

# Private competition law enforcement in Poland – an overview

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## Legal Basis (I)

- Act of 21 April 2017 on the private enforcement of competition law (the Private Enforcement Act)  
→ comprehensive implementation of the Directive 2014/104/EU (the Damages Directive)  
*(BUT: not only cartel infringements, but also abuse of dominance)*
- Act of 17 November 1964 - The Code Of Civil Procedure

## Legal Basis (II)

- the Private Enforcement Act amends the general civil law liability provisions concerning damages claims' enforcement with regard to:
  - (1) circle of liable entities as well as entities entitled to compensation
  - (2) burden of proof -
  - (3) rules of evidence

*The provisions of the Private Enforcement Act apply in their entirety only to competition law infringements that took place after 27 June 2017 (entry into force). However, procedural rules set out in the Private Enforcement Act apply to all civil proceedings concerning antitrust damages initiated after 27 June 2017, regardless of when the competition law infringement occurred, if it remains within the limitation period.*

## General principles of liability (I)

Requirements for an infringer to be liable:

- culpability: that is, that a defendant's behaviour infringing the competition law is illegal, unless the defendant is not at fault;
- harm incurred by the claimant; and
- the causal link between the defendant's behaviour and that harm.

## General principles of liability (II)

### *Culpability*

whether an infringer is at fault for an infringement of the competition law is determined on the basis of two premises:

- whether such behaviour is illegal (objective test) → behaviour is deemed illegal when it infringes the competition law, i.e. Article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) or their Polish equivalents (i.e. Articles 6 and 9 of the Competition Act, respectively)
- and whether the defendant was at fault (subjective test)

## General principles of liability (III)

### *Culpability*

The Private Enforcement Act introduces a statutory rebuttable presumption that the undertaking infringing the competition law is liable for that infringement

→ consequently – the defendant has to prove his or her non-liability

## General principles of liability (IV)

### *Harm*

The Private Enforcement Act provides for a statutory presumption that any infringement of the competition law causes harm, which includes both:

- actual loss (*damnum emergens*)
- lost revenue (*lucrum cessans*)

### *Causal link*

Under the applicable general provisions of Polish law, the infringer is liable only for the ordinary consequences of its actions (objective test)

## Limitation period (I)

- five (5) years from the date the claimant became aware of the loss resulting from the competition law infringement, or should have become aware of it, if it had exercised due diligence - limitation period cannot, however, be extended to longer than 10 years from the date of the occurrence of the infringement

## Limitation period (II)

- starts running only if the competition law infringement ceases to exist or is suspended if proceedings regarding the case are launched by the President of the Office of Competition and Consumer Protection (OCCP), the European Commission or any NCA within the EU

## Limitation period (III)

- suspension is automatically lifted and the limitation period continues to run one year after the proceedings before the relevant authority are concluded
- unlike the Damages Directive, the Private Enforcement Act does not provide for a suspension of the limitation period while parties attempt to resolve a dispute amicably

## Preliminary ruling nature of the decision of competition authority (I)

- the finding of an infringement in a legally valid decision of the OCCP or judgment should be regarded as proven for the purposes of actions for damages related to that infringement filed in Polish courts
- the court is bound by an infringement decision insofar as it covers the nature of the infringement and its material, personal, temporary and territorial scope, as determined by the decision of the OCCP in the exercise of its jurisdiction
- the court is only bound by final infringement decisions of the OCCP or final judgments rendered by a court as a result of an appeal of a decision of the OCCP

## Preliminary ruling nature of the decision of competition authority (II)

- with regard to the decisions of European Commission Article 16 Section 1 of Regulation 1/2003 applies
- with regard to the decisions of other NCAs:
  - a Polish court may consider the finding of an infringement of competition law by a NCA of another EU Member State as the basis for a factual presumption as to the facts relevant for the resolution of a case for damages pursuant to Article 231 of the Civil Procedure Code
  - moreover, pursuant to Article 1138 sentence 1 of the Civil Procedure Code, foreign official documents have the probative force equal to Polish official documents

## Class actions

- no specific class action procedure related to competition law infringements  
- however, the harmed parties may rely on the class action provisions in the Group Proceedings Act
- under the Group Proceedings Act, class action suits may be brought in cases where at least 10 persons pursue the same type of claims based on the same or similar factual background

## Calculating damages (I)

- the Private Enforcement Act does not provide a specific method with regard to the quantification of loss (both the actual loss and lost profits) resulting from the competition law infringement, and it refers the court to the recommendations set out in the relevant EU Commission guidelines
- under the general provisions of Polish civil law: the damages awarded are designed to restore the claimant to the position in which it would have been had the breach (e.g., the competition law infringement) not been committed.
- Thus, the court cannot award damages exceeding the amount of loss

## Calculating damages (II)

- the court cannot award damages exceeding the amount of loss actually incurred by the claimant (punitive or exemplary damages are not available under Polish law)
- the court can request assistance in the calculation of damages from the OCCP or a NCA from another EU Member State – BUT: none of these organs are legally bound to assist, nor is the court bound by their recommendation

## Pass-on defence (I)

- the Private Enforcement Act contains a statutory pass-on presumption, according to which any competition law infringement resulting in an overcharge for a direct purchaser is presumed to be passed on to the indirect purchaser who bought the products
- the pass-on presumption can be claimed and used only by the indirect purchaser seeking compensation from the antitrust infringer
- the presumption is rebuttable, and the infringer has the right to contest it
- the pass-on presumption cannot be used by the infringer to defend him or

## Pass-on defence (II)

- the pass-on presumption cannot be used by the infringer to defend him or herself from the compensation claims – the infringer, when raising such a defence charge, must always prove that the overcharge was passed on by the direct purchaser and therefore he or she should be awarded limited damages or no damages

## Current developments and future

- competition damages claims still rare in Poland:
  - in February 2020, Polish oil refiner and petrol retailer PKN Orlen sued mBank, Mastercard and Visa for about 141 million Euro, alleging that the companies infringed competition law by agreeing on interchange fees;
  - an action against a Cement cartel that operated between 1998 and 2009 may also be filed in the near future – the Court of Appeals in Warsaw is currently working to establish the date on which the competition law infringement ceased to exist.



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