Working Session

"Damage claims in competition matters: The dawn of a new era?"

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National Report of Poland

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QUESTIONNAIRE

CHAPTER I: STATUS QUO OF PRIVATE ENFORCEMENT

1. **How would you summarize in few lines the status quo of private enforcement in your jurisdiction? Can individuals file an antitrust damage claim regardless of the implementation of Directive 2014/104/EU (private enforcement Directive)?**

   As an introductory remark please note that Polish competition law rules are enacted in the Act of February 16, 2007 on competition and consumer protection (hereinafter: "**Act**") are enforced by the President of the Office of Competition and Consumer Protection (hereinafter: Polish Competition Authority or "**PCA**").

   The issue of private enforcement of competition rules in rather novel to Polish law and Polish legal practice as there is no specific regulation relating to bringing action for damages in case of a breach of the EU or Polish competition law. There is neither – to the best of our knowledge – any significant or recent case-law on this matter. Nevertheless, individuals can file an antitrust damage claim regardless of the implementation of Directive 2014/104/EU, based on the same general provisions of the Polish Civil Code of 23 April 1964 (hereinafter: "**Civil Code**") that apply to the other claims for compensation for liability of contract, or in tort as well as provisions regarding unjust enrichment. Along with Civil Code provisions a civil claim related to antitrust enforcement can be possibly based on two other statues, namely: the Act of 16 April 1993 on the Combating of Unfair Competition (hereinafter: "**UCCA**") and the Act of 23 August 2007 on the Combating of Unfair Market Practices ((hereinafter: "**UMPCA**").

   Furthermore, both stand alone and follow-on actions are possible, however PCA's decisions can serve as crucial evidence in damages action (for more details on stand alone and follow-on actions please refer to Question 21 below).

2. **Has your country already implemented/started implementing the private enforcement Directive? If No: Do you believe that your country will meet the deadline?**

   The formal implementation process (in the Parliament) has not started yet, but the preparations are underway. According to the Polish Ministry of Justice, that is the

authority responsible for implementation of the private enforcement Directive, the given deadline will be met[1].

CHAPTER II: COURT AND PROCEDURE

3. What is (are) the court(s) in charge of antitrust private enforcement?

Any civil damage claim relating to a violation of competition law and falling into the competence of the Polish courts is commenced in an ordinary civil court. The value of a claim decides whether it has to be a regional court or a district court.

There is a specialized court for competition law matters (i.e., the Court for Protection of Competition and Consumers), but it only hears appeals from the decisions of the Polish Competition Authority (of the regulatory authorities). It is not competent to decide on, for example, private claims resulting from competition law infringements.

4. What nexus with the jurisdiction is required to bring a private action to a court within your jurisdiction (and to keep it there)? Is there room for forum shopping (eg, is an "anchor defendant" sufficient (*cf* ECJ, C-352/13))?

According to article 1103 Polish Code of Civil Procedure of 17 November 1964 (hereinafter: "**CCP**"), Polish jurisdiction is conferred if the defendant (perpetrator of anticompetitive practices) is staying, resides or has its seat (registered office) in Poland (*actor sequitur forum rei*). Apart from this general rule, there are two modifications: 1) in matters related to a contract there is a general rule that such dispute is to be dealt with by the courts for the place of performance of the obligation in question; 2) in matters related to a liability for wrongful acts (tort, delict or quasi-delict): there is a general rule that such dispute is to be dealt with by the courts for the place where the harmful event occurred or may occur or for the place where the actual damage occurred.[2] Therefore, if the case has a foreign element (i.e. one party to the proceeding is based outside Poland), forum shopping is possible within the frame described above.

5. How long does a single (or collective) antitrust private enforcement action in first instance usually take?

[1] See: *The draft guidelines of the draft law on claims for damages caused by the breach of competition law* – working document published by Polish Ministry of Justice on 1 December, 2015 (Polish language text available only).

