

Private Enforcement of Competition Law in Polish Courts: The Story of an (Almost) Lost Hope for Development*

by

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CONTENTS

- I. Introduction
- II. Polish jurisprudence on private enforcement of competition law
 1. General overview
 2. Back to the 1990s: two opposing positions of the Supreme Court (1993, 1995)
 3. *PKP Cargo/Wilan* (2004)
 4. *Warsaw Apartments* saga (2006, 2007)
 5. *MPEC* (2008)
 6. *TPPD* (2008)
 7. *Zinc* (2009)
- III. Legal, structural and institutional background of private enforcement of competition law in Poland
- IV. Conclusions

Abstract

The article reviews judgments of Polish courts on private enforcement of competition law between 1993 and 2012. A quantitative analysis of this jurisprudence shows that very few cases of that type exist at all. Their qualitative characteristics illustrate that: none of them referred to consumers; none of the claims was a 'pure' damage

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claim; all of these cases focused on partial or general nullity of contracts concluded as a result of an anticompetitive practice; almost all of them concerned an abuse of a dominant position; only one referred to competition-restricting agreements. The relevant jurisprudence largely focused on the binding force of a prior decision of the Polish competition body upon civil courts. Even if the fact that some cases of this type were at all record might suggest that there is a potential for developing private enforcement of antitrust in Poland, nothing like this actually happened. Unfortunately, the Act on Collective Redress (in force since July 2010) has not contributed to a growth in the number of consumers (or any other entities) engaging in court disputes with undertakings restricting competition.

Résumé

L'article passe en revue les jugements des tribunaux polonais sur l'application privée du droit de la concurrence entre 1993 et 2012. Une analyse quantitative de cette jurisprudence montre que très peu de cas de ce type existent. Leurs caractéristiques qualitatives montrent que: aucun d'entre eux ne concernait les consommateurs; aucune des revendications ne constituait une demande d'indemnisation dans le sens exacte; tous ces cas axaient sur la nullité partielle ou générale des contrats conclus à la suite d'une pratique anticoncurrentielle; la quasi-totalité d'entre eux concernaient un abus de position dominante; une seule visait aux accords restreignant la concurrence. La jurisprudence se concentrait surtout sur la force contraignante d'une décision préalable de l'organe polonais de la concurrence prise par des tribunaux civils. Même si le fait que certains cas de ce type-là étaient notés, il pourrait suggérer qu'il existe un potentiel de développement de l'application privée de la concurrence en Pologne – rien que cela ne s'est réellement passé. Malheureusement, la Loi sur les recours collectif (en vigueur depuis juillet 2010) n'a pas contribué à une augmentation du nombre de consommateurs (ou d'autres entités) s'engageant dans des litiges judiciaires avec les entreprises qui restreignent la concurrence.

Classifications and key words: antitrust damage; collective redress; evidence; nullity; private enforcement of competition law; Poland; public enforcement of competition law.

I. Introduction

Public enforcement of competition law started in Poland in 1990 as an element of the widespread economic and political changes that took place at the turn of the 1980s and 1990s¹. At its outset, the nature of public enforcement

¹ The first antimonopoly act was adopted in 1987 but it was not a competition act in a modern sense so it should not be seen as the beginning of competition protection in Poland's market economy.

was strictly antitrust (antimonopoly), rather than competition law – Poland's first legislation was issued in 1990 and entitled the Act on Counteracting Monopolistic Practices². In later periods, the original act was replaced by the Act of 15 December 2000 on Competition and Consumer Protection³. The Act on Competition and Consumer Protection currently in force was adopted on 16 February 2007⁴. None of these legislative measures contained any specific provisions dedicated to private enforcement of competition law. However, each contained a rule stating that legal activities constituting anticompetitive (monopolistic) practices are null and void. Notwithstanding the above, private enforcement of competition law has always been recognised in domestic jurisprudence (even if the number of cases was minimal). The problematic judicial attitude towards the binding force upon civil courts of a final decision issued by the National Competition Authority (hereafter, NCA) was gradually reviewed and modified.

