

## Antitrust Private Enforcement – Case of Poland

by

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### *Abstract*

This article presents the main difficulties surrounding private enforcement of antitrust law in Poland, currently the key implementation problem in the field of antitrust law. Whereas the basic standards concerning the public pillar of antitrust enforcement have already been established, either in the European Community (EC) or in its Member States, the private pillar of antitrust enforcement has not yet been fully developed. The fact that private enforcement of antitrust law is possible, and in fact equal, to public enforcement is not yet commonly recognized. In response to the European Commission's *White Paper on Damages actions for breach of the EC antitrust rules*, private enforcement of antitrust law is presently

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under intense discussion in EC Member States. This article should be considered as one of the contributions to this debate.

It presents the main legal framework of private enforcement of antitrust law in Poland. In order to do so, it directly refers to the Polish Act on competition and consumer protection, the Civil Code and the Civil Procedure Code. This article also discusses Polish case law in this area. It aims to assess whether existing Polish legal provisions are, in fact, sufficient to ensure effective private enforcement of Polish as well as EC antitrust law. The article refers to the main proposals of the European Commission's White Paper.

It is concluded that private enforcement of antitrust law is indeed possible in Poland on the basis of currently applicable procedural rules, even if there are no special instruments designed to facilitate it. However, it cannot be expected that in the current legal climate, private parties will eagerly and frequently apply for damages in cases of a breach of Polish antitrust law. Antitrust cases are special in many aspects and, thus, they require specific solutions in procedural terms. This article aims to pinpoint those areas, where the Polish law needs to be changed in order to develop and promote private enforcement of antitrust law in Poland.

**Classifications and key words:** private and public enforcement, private parties, antitrust damages, court proceedings, collective redress, damage actions.

## I. Introduction

Private enforcement of antitrust law has become a key implementation problem of antitrust law in the EC. The EC initiated an extensive debate on this topic by adopting in 2005 the *Green Paper on Damages actions for breach of the EC antitrust rules (Green Paper)*<sup>1</sup>, followed in 2008 by the *White Paper on Damages Actions for Breach of the EC Antitrust Rules (White Paper)*<sup>2</sup>. With its judgments in *Courage*<sup>3</sup> and

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<sup>1</sup> COM(2005) 672 (20 December 2005). See: E. De Smijter, C. Stropp, D. Woods, "Green Paper on damages actions for breach of the EC antitrust rules" (2006) 1 *EC Competition Policy Newsletter* 1–3.

<sup>2</sup> COM(2008) 165 final, SEC(2008) 404, SEC(2008) 405, SEC(2008) 406. See two documents accompanying White Paper (1) Commission Staff Working Paper accompanying the White Paper on Damages Action for Breach of the EC antitrust rules, COM(2008)165 final, SEC(2008)405, 406; (2) *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios. Final Report*, Report for the European Commission, Brussels, Rome, Amsterdam, 30 March 2008.

<sup>3</sup> C-453/99 *Courage Ltd v. Crehan* [2001] ECR I-6297. See comments to the *Courage* case by the Polish authors: by D. Miąsik, published in: (2006) 2 *Europejski Przegląd Sądowy* 57, and by A. Jurkowska, published in: A. Jurkowska, T. Skoczny (eds), *Orzecznictwo sądów wspólnotowych w sprawach konkurencji w latach 1964–2004*, Warszawa 2007, pp. 698–706.

*Manfredi*<sup>4</sup>, the European Court of Justice (ECJ) strongly engaged in this debate. Simplifying the legal environment surrounding the effective enforcement of EC antitrust law in the national courts of its Member States should be regarded as a further step in the modernisation process of EC antitrust law. In fact, the current antitrust enforcement system was not so much modernised as replaced by a new one – built on two equal pillars (public and private). So far enforcing EC law by private parties in EC Member States has been infrequent, the Commission wants to reverse that tendency.

Unlike the amendments of the application system of Article 81 and 82 of the EC Treaty (implemented by Regulation 1/2003), measures adopted to facilitating private enforcement of antitrust law will not only affect the implementation of EC law. Instead, they will broadly influence the enforcement of domestic antitrust rules as well. It is highly likely, however, that procedural rules concerning antitrust damage claims established at the EC level will be implemented by national legislators in respect to the enforcement of domestic antitrust laws. Thus, the debate on private enforcement of EC antitrust rules became simultaneously a discussion on procedures for actions based on national laws. In the majority of Member States, domestic antitrust rules are patterned on EC provisions, so a similarity in the enforcement system of EC and national rules is natural. European initiatives directed at promoting private enforcement may also be considered as a form of incentive for national legislations.

Polish antitrust law does seem to need such an incentive. The private pillar of antitrust enforcement has not developed in Poland yet. There are hardly any cases on civil issues connected with infringements of antitrust law. However, the European debate on private enforcement of competition law should start a similar process in Poland. At the moment, the domestic debate is far from intense – it is in fact quite surprising that even one single opinion from a Polish body was actually submitted to the Commission as a reply to its call for comments to its *White Paper*. This article constitutes a contribution to this debate as it presents current legislation, which is useful (or potentially useful) in the area of private enforcement of antitrust law, as well as existing Polish case law affecting this field. The Commission's *White Paper* remains a natural background for all the considerations below.

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<sup>4</sup> C-295-298/04 *V. Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA, Nicolò Tricarico, Pasqualina Murgolo v Assitalia SpA* [2006] ECR I-06619. See M. Carpagnano, "Private enforcement of Competition Law Arrives in Italy: Analysis of the Judgment of the European Court of Justice in Joined Cases C-295-298/04 Manfredi" (2006) 3(1) *Competition Law Review* 51–53.