[2] See e.g., T. Erecinski, Kodeks postępowania cywilnego Komentarz,102 et seq.

It is much dependent on location of the court. Since courts in Warsaw are very busy, complex damages actions in Warsaw may take about 3 years or even more and in other courts first instance proceedings usually last 2-3 years. However, please bear in mind that competition law related cases have not been examined by the Polish courts so far and judges will need more time than usual to assess such cases.

6. **Who bears the legal costs (court fees, the own representation costs and the representation costs of the opposite party)?**

The court in its final judgment decides who has to bear the costs of the proceedings. In principle, these costs are borne by the losing party but there are some exceptions to this rule. Until that moment, each party bears its own costs of the proceedings. These costs may be recovered at the request of a party submitted before the conclusion of proceedings at the court of the particular level. There are few exceptions to the general rule stating that the costs are borne by the losing party, provided in the CCP (Articles 101-104):

1) a losing defendant is entitled to recover all his/her costs, if he/she was not a reason to file the suit and admitted the claim at the first procedural opportunity;

2) the court may, where specially compelling reasons exist, award only a portion of the costs against the loser or may even not award any at all;

3) the court may award costs against a party regardless of who wins to the extent the costs were caused by the party's lack of diligence or manifestly inappropriate conduct; this includes especially situations where such party refused to give testimony, gave false testimony, or withheld or delayed evidence

4) where a case is settled in court, each of the parties bears its own costs unless they agreed otherwise

7. **In your jurisdiction, are there any alternative funding options or fee arrangements that can be put in place by the plaintiff (for example conditional fee or damages based agreements)? Please outline and give examples if so. What rules on the assignment/bundling of claims exist in your jurisdiction that could allow third parties to buy claims from cartel victims?**

Principles of legal ethics in Poland prohibit arrangements between attorney and his client based on "pure" success fee since some part of remuneration should be paid irrespective of the outcome of the case.

On the other hand, there are several organisations operating that provide free legal assistance for plaintiffs in Poland (e.g., Helsinki Foundation for Human Rights). Nevertheless, their actions are mainly focused on individuals who fundamental human rights are violated. Thus, competition law related cases fall rather outside their scope of interest.

Polish law allows for assignment of claims to any legal or natural person. According to Article 509 Civil Code "*The creditor may without the consent of the debtor transfer his rights to a third person (assignment), unless this would be inconsistent with a statue, with a contractual stipulation or with a nature of the obligation*".

To assign a claim the parties must conclude an agreement. Agreement in question should identify at least (1) a legal basis for the claim (2) debtor(s) and (3) damage.

In practice, the issue of exact specification of a damage might be one of the key problems that third party will face in the enforcement of claims.

8. Beside antitrust private actions, does your jurisdiction dispose of a collective redress system?

Yes, collective redress system was introduced by the Act on pursuing claims in group proceedings (Group Litigation Act) of 17 December 2009 (hereinafter: "**GLA**") which came into force on 19 July 2010. According to the GLA only the claims regarding the consumer's protection, liability for damages caused by dangerous products, and in tort cases, with the exception of claims for the protection of personal property, can be settled in the group actions proceedings. The group has to consist of a minimum of 10 people. The Polish system is designed as the opt-in model, according to this act every person who wants to take part in such proceedings needs to report to the group. In case of class-action proceedings, the suit is filed by the group representative, who may be chosen from the group. Also the local consumers' advocate may be the group's representative. The sentence will apply to all participants and they will all receive the same amount of compensation even if the level of damage was on a different level. The participation in the group is not obligatory; each person who is participating in the group is able to file an individual suit. There is a compulsory legal representation of such group; however, the fee of the lawyer is limited to 20% of the amount awarded in the judgment. The court fee may be an obstacle for filing the suit, it is 2% of the value of the subject matter of a dispute, however not less than PLN 30 and not more than PLN 100,000 (approx. EUR 25,000).