Even if there are no special provisions for private enforcement of competition law, the Polish lawmaker appreciated its significance in the overall system of competition law enforcement. Introducing the Competition Act 2007, the government justified the elimination of a specific legal provision permitting the initiation of antitrust proceedings upon a motion (request) of a private party by stating that private claims can be ruled upon by common (civil) courts instead. Although this solution was expected to increase the number of privately litigated competition cases, it has not yet been fulfilled.

In theory, private enforcement of competition law was admissible in Poland but there is very little empirical data to actually consider. A realistic view of private litigation in competition cases cannot be easily presented as gathering reliable data is difficult primarily because for many years there was no central database of the jurisprudence of Polish common courts⁵. Only cases dealt with by the Supreme Court were relatively easy to identify. Even the Ministry of Justice was not able to provide trustworthy data on rulings involving private enforcement of competition law seeing as these cases had no special indicators (they are listed as standard civil law cases). Under those circumstances, only legal databases created by private companies (such as LexPolonica Maxima by LexisNexis Poland or Lex by Wolters Kluwer Poland) or information provided

² Act of 24 February 1990 on Counteracting Monopolistic Practices and Consumer Protection (consolidated text: Journal of Laws 1997, No 49, item 318, as amended); hereafter, the Antimonopoly Act 1990.

³ Act of 15 December 2000 on Competition and Consumer Protection (consolidated text: Journal of Laws 2005 No 244, item 2080, as amended), hereafter, the Competition Act 2000.

⁴ Act of 16 July 2007 on Competition and Consumer Protection (Journal of Laws 2007 No 50, item 331, as amended); hereafter, the Competition Act 2007.

⁵ This situation changed in 2012 when such a database started operating under auspices of the Ministry of Justice (databases available at <http://orzeczenia.ms.gov.pl>).

directly by law firms could be considered as a source of research material. Through these sources, it was possible to collect information on the absolute majority (if not all) of cases involving private enforcement of competition law in Poland between 1990 and 2012. In order to confirm the limited outcomes of this research, a questionnaire on this subject was sent in May and June 2012 to antitrust lawyers in leading law firms operating in Poland⁶. One law firm responded that they are currently dealing with two such cases at a pre-trial stage (it is likely however that these disputes will never reach a court); another answered that one case is pending in a court in Krakow. The content of this article was prepared with the best knowledge of the Author as of 29 July 2012.

There have never been any legal obstacles in Poland for consumer redress within private enforcement of competition law (consumers have always had the possibility of raising an action) and yet none of the identified cases involved consumers – they were all cases between entrepreneurs (undertakings). It is worth noting that the possibility of lodging a collective claim was introduced in Poland for both consumers and entrepreneurs on 19 July 2010 (the date of the entry into force of the Act of 17 December 2009 on collective redress⁷). Although expectations in relation to this new legal instrument were very high⁸, Poland has not yet seen a case that uses collective claims as a tool in private enforcement of competition law by consumers or any other groups.

II. Polish jurisprudence on private enforcement of competition law

1. General overview

As mentioned, the number of privately litigated competition cases in Poland is very low; it thus seems justified to present them all together. Even a small number of cases makes it possible to assess the general characteristics of private enforcement of competition law in Poland. The qualitative characteristics of the existing jurisprudence show the following features:

- a) None of the cases referred to consumers; the claimants were always entrepreneurs (undertakings);

⁶ Research on private enforcement of competition law conducted by other Polish academics confirms the very low number of existing cases – see for instance D. Hansberry-Biegunska, *Poland*, [in:] I. K. Gotts (ed.), *The Private Competition Enforcement Review*, London 2011, p. 251–259.

⁷ Journal of Laws 2009 No. 7, item 44.

⁸ Some Polish authors seem to consider this opportunity as an important factor for developing private litigation in antitrust case, see M. Sieradzka, *Pozew grupowy jako instrument prywatnoprawnej ochrony interes konsumentów z tytułu naruszenia reguł konkurencji*, Warszawa 2012.