## II. Polish private enforcement of antitrust law – state of play

### 1. Nullity of practices restricting competition

In Polish antitrust law, prohibitions of practices restricting competition are established by Article 6 (prohibition of cartels) and Article 9 (prohibition of abuse of a dominant position) of the Act of 16 February 2007 on Competition and Consumer Protection (Competition Act)<sup>5</sup>. Infringing these prohibitions generates a sanction of nullity of all the business practices – or their respective parts – constituting a restrictive agreement (see Article 6(2) or an abuse of a dominant position (see Article 9(3)). The rule of nullity opens a way for private enforcement because it stresses the civil dimension of competition restricting practices. Business practices caught by the prohibition of cartels or the prohibition of abuse of a dominant position are null and void *ex lege*. That effect does not depend on a statement of nullity made by the President of the Office of Competition and Consumer Protection (UOKiK) in an administrative decision, or a judgment by a court involved in adjudicating antitrust cases<sup>6</sup> (the Court of Competition and Consumer Protection, Court of Appeals in Warsaw or Supreme Court). As the Supreme Court stated in its resolution of 23 July 2008 (III CZP 52/08)<sup>7</sup>, pursuant to the provisions of the Competition Act referring to nullity, a final and binding decision of the President of UOKiK is not a prerequisite for declaring a contract as null and void. In the same judgment the Supreme Court found however, that a declaration by a court that an entrepreneur infringes a Competition Act prohibition is only a prerequisite for a court's statement on nullity of an analyzed contract and simultaneously a condition for a validity of claims brought to the court.

Legal actions are null and void *ex tunc*, from the moment the actions were taken or a reason for nullity occurring<sup>8</sup>.

The sanction that is prescribed in Article 6(1) and 9(3) of the Competition Act is presumed to be absolute nullity. Contractual actions that are the basis of competition restricting practices, bear an *erga omnes* effect and so, every entity

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<sup>5</sup> Act of 16 July 2007 on Competition and Consumer Protection (Journal of Laws 2007 No 50, item 331; amendments: Journal of Laws 2007 No 99, item 660; Journal of Laws 2007 No 171, item 1206.

<sup>6</sup> K. Kohutek, [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2008, p. 291; E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2002, p. 87. See also point II.2 below.

<sup>7</sup> Resolution of the Supreme Court of 23 July 2008, III CZP 52/08, unpublished.

<sup>8</sup> K. Kohutek, [in:] K. Kohutek, M. Sieradzka, *Ustawa...*, p. 291; P. Podrecki, *Porozumienia monopolistyczne i ich cywilnoprawne skutki*, Kraków 2000, p. 186.

may refer to the sanction of nullity<sup>9</sup>. Contractual actions considered null and void – pursuant to respective provisions of the Competition Act – cannot be validated<sup>10</sup>. It is also impossible to execute contractual actions, to which sanction applies<sup>11</sup>.

At this time, the sanction of nullity set out in the Competition Act is commonly considered to be equivalent to the sanction prescribed in Article 58 of the Polish Civil Code<sup>12</sup>, even if a different opinion – pointing to the specific nature of nullity in antimonopoly law – was expressed in the past in relation to the Act of 24 February 1990 on Counteracting Monopolistic Practices and Consumer Protection<sup>13</sup>. The equivalence of nullity in antitrust and civil law was confirmed in many judgments issued by the Court of Competition and Consumer Protection (previously: Antimonopoly Court). For instance, the Court stated that Competition Act was one of the legal acts that may – pursuant to Article 353<sup>1</sup> of the Civil Code – limit the freedom of contract<sup>14</sup>.

## 2. Enforcement of the Competition Act 2007

Thanks to the changes made to the Competition Act of 2007 in comparison to the Competition Act of 15 December 2000<sup>15</sup>, Polish antitrust law enforcement before the President of UOKiK turned, from a mixed model (public-private), into a purely public enforcement model. Under the current Competition Act, antitrust proceeding before the President of UOKiK can be initiated – on the basis of Article 49 – only *ex officio*, an individual cannot lodge a claim on infringements of the prohibition of cartels or abuse of a dominant position. In other words, individuals cannot force the President of UOKiK to initiate proceedings before the UOKiK. Individuals are only allowed to

<sup>9</sup> Decision of the President of the UOKiK of 30 April 2007, DOK-53/07, unpublished.

<sup>10</sup> T. Szanciło, “Porozumienia ograniczające konkurencję” (2006) 6 *Przegląd Prawa Handlowego* 41; K. Kohutek, [in:] K. Kohutek, M. Sieradzka, *Ustawa...*, p. 291.

<sup>11</sup> See judgment of the Court of Competition and Consumer Protection of 10 September 20003, XVII Ama 136/02, (2004) 7–8 *Wokanda*.

<sup>12</sup> Act of 23 April 1964 Civil Code (Journal of Laws 1964, No 16, item 93, with amendments). See P. Podrecki, *Porozumienia monopolistyczne...*, p. 187; S. Gronowski, *Polskie prawo antymonopolowe*, Warszawa 1998, p. 169.

<sup>13</sup> Act of 24 February 1990 on Counteracting Monopolistic Practices and Consumer Protection (consolidated text: Journal of Laws 1997, No 49, item 318 with amendments). See T. Ławicki, “Glosa do wyroku SN z dnia 22 lutego 1994 r., I CRN 238/93” (1995) 7 *Państwo i Prawo*.

<sup>14</sup> Judgment of the Antimonopoly Court of 6 September 1993, XVII Amr 26/93, (1993) 4 *Orzecznictwo Gospodarcze*, item 86.

<sup>15</sup> Act of 15 December 2000 on Competition and Consumer Protection (consolidated text: Journal of Laws 2005 No 244, item 2080, with amendments).

submit a notification of an infringement, which is non-binding to the UOKiK (Article 86).