CHAPTER III: EFFECT OF NATIONAL DECISIONS, BURDEN OF PROOF, LIMITATION PERIODS, JOINT AND SEVERAL LIABILITY

9. Are National Competition Authority decisions relevant for individual antitrust claims?

PCA's decisions carry significant evidential value, but are not needed for a claim for damages to be brought, because an injured party can sue the individual for damages on the basis of facts. All administrative decisions and judgments may be used as documentary evidence, but unless they are final, the court has discretion to decide on the value of such evidence. The most effective way of seeking damages is to first obtain either the decision of the PCA, which provides crucial evidence; or the judgment of the court upholding the Polish Competition Authority decision, which is binding on the civil court to the fact that competition law has been breached. PCA's decisions are not relevant for individual antitrust claims as to the *quantum* of the compensation. It is also important to note, that fines imposed in administrative proceedings by the Polish Competition Authority are not taken into account when settling damages.

10. What are the relevant limitation periods (taking into account question 9 above)?

Limitation periods in Poland are set out in the Civil Code. They differ according to the type of action. Unless there is a special regulation to the contrary, the period of limitation shall be ten years, or three years for claims in business/commercial cases.

There are special regulations for specific types of action, including with respect to damages claims, for which the prescribed period of limitation is three years from the date on which the harmed party became aware of the loss and of who is liable to redress it (a tempore scientiae). However, in any case a damages claim shall expire after the lapse of ten years from the day on which the harmful event occurred (a tempore facti).

The mere fact that antitrust proceedings have been commenced or even that they have been concluded with PCA's finding of infringement will not be sufficient for the period of limitation to start running. It will not begin until the PCA's finding (in the form of a decision) becomes final and acquires the force of law because it is not until this point that those harmed by the practice are sure that it was illegal and are clear as to who the wrongdoer is (which is relevant, e.g. in cartel cases where there may be many parties sharing a potentially joint and severable liability).

If, at the time antimonopoly proceedings commence, the period of limitation is already pending for any reason, the commencement of these proceedings will not suspend or interrupt the running of the period.

11. What is the liability regime as regard parents for the infringement of their subsidiaries?

The concept of single economic unit is not provided by the Polish law, therefore infringements of the Act are assigned only to an undertaking which directly committed the infringement (and not to its entire capital group).

12. Please describe limits and scope of joint and several liability for antitrust infringements performed by undertakings (in particular between cartelists) in civil litigation. Does this differ from liability vis-à-vis the authorities?

According to Article 441 of the Civil Code where there is more than one person liable in tort, their liability is joint and several. Those harmed by cartel activity may enforce their claims against any or all of the cartelists. If a claim is lodged against several undertakings, each defendant is liable for the entire loss suffered by the plaintiff, and the plaintiff may choose to enforce the entire damages awarded from only one of them. Judgment in favour of one of joint and several debtors releases the other co-debtors, if defences common to all debtors have been considered.

It is important to note, that failing of a claim against one cartel member does not affect the limitation period against others.

In case of PCA's proceedings each cartelist is liable on his own basis (also with respect to the financial penalty imposed in a decision).

CHAPTER IV: DISCLOSURE OF EVIDENCE

13. What evidence is admissible in individuals' actions for antitrust infringements? Is there any pre-trial discovery procedure available? Is there any evidence protected by legal privilege?

There are no limitations on the forms or kinds of evidence used by individuals, which include for example: 1) documents; 2) witness testimonies; 3) expert opinions; 4) hearings of the parties; 5) inspections. The list is non-exhaustive and there is no hierarchy of the forms. The court has the power to assess the credibility and weight of the evidence presented and to exclude evidence which is submitted only to delay proceedings.

A pre-trial procedure is not recognized under Polish law.

The concept of legal professional privilege as established in the common law systems is not developed in Polish civil law. However, a qualified lawyer is under a duty to keep secret anything he or she has learnt when providing legal assistance

and may not be released from the duty with regard to facts which came to his/her knowledge whilst providing legal assistance or whilst conducting a case.

