognised by law. Compensation for damage to reputation may therefore be awarded, provided that the company has suffered pecuniary damage as a result of damage to its reputation. Similar conclusions apply to the Finnish legislation. By contrast, in Italy (under Article 2059 of the Italian Civil Code) or Slovenia (under Article 132 of the Slovenian Law on Obligations), case law recognises the possibility of compensation for non-pecuniary damage suffered by a legal person as a result of damage to its reputation⁵².

In view of the above regulations, the Supreme Court concluded that it could not be assumed that the right of the legal person in question could be considered part of the European continental convention of private law, to which the Czech Civil Code in force subscribes. According to the Supreme Court, the right to compensation for non-pecuniary damage is granted to legal persons in those provisions rather exceptionally and cannot be regarded as a standard in continental private-law traditions.

This decision of the Supreme Court sparked a stormy debate among the professional community⁵³ and the lower courts. For example, the Municipal Court in

⁵⁰ Cf. decisions of the Court of Cassation of 30 May 2006, Case No. 05-16.437, or of 15 May 2012, Case No. 11-10.278.

⁵¹ See, for example, judgments of the Federal Court of Justice of 3 June 1975, Case No. VI ZR 123/74, or of 8 July 1980, Case No. VI ZR 177/78.

⁵² Cf. Ch. von Bar: *Principles of European Law: Study Group on a European Civil Code. Non-contractual Liability Arising out of Damage Caused to Another*, Ch. von Bar (ed.), Munich 2009, p. 336.

⁵³ Cf. e.g. L. Tichý, J. Dubický: *Náhrada nemajetkové újmy právnické osoby?*, Bulletin advokacie 2023, Issue 11, pp. 24–34; K. Eliáš: *Úvahy nad právem a jeho ohýbáním*, Právní rozhledy 2022, Issue 18, pp. 611–626; or

Prague⁵⁴ maintained its previous decision-making practice, which granted a legal person the following relief in case of interference with its reputation under Section 135(2) of the Civil Code (with the reasons given above). The Municipal Court in Prague continues to hold that the absence of an express statutory recognition of the legal person's right to be awarded adequate compensation is not the legislator's intention but an unintentional omission which must be overcome by means of the analogy of the law (Section 10(1) of the Civil Code). The Court emphasised *inter alia* that it is illogical and therefore unacceptable that in the same situations — with the only difference being the fact that one is an official procedure and the other a private procedure, or that one is a competitive act and the other a non-competitive act — the legal person is entitled to compensation for non-pecuniary damage in the first case and not in the other. Filling the loophole in the law by adding a right to compensation for non-pecuniary damage in the event of damage to the reputation of a legal person is in accordance with the principles of fairness and the good administration of rights and obligations. The opposite may be perceived as recklessness and a contradiction with the ordinary perception of justice. With detailed reasoning, the Court concluded that a legal person is entitled to compensation for non-pecuniary damage caused even by mere unjustified interference with its reputation under Article 135(2) of the Civil Code, without this having to be expressly agreed.

I strongly agree with the critical approach of the Municipal Court in Prague to the decision of the Supreme Court (with reference to the argumentation outlined above). It is unacceptable that, despite the fact that a claim is not expressly granted by law, a legal person should be denied the right to compensation for its non-pecuniary damage and that natural persons should be given a completely unjustified advantage over legal persons in compensating for damage to their good name or reputation.

6. CONCLUSION

If a legal person's reputation is harmed, it may seek protection of its rights under the provisions on unfair competition (Section 2976(1) of the Civil Code) or under the provisions on the protection of reputation (Section 135(1) of the Civil Code). In the case of unfair competition, it is necessary to prove that the interference occurred in the course of business activity, whereas in the case of reputation, it is sufficient to prove the interference itself.

Whereas in unfair competition a legal person is entitled by law (Section 2988 of the Civil Code) to adequate compensation, in the case of protection of reputation

V. Brotan, L. Hadamčík: *Z dubnového, květnového a červnového zasedání občanskoprávního a obchodního kolegia Nejvyššího soudu*, Soudce 2022, Issue 12, pp. 17–22.

⁵⁴ Decision of the Municipal Court in Prague of 3 November 2022, Case No. 22 Co 200/2022.

under Section 135(1) of the Civil Code, the law is silent on this claim. From this silence, some expert sources and the Supreme Court infer the absence of such a claim, while other sources (expert literature and the Municipal Court in Prague) consider it fair and reasonable to infer this claim from general rules (in particular the Charter of Fundamental Rights and Freedoms and the Convention for the Protection of Human Rights and Fundamental Freedoms), inter alia because of the unjustified denial of compensation for non-pecuniary damage to a legal person when such a claim is due to a natural person in the event of interference with their reputation or good name. I lean towards the approach of the Municipal Court in Prague and believe that the legal person's claim to adequate compensation for non-pecuniary damage caused to its reputation can be inferred from Section 135 of the Civil Code.

Although such a pragmatic approach of the Municipal Court in Prague solves practical difficulties arising from the wording of Section 135(1) of the Civil Code, it is not a technically appropriate legal solution. Therefore, the legislator should establish an express statutory title for compensation for non-pecuniary damage to legal persons whose reputation or privacy has been violated. Unfortunately, in the ten years of the Civil Code effectiveness, such a legislative remedy has not been afforded and nothing similar is planned in the foreseeable future as part of the amendments.

Therefore, if a legal person seeks adequate compensation under Czech law as a means of compensating for the non-pecuniary damage caused to its reputation, it should be borne in mind that this is unequivocally possible if the features of unfair competition are fulfilled (typically, parasitism on reputation under Section 2982 in combination with Section 2976(1) of the Civil Code). If the interference with a legal person's reputation does not take place in the course of business activity, i.e. the conduct is not competitive, then, in my opinion, the legal person should be entitled to adequate compensation under Section 135 of the Civil Code as well (protection of a legal person's reputation). However, this matter is contentious in both legal writings and case law, and therefore the legislator should adopt a new solution that is clear and unequivocal, and grants legal persons the claim explicitly, as there is no convincing reason for their not to being entitled to it.

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Słowa kluczowe:

DANA ONDREJOVÁ

CAN A LEGAL ENTITY CLAIM ADEQUATE COMPENSATION UNDER CZECH LAW IN THE EVENT OF INFRINGEMENT OF ITS GOOD REPUTATION?

S u m m a r y

This article provides an analysis of the possible means of protection for a legal entity that has suffered an infringement of its reputation. The paper focuses specifically on two options — unfair competition and general private law protection of reputation: it points out the differences between them, especially with regard to the right to claim adequate compensation as a claim for compensation of non-pecuniary damage caused by the infringement of the reputation of a legal entity, both in terms of legal regulation and the current case law of the Czech courts.

Key words: adequate compensation, good reputation, legal personality, unfair competition.