According to the Polish government, this amendment was justified by the need to eliminate the possibility to lodge a claim before the UOKiK by individuals – eliminating such an activity of individuals was presumed to be a prerequisite to help improve the level of private enforcement of antitrust law in Poland<sup>16</sup>. This statement should be regarded as a confirmation of a two-fold system of antitrust law enforcement: public (with the exclusive competence of the President of UOKiK) and private (with the participation of civil courts)<sup>17</sup>. Certainly, the shift towards a public enforcement model before the President of UOKiK is a step in the right direction. Indeed, when individuals were allowed – under the Competition Act of 2000 – to lodge a claim to the UOKiK, they had no incentive to start civil proceedings. An intervention by the President of UOKiK was not only much faster (considering that the average duration of court proceedings in Poland is over one year), but also much cheaper. Naturally, the character and results of public and private enforcement are totally different. However, a majority of entities filing a claim to the President of UOKiK were ‘personally’ satisfied with an administrative decision confirming an infringement of the Competition Act. Currently, when public enforcement lies in the exclusive competence of the President of UOKiK, satisfaction of that kind cannot be achieved by individuals; initiating court proceedings is thus the only way to play a fully active role in establishing an infringement (not to mention the fact, that private enforcement has always been the only road to gain financial satisfaction). Indeed, a new *ex officio* enforcement model of the Competition Act before the President of UOKiK may motivate individuals to intensify their efforts in the context of private enforcement. On the other hand, such an indirect incentive is far too small to radically change the situation and to strengthen the eagerness level of individual to claim antitrust damages.

### 3. Legal basis for private enforcement of antitrust law

Even, if the Polish Competition Act of 2007 was planned to broaden the scope of private enforcement of antitrust law, the legislator did not follow solutions applied in the German competition act where, the so-called 7<sup>th</sup> amendment, introduced a direct legal basis for private enforcement of antitrust

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<sup>16</sup> Government’s Explanatory Note to a Draft Competition Act, p. 17.

<sup>17</sup> A. Jurkowska, “Perspektywy prywatnego wdrażania prawa ochrony konkurencji w Polsce na tle doświadczeń Wspólnoty Europejskiej” (2008) 1 *Przegląd Ustawodawstwa Gospodarczego* 25–26.

law<sup>18</sup>. Under those circumstances, the provisions of the Polish Civil Code and the Act of 16 April 1993 on Combating Unfair Competition<sup>19</sup> (hereafter, Unfair Competition Act) must be applied as the legal basis for establishing responsibility for the breaches of antitrust law in Poland.

The legal rules of the Unfair Competition Act may constitute the legal basis for establishing breaches of antitrust law due to the broad concept of unfair competition practice in Article 3(1) of the Unfair Competition Act. This provision, considered to be a general clause, defines an act of unfair competition as “an activity contrary to the law or good practice which threatens or infringes the interest of another entrepreneur or customer”. Antitrust breaches, which are indeed “contrary to the law”, may be considered to be acts of unfair competition. As a result, the rules on civil liability that are contained in the Unfair Competition Act may be successfully applied to either to them. On the basis of Article 18(1), which opens Chapter 3 of the Unfair Competition Act (entitled “Civil liability”), an entrepreneur whose interests have been threatened or violated may submit the following claims: 1) to abandon unlawful actions, 2) to remove results of unlawful actions, 3) to make a single or repeated statement of a given content and in a prescribed form, 4) to repair a damage, “pursuant to general rules”, 5) to hand over unjustified benefits, “pursuant to general rules”, 6) to adjudicate an adequate amount of money to the determined social goal connected with the support of Polish culture or related to the protection of national heritage (if the act of unfair competition has been deliberate).

However, the Unfair Competition Act may be used as the legal basis for liability for antitrust infringements only by entrepreneurs: claims may be lodged either individually or – pursuant to Article 19(1) point 3 – by a national or regional organisation, whose statutory objective is to protect the interests of entrepreneurs. The Unfair Competition Act does not provide any legal basis that would allow consumers – either individually or collectively – to apply for compensation for antitrust damages. This weakness makes it impossible to treat the Unfair Competition Act as a universal source of rights for victims of breaches of antitrust law – excluding consumers from the scope of the beneficiaries of private enforcement of antitrust law would significantly weaken its effectiveness.

Damage actions for breaches of antitrust law can also be based on the Polish Civil Code, using its provisions means, however, to apply general civil law rules to specific situations such as antitrust damages. The Civil Code contains three

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<sup>18</sup> See M. Będkowski-Koziół, “Prywatne wdrażanie prawa antymonopolowego w RFN – uwagi na tle regulacji siódmej noweli kartelowej” (2007) 12 *Przegląd Ustawodawstwa Gospodarczego*.

<sup>19</sup> Act of 16 April 1993 on Combating Unfair Competition (consolidated text: Journal of Laws 2003 No 153, item 1503 with amendments).

different legal grounds that can be used in the context of damage actions for antitrust infringements. They include, first of all, Article 415 and 471 of Civil Code (establishing a system of general civil liability – tort and contractual one, respectively). Article 415 of the Civil Code states that “[w]hoever by his fault caused a damage to another person shall be obliged to redress it”. The condition of “fault”, which is a prerequisite of the application of Article 415, causes that this provision may be used as a legal ground for antitrust liability only in cases, where a breach of antitrust law was deliberate (agreements, the object of which restricts competition and all cases of abuse of a dominant position seeing as settled case law considers that abuse cannot derive from negligence). The clear advantage of the application of Article 415 of the Civil Code as grounds for liability for antitrust law infringements is the fact that this rule refers not only to material, but also to non-material damages (pecuniary compensation for a wrong (injunctive relief)).

Article 471 of the Civil Code concerns the liability of a debtor for a failure to perform, or a failure to properly perform, an obligation (liability *ex contractu*). That type of liability – as it is presumed in the Polish doctrine of civil law – excludes a possibility of compensation for non-material damages.