Furthermore, CPC regulates issue of privilege against self-incrimination as follows: (i) a witness may refuse to testify if the witness is a spouse, ascendant, descendant or next of kin in relation to any of the parties; (ii) a party may refuse to answer a question if the answer could expose the party or the party's relatives to criminal liability or direct pecuniary loss, or would involve a material breach of professional privilege; (iii) a witness may refuse to answer a question if the answer could expose the witness or their relatives to criminal liability or direct pecuniary loss, or would involve a material breach of professional privilege

14. Can the court order the discovery of evidence to defendants or to third parties? Please describe its limits and scope.

Under Polish law the litigating parties are obliged to disclose only those documents on which they intend to rely. However, the court may, usually at the request of another party, order any party to produce a document to the court. The requesting party must justify its request by stating the relevance of the document and showing what facts are to be proven thereby. A refusal to submit the requested document is permissible only if the document contains State secrets or if the person requested could refuse testimony as a witness as to the circumstances contained in the document, or the person requested holds the document on behalf of a third party that would be allowed to withhold the document for the same reasons. However, the foregoing exemptions do not apply if such holder of the document or such third party owe a duty to produce the document to any of the litigating parties, or if the document was issued in the interests of the party requesting the disclosure.

15. Do the claimants and/or courts have access to the National Competition Authority's files? If so, also during a pending investigation? Please describe its limits and scope.

According to the general rule in Article 73 of the Act, no information obtained in course of antimonopoly proceedings may be used in any other proceedings. The Act allows just a few exceptions to this rule, as follows:

- criminal proceedings commenced at public prosecutor's initiative, fiscal crime proceedings;
- other proceedings conducted by the PCA;
- exchange of information with the European Commission and competition authorities of other Member States pursuant to Regulation 1/2003/EC;
- exchange of information with the European Commission and relevant authorities of other Member States pursuant to Regulation 2006/2004/EC;

- provision of information to relevant authorities that suggests violation of other laws.

These exceptions do not seem to apply to civil proceedings, therefore using evidence obtained in administrative proceedings for private enforcement does not seem to be possible.

CHAPTER V: THE PASSING-ON OF OVERCHARGES

16. Are indirect purchasers entitled to claim compensation, and which limitation do they face?

The notion of indirect purchasers does not exist in Polish law. Nevertheless, there are some conclusions that can be drawn about them by reference to the general rules: (i) there is no presumption that higher prices have been passed on, and (ii) an indirect purchaser can claim damages relying on indirect causation.

Moreover, according to the principle of *compensatio lucri cum damno*, the damages awarded to a harmed party cannot exceed the amount of loss incurred by the party, which cannot be enriched following the award. The aim of the fine is to compensate the loses and not to punish the wrongdoer.

With no authority on the matter to date, we are yet to see how the civil courts will tackle the issue of damages claims from indirect purchasers.

17. Are victims of "umbrella damages" entitled to protection against antitrust infringements and to compensation in court?

Since there have been no antitrust damage actions examined by the Polish court it is really difficult to predict how claims brought by victims of "umbrella damages" would be examined.

18. Is the passing-on defence allowed?

It can be assumed that the passing-on defence is allowed in Poland since there is no legal provision under Polish law that would prohibit such action. However due to lack of relevant case-law it is difficult to give a conclusive response.

CHAPTER VI: DAMAGES

19. What form of compensation can be granted by national courts for antitrust violations? In particular, can national courts accord punitive damages or treble damages or compensatory function exclusively?

Two forms of compensation can be granted by court regarding antitrust infringements, and it is left to the decision of the injured party. The party can claim either the redress in money or *restitutio in integrum*. In practise, the latter one is very uncommon. Punitive damages are not available under Polish law in case of damages resulting from infringement of the competition law.