It is worth mentioning that the European Commission is of the opinion that “fault” should be seen as a necessary pre-requisite of compensatory liability. Thus, the concept of “fault” is of fundamental importance in this context. Under the Polish law, “fault is captured in a synthetic manner, combining objective and subjective elements”<sup>20</sup>. On the basis of Article 471, a concept of “fault” covers either an intention not to fulfill an obligation or involuntary negligence in performing an obligation. This broad concept seems to correspond to the opinion pursued by the European Commission, which suggests that only an “excusable error” may abolish liability of entrepreneurs for antitrust breaches.

Article 405 of the Civil Code contains rules on unjust enrichment. Benefits resulting from unlawful actions (among them – antitrust breaches) may be regarded as unjust enrichment. The Supreme Court delivered a judgment on 10 August 2006 where Article 405 of the Civil Code was successfully used as the legal grounds for damages in a breach of the Unfair Competition Act<sup>21</sup>. As the European Commission presumes, unjust enrichment may appear in the context of “passing-on” benefits. It should also be recommended for the Polish courts to accept the approach, presented in the *White Paper* (point 2.6) that suggests: “to lighten the victim’s burden” and “to make indirect purchasers

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<sup>20</sup> *Green Paper. An Optimal View of the Civil Code of the Republic of Poland* (Z. Radwański, ed.), Ministry of Justice, Warszawa 2006, p. 108.

<sup>21</sup> Judgment of 10 August 2006, V CSK 237/06, unpublished.



able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety”.

Worth noting is also the fact, that even Article 18(1) points 4 and 5 of the Unfair Competition Act refers to “general rules” of civil liability established in the Civil Code. Actually, applying the Unfair Competition Act may lead – in cases of some claims – to the application of the Civil Code. Due to that, the Civil Code and the Unfair Competition Act should not be regarded as real alternatives. The burden of proof is the same, regardless of the legal basis (a shift in the burden of proof set out in Article 18a of the Unfair Competition Act does not refer to antitrust cases). The Unfair Competition Act contains a special mechanism preventing entrepreneurs from filing unjustified claims (Article 22). Paradoxically, and specially where the President of UOKiK has not taken a prior decision on the case, that mechanism may discourage damage actions from entrepreneurs who fear to be accused of abusing the system of damage claims.

Unlike the Unfair Competition Act (with a limited scope of entities that can benefit from claims based on that Act), the Civil Code has a “universal” applicability for establishing antitrust liability in the meaning that Article 415, 471 and 405 can be used either by entrepreneurs (competitors or co-operators of an infringer) or by consumers. It is compatible with the approach of the ECJ that stated in *Courage* and then in *Manfredi* that “every individual” should have an opportunity to make a claim for damages<sup>22</sup>. The Commission confirmed that opinion in its *White Paper* (point 2.1).

#### 4. (Still no) basis for collective redress

In order to comply with the aforementioned opinion of the ECJ concerning personal standing within antitrust private enforcement, a right to claim for antitrust damages should be granted to a group of consumers. Such a solution, proposed by the Commission in its *White Paper* (point 2.1.), could significantly strengthen the participation of consumers in private enforcement of antitrust law, putting, in turn, stronger pressure on entrepreneurs. The Commission proposes two “complementary systems” of collective redress: 1) representative actions which are brought by an organisation acting for a group, and 2) opt-in collective actions (*White Paper*, point 2.1.).

There were so far no provisions regulating collective redress in the Polish legal system, even though some form of “class actions” or “collective claims”

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<sup>22</sup> *Courage*, para. 24; *Manfredi*, par. 61.

can be identified in the Civil Procedure Code<sup>23</sup>. It is in fact possible for several plaintiffs to bring an action simultaneously<sup>24</sup>. Moreover, pursuant to Article 7 of the Civil Procedure Code, a prosecutor is entitled to initiate court proceedings, acting on a behalf of a particular person, in any case where the legal system, citizen rights or the public interest must be protected. It is not impossible that these conditions can be fulfilled in some antitrust cases. The Polish ombudsman has the same (as a prosecutor) ability to initiate proceedings in a civil court, even in antitrust cases<sup>25</sup>. Naturally, both solutions bear little resemblance to collective claims. An institution that is indeed quite close to “collective claims”, is a possibility to initiate proceedings in consumer cases, on behalf of consumers, by representative bodies (consumer associations, human rights organisations, scientific and technological bodies, trade unions, and automobile associations, other than those representing commercial transport undertakings).

However, a respective legislative act “on group proceeding” (collective redress) is currently being prepared by the Commission of Civil Law Codification at the Polish Ministry of Justice. The draft follows on an opt-in model. It provides an opportunity for a group of at least 10 individuals to bring a single action provided that their claims are based on the same factual or legal grounds, and that the facts justify common demands for all their claims (see Article 1 of a draft). However, it would be the court that would decide on the admissibility of a collective (group) claim (Article 10 of a draft). The position of a representative of the group, that brings a claim, may be taken by a member of the group or a Consumer Ombudsman<sup>26</sup>. The representative of the group conducts the proceeding on his own behalf, but in the interest of all group members. The group is entitled to bring an action for pecuniary or non-pecuniary claims. In the case of the former, the amount of the claim must be generally equal for each member of the group, although the equalization may be done in a subgroup (see Article 2(1) of a draft). Introducing collective redress is a revolution of sorts for Polish civil procedure; it is a response to the challenges, needs and values that are associated with modern market relations and consumer protection needs, as well as the latest trends in European legal culture – private enforcement of antitrust law remains a part of that reality.

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<sup>23</sup> Act of 17 November 1964 Civil Procedure Code (Journal of Laws 1964 No 43, item 296 with amendments).

<sup>24</sup> See *Study on the conditions of claims for damages in case of infringement of EC competition rules – National Report – Poland*, p. 4 (available at: [http://ec.europa.eu/comm/competition/antitrust/actionsdamages/national\\_reports/poland\\_en.pdf](http://ec.europa.eu/comm/competition/antitrust/actionsdamages/national_reports/poland_en.pdf))

<sup>25</sup> *Ibidem*, p. 5.

<sup>26</sup> Consumer Ombudsmen operate on the basis of Article 39–43 of the Competition Act 2007.

The forthcoming act on collective claims will be the next step not only to compliment, but also to improve the effectiveness of the system of private enforcement of antitrust law in Poland.

## 5. Categories of claims

The Commission's *White Paper* focuses on damage actions. The Polish law, like in many other countries, sets out various forms of compensation. The way damages are compensated greatly depends on what kind of damage was sustained: whether it was material in nature (repaired with redress) or non-material (compensated with injunctive relieves).

Compensation may take the form of pecuniary and non-pecuniary measures. Regarding the latter, in antitrust cases a plaintiff may claim for: 1) a declaration of declaring an infringement of competition law, 2) an abandonment of restrictive practices, 3) a public statement on the breach of antitrust law by an infringer. Regarding pecuniary measures, one can bring an action for 1) "typical" damages, granted pursuant to general rules, and 2) *restitutio in integrum*. There are no specific provisions (or even non-binding guidelines) on methods of calculating damages in antitrust cases. The courts will most likely calculate damages on the same general basis, which they use in other cases relating to business and market activity. Polish courts are likely to accept the principle established by the ECJ in *Manfredi*<sup>27</sup>, whereby compensation in antitrust cases should consist of *damnum emergens*, *lucrum cessans* and interests seeing as such an approach is compatible with basic rules of Polish civil law. However, to the best of the Author's knowledge, that fact has not yet been confirmed in Polish antitrust case law.

In contrast, Polish courts are not likely to grant compensation for non-material damages, as that would be unusual for the Polish civil law system. Nonetheless, the European Commission is not likely to impose a duty to implement such measure in individual Member States, so the status quo should remain – an injunctive relief is theoretically possible in antitrust cases, but would be unusual in practice.

Finally, it is worth mentioning that an exemplary, rather than exhaustive, list of potential forms of compensation is included in Article 18(1) of the Unfair Competition Act<sup>28</sup>.

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<sup>27</sup> See *Manfredi*, para. 79.

<sup>28</sup> See above point II.3.

## 6. Single enforcement procedure for Polish and EC competition law

A process of private enforcement refers either to national or to EC antitrust law that, pursuant to Regulation 1/2003, must be directly applied in Member States. According to the principle of effectiveness and its interpretation by the ECJ, national law is not allowed to deprive EC law of its effectiveness. Therefore, national rules cannot make it impossible, or extraordinarily difficult, to execute an individuals' right to claim damages based on Article 81 and 82 EC<sup>29</sup>. The principle of equivalence in EC law requires the usage, for damage actions based on EC law, national procedural rules not less favourable than those used for equivalent actions deriving from national material law<sup>30</sup>. Polish law does not have a special procedure for enforcing damage actions based on EC law – their legal grounds would also be based on the Civil Code or the Unfair Competition Act. At the moment, there is no risk that Polish procedures would undermine private enforcement of EC antitrust law. Unlike in the *Manfredi* case, actions based on EC law and those based on national law are lodged at the same type of civil courts. All procedural issues, including limitation periods, are applied in the same way to actions based on the Polish Competition Act and those, potentially, based on the EC Treaty. The Supreme Court stated in the resolution of 23 July 2008 (III CZP 52/08), that even if, in a given case, EC law is not applied, national provisions should be interpreted in such a way, as to eliminate procedural discrepancies in the application of Polish and EC law.

Other issues crucial to private enforcement of antitrust law include the prejudicial nature of administrative decision, that is not regulated in legal acts, but that has been dealt with by the Polish judiciary<sup>31</sup>.

## III. Developments in Polish case law on private enforcement of antitrust law

The record of privately enforced antitrust cases in Poland is not impressive. In the recent years their number has, nevertheless, increased. It can be expected that the number of privately enforced antitrust cases will continue to grow due to its further popularisation. Presented below are the most

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<sup>29</sup> See *Manfredi*, para. 62. See M. Szpunar, *Odpowiedzialność podmiotu prywatnego z tytułu naruszenia prawa wspólnotowego*, a Wolters Kluwer business, Warszawa 2008, p. 325–326.

<sup>30</sup> *Manfredi*, para. 71.

<sup>31</sup> See point III. below.

important judgments of the Supreme Court that concern some aspects of private enforcement of antitrust law. The case law analysed here shows two key problems arising in antitrust matters in the context of private enforcement. The first issue is the nullity of contracts constituting practices restricting competition; the second, the prejudicial character of administrative antitrust decisions of Polish competition authorities.

Moreover, there is a number of judgments, either from the Supreme Court or the Appeal Court or the Court of Competition and Consumer Protection (earlier: Antimonopoly Court), that emphasise a possibility to bring an action to civil courts as a result of antitrust breaches. Actually, these judgments explicitly note the existence of two pillars (public and private) of antitrust law enforcement. Within the first pillar the public interest is protected – this being a task of the President of UOKiK and the courts (involved in the appeal and/or cassation procedures). Private interests get their protection in “classical” civil proceedings initiated in civil courts. In the judgment of 29 May 2001 (I CKN 1217/98) the Supreme Court claimed: “[a]n objective of the Act on Combating Anti-monopoly Practices (a predecessor of Competition Act) was not the protection of an individual entrepreneur (...). Individual legal rights of market participants are subject to a protection in a procedure of bringing an action to a civil court or to an administrative court”<sup>32</sup>. The Antimonopoly Court in the judgment of 15 January 2002 (XVII Ama 29/2002) repeated: “[r]egarding a public character of the Competition Act, its objective is not a direct protection of legal rights of market participants touched by activities of other entrepreneurs. Such a protection is a field of activity for civil courts”<sup>33</sup>. In the resolution of 23 July 2008 the Supreme Court stressed that individuals (entrepreneurs, consumers) suffering from a restrictive practice should look for compensation of their damages before civil courts (III CZP 52/08). Dualism in applying the same legal act, reflected in the possibility to execute prohibitions settled by that act in a proceeding either before an administrative body or before a civil court is fully admissible.