CHAPTER VI: QUANTIFICATION OF HARM

20. What do individuals have to prove in court in order to successfully obtain compensation for antitrust damages, who bears the burden of proof?

The Civil Code provides general framework for pursuing private claims, which is to be used accordingly in respect of practices in restrain of competition.

According to the Civil Code, there are two types of liability – tortuous and contractual, both of them play a role in private enforcement of competition law.

The liability in tort is regulated by Article 415 Civil Code, which stipulates that *"whoever by his fault caused a loss to another person shall be obliged to redress it"*. The following elements therefore must be proved in order to establish liability in tort: illegal conduct, loss, adequate causal link between the conduct and the loss, and fault of the tortfeasor.

Article 471 Civil Code refers to the liability of a debtor for a failure to perform, or a failure to duly perform. This provision does not apply only to specified forms of undue performance of contractual obligations but also makes the debtor liable for any action taken that can be seen as a violation of an obligation under a contract. However, contractual liability has a very limited application to the competition law, because the majority of the competition infringements is not contractual. Furthermore, in case a contract is contrary to the Act, then it is null by operation of law and one important element of this type of liability will be missing, i.e. the legal relationship (contract) between the parties.

In terms of unjust enrichment Article 405 Civil Code states that "*Whoever without legal grounds has gained a material benefit at the expense of another person shall be obliged to return that benefit in kind and, if that is impossible, to return its money's worth*". A performance is "not owed" if, inter alia, the act in law which underlies the obligation to render the performance was null and void and did not become valid following the performance. Therefore, if the acts in law which amount to anticompetitive practices are null by operation of law, then any performance rendered by the parties (e.g. under contract) is performance not owed for the purposes of civil law. Importantly, however, unlike in cases of tort, loss is not

sufficient for Article 405 Civil Code claims to arise because this Article requires one more element, which is enrichment.

When it comes to other legal basis please note that the UCCA establishes the broad notion of 'unfair competition practice'. Article 3.1. UCCA – often seen as a general clause – defines an unfair competition practice as '*an activity contrary to the law or good commercial practice which threatens or infringes the interest of another entrepreneur or customer.*' Taking into account that competition law infringements *ex definitione* are 'contrary to the law' and as such illegal, they may be seen as examples of unfair competition practices and Nevertheless, it should be noted that UCCA has limited effectiveness in the context of private enforcement as it is designed to protect the interests of businesses only. Individuals (consumers) are not entitled to rely on its provisions

Eventually, under Article 4 UMPCA, a market practice is deemed to be unfair to consumers if it is inconsistent with good practices and distorts, or may distort, materially the market behaviour of an average consumer prior to, during, or after the execution of a product-related agreement. Considering the broad scope of competition restricting practices, it is also possible that consumer interests might be infringed as a consequence of their application in the private law area. So, theoretically, UMPCA can be instrumental for the purpose of damages claims resulting from competition law infringements. Importantly, UMPCA being designed to facilitate enforcement of consumer rights, Article 12.1 UMPCA authorizes consumer action only. Businesses cannot rely on this law. In this context, the use of this law for perusing damage claims resulting from violation of competition laws maybe somehow limited.

In terms of the burden of proof Article 6 Civil Code states a general rule, that the burden of proof relating to a fact shall rest on the person who attributes the legal effects to that fact. Therefore the burden always shifts from the plaintiff to the defendant accordingly to the situation in the process.

21. Is there a difference between stand alone and follow-on actions?

In case of a follow on action the final decision of the Polish Competition Authority finding an infringement is binding upon Polish courts (it is a binding proof of the infringement, but not of the related damage). Irrespective whether there is a standalone or follow-on action the plaintiff has to prove the loss and the rational link between the loss and the breach of the competition law rules. The follow-on action may be far more easier for the plaintiff, since the infringement is already proven by the PCA. Additionally, the PCA's decision, that is usually published, indicates the evidence of the infringement.

22. How is damage quantified?

Polish law does not provide any special regulations for calculating damages, but the Civil Code follows the principle of full reparation, which covers *damnum emergens* (actual/direct loss) and *lucrum cessans* (hypothetical loss of profit). It is important to note at this point, that these hypothetical losses are not to be confused with contingent losses (loss by chance).

There are no guidelines for courts regarding quantifying damages, therefore the assessment has to be done on a case-by-case basis. In practice, the injured party has to prove how much profit the business would have gained if it was running in ideal competition (counterfactual) and assess the amount of sustained damage.

23. What defence is recognized, if any, for defendants (besides the passing-on defence (question 18 above), if applicable)?

Article 362 Civil Code allows the court to reduce the measure of damages in cases of contributory conduct of the harmed party (i.e. it contributed to the loss arising or increasing). But this is a power and not an obligation of the court, so full damages may be awarded even in the event of contributory negligence. In contributory negligence cases, the loss must be a natural consequence of the harmed party's conduct. The court will not examine the reasonableness of damages reduction until after it resolves the contribution aspect. The relevant issues will be contemplated by the court in the following priority: (i) was there a loss?; (ii) what is extent of the loss?; (iii) to what extent has the harmed party contributed to the loss?; (iv) how much should the damages be reduced?. The contributing victim may be denied compensation altogether only if his fault has been proved to be intentional. Thus, damages cannot be totally waived in the absence of intentional fault on the part of the plaintiff.

24. **What is the role of economic experts, if any?**

Since there has been no relevant cases under Polish law so far it is difficult to precisely predict the role of economic experts in private damage cases in Poland. However, when such case-law finally arrives economic experts surely will play a crucial role e.g., in quantification of harm suffered by the plaintiff.

25. What other types of experts are typically engaged in your jurisdiction?

As a rule, evidence from experts can be heard in cases that require special knowledge. In practice such "special knowledge" refers predominantly to the following areas: medicine, highly technical issues, construction works etc.

26. In case of follow-on claims, are the fines imposed by the national – or supranational – competition authority taken into account in evaluating the quantification of damage?

No, as mentioned in answer to Question 9, fines imposed in administrative proceedings by the Polish Competition Authority are not taken into account when settling damages.

CHAPTER VII: ALTERNATIVE DISPUTE RESOLUTION

27. Is there any form of alternative dispute resolution available in your jurisdiction? If yes, in which form, and how do they coordinate with the civil and criminal proceedings regarding antitrust infringements?

Arbitration is available, there are no legal obstacles preventing competition law disputes to be resolved in that way. The case shall arise from contractual relations and the parties should have agreed to submit the case to arbitration before. Mediation is also available by the law. Unfortunately we are not aware of the fact that arbitration or mediation have been engaged in the competition law cases so far.

CHAPTER VIII: SETTLEMENTS

28. Please briefly set out the settlement mechanisms (if any) in your jurisdiction

The settlement procedure (*dobrowolne poddanie się karze*) has been introduced to the Act in January 2015 and it allows PCA to reduce a fine by 10 % if a party accepts the fine and admits to the factual findings made by the Polish Competition Authority. It is noteworthy that he settlement procedure is available not only for cartels but also for other types of multilateral or unilateral infringements of competition law. PCA itself can start the procedure if it considers that the settlement will accelerate the proceedings. Also the party(ies) can ask for the settlement procedure, but it is not binding for PCA. Courts are not involved in the settlement procedure. Both the Polish Competition Authority and the undertaking are entitled to withdraw from the settlement procedure at any stage. It should be stressed that the Act provides that information obtained by the Polish Competition Authority during a settlement procedure shall not be disclosed unless undertaking agrees.

CHAPTER IX: RECENT CASE LAW

29. Please give an example of noteworthy cases or authorities in your jurisdiction rendered in the last 18 months which are relevant to the content of this questionnaire.

To the best of our knowledge, there has been no actions for damages resulting from competition law infringements until now.