Even if private enforcement of antitrust law has always been recognised by Polish judiciary, case law on the interdependence between public and private usage of the competition act has significantly evolved. The first judgments on this issue appeared on the basis of the Act on Combating Anti-Monopoly Practices. In a judgment of 22 February 1994 (I CRN 238/93) the Supreme Court claimed that “regardless of a procedure of affirmation consequences of

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<sup>32</sup> Judgment of the Supreme Court of 29 May 2001, I CKN 1217/98, (2002) 1 *Orzecznictwo Sądu Najwyższego – Izba Cywilna*, item 13.

<sup>33</sup> Judgment of the Antimonopoly Court of 15 January 2003, XVII Ama 29/2002, unpublished. See also: judgment of the Antimonopoly Court of 23 October 2002, XVII Ama 133/01, unpublished.

monopolistic practices, an affirmation that an agreement has been reflecting such a practice and – as a result – it is null and void, may be made in a civil matter between parties of that agreement, as a prerequisite for assessing claims resulting from the agreement”<sup>34</sup>. With this judgment, the Supreme Court confirmed that it is not necessary to gain an administrative decision affirming antitrust practices before bringing an antitrust damages action to a civil court. Considering that Polish antitrust law was seen, at that time, as mainly administrative in nature, the judgment of the Supreme Court was somewhat criticised by the Polish doctrine<sup>35</sup>.

One year later, the Supreme Court changed its attitude towards the character of the decisions taken by the Polish antitrust authority. It stated, in its order of 27 October 1995 (III CZP 135/95)<sup>36</sup>, that it was permissible to bring an action related to an infringement of the prohibition of restrictive agreements, only if a decision confirming an infringement has previously been adopted by the Antimonopoly Office (the predecessor of the President of the UOKiK). This approach, linking private enforcement to administrative intervention, must be considered a factor that built a barrier in developing private enforcement of antitrust law and as such, must be assessed negatively<sup>37</sup>.

It was sustained in the later judgment of 28 April 2004 (III CK 521/02), where the Supreme Court confirmed a prejudicial character of a previous rulings in a competition case made by the President of UOKiK or the Court of Competition and Consumer Protection. The Supreme Court stressed that the nullity of a contract associated with a practice that constitutes an abuse of a dominant position may be a prerequisite in a court proceeding only if an antitrust authority or a competition court stated an infringement of a prohibition of an abuse of dominant position.

However, in the judgment of 2 March 2006, the Supreme Court has finally changed its opinion on that matter. According to the Court, “if proceedings before the President of UOKiK had not been instituted or proceedings were not completed with a decision based on Article 9 or 10 of the Competition Act (decisions affirming an infringement – AJ), a civil court may make its own arrangements referring to a practice restricting competition, by entering into a contract, and those arrangements are a prerequisite of a nullity of

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<sup>34</sup> Judgment of the Supreme Court of 22 February 1994, I CRN 238/93, (1994) 10 *Orzecznictwo Sądu Najwyższego – Izba Cywilna*, item 198.

<sup>35</sup> See T. Ławicki, op. cit.

<sup>36</sup> Order of the Supreme Court of 27 October 1995, III CZP 135/95, (1996) 6 *Orzecznictwo Sądów Polskich*, item 112.

<sup>37</sup> S. Gronowski, „Głosa...”; A. Jurkowska, “Perspektywy...”, p. 27; A. Jurkowska, D. Miąsik, T. Skoczny, M. Szydło, “Nowa uokik z 2007 r. – kolejny krok w kierunku doskonalenia publicznoprawnej ochrony konkurencji w Polsce” (2007) 4 *Przegląd Ustawodawstwa Gospodarczego* 5–7.

that contract”<sup>38</sup>. In this judgment, the Court stated that “a decision by the President of UOKiK has a declaratory character and in a sphere of civil law it does not create any new legal situation”. It should be noted that the judgment I CSK 83/05 was adopted under the enforcement system where proceedings before the President of UOKiK could be initiated “on demand” of individuals. Since currently such proceedings are started exclusively on an *ex officio* basis, the value of the statement on the independency of civil sanctions in antitrust law has grown.

Private enforcement of antitrust law has again become independent from administrative decisions of the President of UOKiK as long as a decision affirming an infringement of a prohibition of competition restricting practices is not taken by the President of UOKiK. The judgment I CSK 83/05 – read *a contrario* – points at a prejudicial character of an administrative decision taken by a Polish competition authority (if such a decision exists). That opinion of the Court has been sustained also in other judgments adopted since 2006: the judgment of 5 January 2007 (III SK 17/06)<sup>39</sup> and the judgment of 4 March 2008 (IV CSK 441/07)<sup>40</sup>. A positive opinion on a prejudicial nature of the decision adopted by the President of UOKiK is rather common among the Polish doctrine<sup>41</sup>.

All the aforementioned judgments confirming the prejudicial character of administrative decisions relate only to decisions where infringements of the Competition Act were directly claimed. However, one of the resolutions adopted by the Supreme Court in 2008 referred – for the very first time in Polish judiciary – to a commitment decision admissible on the basis of Article 12 of the Competition Act. The Supreme Court stresses there that making an affirmation of a contract’s nullity by a court dependent on a previous involvement of a competition authority “may remain in incompliance with Community law” (III CZP 52/08, unpublished) as it may not – against the principle of effectiveness – create a barrier to enforce an individual’s right based on the EC Treaty. The Court states further that even if from a point of view of public interest, adopting a commitment decision may be more beneficial than a final arrangement on the existence of practices restricting competition, that fact “should not exclude a possibility to protect individual interest in proceedings before a civil court”. Moreover, the Court states that the limitation period for initiating a proceeding in an antitrust case (Article 93 of the Competition Act) cannot act against individual interests and exclude an admissibility of civil proceeding, in which an

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<sup>38</sup> Judgment of the Supreme Court of 2 March 2006, I CSK 83/05, unpublished. See also: judgment of the Supreme Court of 14 March 2007, I CSK 454/06, unpublished.

<sup>39</sup> Judgment of the Supreme Court of 5 January 2007, III SK 17/06, unpublished.

<sup>40</sup> Judgment of the Supreme Court of 4 March 2008, IV CSK 441/07, unpublished.

<sup>41</sup> See A. Jurkowska, D. Miąsik, T. Skoczny, M. Szydło, “Nowa ustawa...”.

existence of a monopolistic practice is affirmed as a condition for the statement on a plaintiff's claims. Additionally, the Supreme Court recalls EC law and its rules on the prejudicial character of antitrust decisions taken by the European Commission. Article 16(1) of Regulation 1/2003 imposes on national courts a duty not to take judgments contrary to the content of the decisions of the Commission. When both, court and administrative proceedings are being held simultaneously, national courts are obliged to avoid issuing judgments that would be contrary to the decision envisaged by the Commission.

According to the Supreme Court, EC law points directly to a necessity of providing administrative decisions in competition cases with a prejudicial status, as this is the most proper way to achieve a consistency of arrangements within a process of public and private antitrust enforcement. It is worth stressing however, that only a final administrative decision should be treated as binding for a court. A commitment decision is not final because it only declares that an infringement is highly probable, although not definite. That is confirmed by Article 12(4) of the Polish Competition Act stating that a commitment decision excludes the possibility of applying provisions on affirming an infringement (Article 10 and 11) or on imposing a penalty (Article 106(1) point 1 and 2). The Supreme Court concludes that a commitment decision cannot be considered as prejudicial in civil court proceedings. Once more recalling EC law, the Supreme Court stresses point 13 and 22 *in fine* of the preamble to Regulation 1/2003 that suggest that the Commission's commitment decisions (adopted pursuant to Article 9) are not binding for national courts.

Some general conclusions can be drawn on the basis of the analysis of existing Polish case law on private enforcement of antitrust law, even though the number of the relevant judgments is small. Firstly, it seems that the Supreme Court worked out basic rules for a co-existence (in some cases a form of co-operation) between public and private pillar of antitrust law enforcement. It was confirmed that when the President of UOKiK adopts a final antitrust decision, its findings are binding (have a prejudicial character) for civil courts. This rule does not, however, apply to commitment decisions, which are not final. If the President of UOKiK has not yet ruled in a case, a civil court is free to decide for the sake of its plaintiff. The same may happen when the President of UOKiK adopted a commitment decision. The case III CZP 52/08 illustrates the influence of EC law solution on the interpretation of Polish rules in this field.

Secondly, considering private enforcement of antitrust law in Poland, the majority of cases are only using the plea of nullity (resulting from a breach of a prohibition of practices restricting competition) as a defense in litigations based on general rules of civil law; so far, there are only a few cases when private enforcement of antitrust law takes the form of damage actions.



#### IV. Prospects of private enforcement of antitrust law in Poland

Although private enforcement of antitrust law is not completely absent from the Polish legal culture, seeing as the Supreme Court has recently delivered some crucial judgments in this area, it is, like in many European countries, still underdeveloped. However, some indications suggest that private enforcement of antitrust law will accelerate, among other things, due to the revolutionary change in the enforcement model, introduced by the Competition Act of 2007 (see point II.2 above), the currently being drafted act on collective redress (see point II.5 above), and a clear line of the Supreme Court regarding the civil aspects of antitrust cases. The influence of EC law and the initiatives of the European Commission, such as its *White Paper*, can also not be ignored as an important influence on the development of the Polish private enforcement system. In general, the Polish doctrine does not deny the competence of the European Commission to propose measures harmonising procedural aspects of damage actions. Still, some tension remains as private enforcement of antitrust law resembles a battlefield where antitrust (usually public) and civil (private) lawyers act. In order to guarantee an effective private enforcement of antitrust law, a high level of co-operation between the public and private pillars of antitrust enforcement is required. In reality, the Polish competition authority is not likely to strongly engage in legislative initiatives concerning private enforcement, seeing as it is active in the sphere of public protection of competition. The Polish competition authority declares, however, its interest in making competition rules effective in the area of private enforcement. It can be assumed nevertheless, that the UOKiK will support the development of the second pillar of antitrust enforcement, because the actions of private entities filing antitrust claims in civil courts remain in advantageous to public interests. Certainly, UOKiK's contribution to building a 'damage culture' in antitrust enforcement<sup>42</sup> should be considered to be a key factor for the success of private enforcement of the Competition Act. Judging the interest shown in private enforcement by the level of involvement in the public consultation process following the *White Paper*, UOKiK was in fact the only Polish body to engage in promoting private enforcement (no other responds from Poland were submitted to the European Commission!). Concluding, however, that there is little interest in private enforcement of EC law in Poland would be exaggerated.

Considering the legal framework of private enforcement of antitrust law, even if it has no specific procedural mechanism, bringing antitrust damage actions in Poland is possible on the basis of its existing legal rules (the Civil

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<sup>42</sup> A. Jurkowska, "Perspektywy...", p. 25.

Code, the Civil Procedure Code, the Unfair Competition Act). “An action for bringing competition-based damages is no different from any other action for damages and the same principles apply to both” (National Report, Poland, p. 2), but it is not a serious hurdle to private enforcement in Poland. However, one cannot expect that in this state of law, private parties will eagerly and frequently apply for damages in cases of a breach of Polish antitrust law. Antitrust cases are specific in many aspects and thus, they may require specific solutions in either procedural or material terms. Not all issues should be resolved through legal acts, some problems can be dealt with by the judiciary – a prejudicial character of a prior administrative decision, confirmed by the Supreme Court, constitutes a good example for such an approach solution. The prospective EC legal regulation or directive on private enforcement<sup>43</sup> will probably show a direction of the Polish legislation and practice in that field and will become a framework for national provisions. Many potential problems can be avoided if there are no (procedural) differences in the enforcement of Article 81 and 82 EC and Article 6 and 9 of the Polish Competition Act.

There is a list of questions linked to private enforcement of antitrust law that should be answered in a debate on antitrust claims and damage actions in Poland. Among them: what categories of damages can be compensated? Even if Polish law permits material and non-material damage compensation, it seems that the Commission in its *White Paper* limits damage actions to material loss only. This pattern is likely to be followed in Poland considering, in particular, the reluctance of the national legislator and courts to broaden the scope of causes for compensating non-material damages. Questions surround also what form should the compensation take (only damage or/and injunctive relief)? Seeing as damages are the main form of compensation for antitrust breaches, difficulties in calculating their proper amount are often stressed<sup>44</sup>. It seems those doubts are – at least to some extent – exaggerated. Judges have always faced problems with calculating damages, especially while ruling on a pecuniary compensation for a “wrong”, and antitrust proceedings – even if quite specific – do not radically differ from other market-related cases. The support from the Commission deriving from its guidelines on calculating damages in antitrust cases, announced as part of the “private enforcement package”, will additionally improve the situation – the idea of prohibition of competition restricting is the same in EC law and national law, so EC guidelines on calculating damages can be easily applied by Polish courts.

A concept of American-style triple (or multi-) damage may also be an issue in Poland, even if it is not part of its national legal culture – similar measures exist however in Polish copyright law. As the Commission expressed a negative

<sup>43</sup> See M. Szpunar, *Odpowiedzialność...*, p. 330–335.

<sup>44</sup> See *White Paper*, point 2.5.

view of triple damages, the introduction of such a solution in individual Member States is not likely.

Pecuniary damages should not remain the only – except for the nullity *ex lege* – civil sanction for breaches of antitrust law. Generally worth recommending is the application of a broad scope of measures to react to antitrust infringements. For instance, a statement that a breach of antitrust rules has taken place (or an announcement of that breach) published in a popular journal, may constitute a very severe sanction for an infringer as well as satisfy its victims, while simultaneously, all the problems connected with calculating damages would cease to exist. The same applies to a claim to abandon an infringement or remove its results. Private enforcement will play its role when it is helpful and open to the needs and expectations of potential plaintiffs.

Some questions may be raised in the context of ‘delivery of proofs and evidences’ in proceeding before civil courts. The Polish Civil Procedure Code sets out a rule of preclusion in proceedings conducted in economic (market) cases<sup>45</sup>. This is a true impediment for private enforcement of antitrust law, as many of such cases (e.g. tacit collusions) cause a lot of probative problems and requires high standards of proves that cannot always be guaranteed because of a preclusion rule<sup>46</sup>. The abandonment of this rule seems to be an important challenge for facilitating private enforcement of antitrust law. Another measure that can make private enforcement more effective is the introduction of a disclosure *inter partes*<sup>47</sup>. Considering that a reflection of that procedure can be found in the Polish copyright law system (Article 105)<sup>48</sup>, its application here would not constitute a total novelty for the Polish legal system. Certainly, that type of probative procedure requires a well-designed “defense mechanism” that would prevent abusing the notion of disclosure<sup>49</sup>.

The question, which courts are entitled to rule on antitrust damage actions must also be posed in a debate on private enforcement in Poland. Some believe that judging antitrust cases needs specialised knowledge and, as a result, specially qualified judges. That problem could be resolved by choosing just one, or only a few, courts in Poland (probably at regional level) that will

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<sup>45</sup> See T. Szanciło, “Prekluzja w postępowaniu gospodarczym” (2007) 6 *Przegląd Prawa Handlowego*.

<sup>46</sup> See M. Bernatt, “Postępowanie przed sądem krajowym w związku z naruszeniem reguł konkurencji” [in:] E. Piontek (ed.), *Nowe tendencje w prawie konkurencji UE*, Warszawa 2008, p. 339–343.

<sup>47</sup> R. Stürner, “Duties of Disclosure and Burden of Proof in the Private Enforcement of European Competition Law” [in:] J. Basedow (ed.), *Private Enforcement of EC Competition Law*, Kluwer Law International 2007, p. 163–192.

<sup>48</sup> Act of 4 February 1994 on Copyrights and Related Rights (Journal of Laws 1994 No 24, item 83 with amendments).

<sup>49</sup> See *White Paper*, point. 2.2.

have special departments trained and prepared to deal with antitrust cases. This solution seems reasonable, however, a plea of a contract's nullity resulting from a prohibited practice may occur in every claim considered by every civil court in Poland. In such cases, judges will also need specialised knowledge in order to give a ruling on an existence of a practice, with all its prerequisites. Thus, trainings in antitrust law should be delivered to all judges of civil courts in Poland.

The current legal framework of private enforcement of antitrust law in Poland, or rather, a lack of special provisions in this field, does not create a barrier for private actions to be taken to enforce the Competition Act or antitrust provisions of the EC Treaty. In the opinion of the Author, the overall success of private enforcement of antitrust law in Poland is far more dependent on public perception than on a change in the law. The current legal framework of civil law and civil procedures, supported by the existing case law largely attributable to the judgments of the Polish Supreme Court, seems to be sufficient from a legal point of view. An explicit mention of the right to antitrust damage actions and clear instructions concerning the execution of this right would be likely to accelerate a 'psychological' shift towards private enforcement of antitrust law.

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