- b) None of the claims was a 'pure' damage claim (one case was based on an unjustified enrichment claim);
- c) All of the cases focused on partial or general nullity of contracts concluded as a result of an anticompetitive practice – in this sense, private enforcement of competition law in Poland has so far played the role of a 'shield' rather than a 'sword';
- d) Not only is the number of cases very low, but, from a research perspective, their content is also very poor. Actually, the key issue in relation to private enforcement of competition law concerns the binding force of a prior decision of a competition body upon civil courts. Jurisprudence evolved in this context considerably. In the 1990s, one Supreme Court judgment (ref. no. I CRN 238/93) recognized the full independence of, respectively, the rulings of civil courts and those of the competition authority in relation to the existence of an anticompetitive practice. By contrast, a second judgment delivered in that time period also by the Supreme Court (ref. no. III CZP 135/95) made a decision by the competition authority a necessary pre-condition for a subsequent ruling by a civil court. Recent jurisprudence on this issue seems to have settled: if an antitrust decision exists in a certain case, it is binding upon a court unless it is a commitment decision. If a competition authority has not yet acted, a civil court is totally free in making its own decision upon the existence or non-existence of an anticompetitive practice.
- e) Almost all the identified cases concerned an abuse of a dominant position; only one referred to competition-restricting agreements. This realisation might be related to the characteristics of Polish antitrust law and the transformation of the national economy. Reflecting the highly monopolized structure of Poland's pre-1989 market, the NCA has since its creation consistently dealt with a greater number of abuse than cartel (agreement) cases. It was not until recently that the proportion of abuse versus cartel cases has somewhat changed. The Polish NCA, the President of the Competition and Consumer Protection Office (hereafter, the UOKiK President), issued 28 decisions on competition restricting agreements and 72 decisions on abuse in 2011 as opposed to the 20 decisions on agreements and 82 on abuse issued in 2002. It is difficult to compare detailed data from earlier periods since the Antimonopoly Act 1990 prohibited monopolistic practices in general, without making a sharp distinction between competition restricting agreements and the abuse of dominance. Still, it is estimated that in 1992, for instance, 75% of the proceedings concerned practices which would be classified in today's terminology as an abuse of a dominant position.

- f) The majority of the identified cases concerned antitrust practices on relevant markets connected to infrastructure (energy supply, water supply, sewage collection). The majority of the contested practices resulted from unclear legislation regarding private and public ownership of infrastructure related to political and economic changes and the liberalization processes that took place mostly in the 1990s. The same practices could not occur nowadays as those legal problems were subsequently resolved. Only one case (ref. no. III CK 521/02) referred to rail transport services, one case (ref. no. III CZP 52/08) referred to an abuse of a dominant position in the sale of wood and the most recent case (ref. no. VI ACa 422/09) to an anticompetitive agreement on a market of zinc-processing.

Not once in these cases has a court applied EU law, but the Supreme Court suggested the possibility of its application in a 2008 resolution (ref. no. III CZP 52/08). The Supreme Court claimed therein that because the contested contract was concluded after Poland's accession to the EU in 2004, and the resulting antitrust decision was thus also issued after that time, Article 102 TFEU should have been applied. As a consequence, the Supreme Court referred in its resolution to arguments flowing from EU law (Article 3(2) Regulation 1/2003 and EU case-law).

2. Back to the 1990s: two opposing positions of the Supreme Court (1993, 1995)

The very first judgment identified in the framework of this research project as involving private enforcement of competition law in Poland concerned a case between Przedsiębiorstwo Wodociągów i Kanalizacji in K. (a local water-supply and sewage-collecting company; hereafter, PWK) and Zakłady Pivowarskie in K. (a local brewery; hereafter, Brewery). The case was ruled upon by the Supreme Court on 22 February 1993 (ref. no. I CRN 238/93⁹). Both companies entered into a contract involving sewage-collection. One of its clauses imposed a duty on the Brewery to pay penalty payments for letting pollution into the sewage system which did not meet the conditions prescribed in the contract. The PWK submitted a claim to a civil court demanding from the Brewery a certain amount of money as a penalty payment for the collected sewage. The payment was calculated on the basis of a regulation of the Council of Ministers being in force at the time when the contract was signed, but not at the time of the requested payment (as a consequence, the

⁹ OSNC 1994 No. 10, item 198.

payment was considered by the Brewery to be too high). Courts at first and second instance agreed with the claimant (PWK). Neither referred in their judgments to the Brewery's claim that PWK's behaviour should have been considered as a monopolistic practice prohibited by the applicable Article 4(1)(1) of the Antimonopoly Act 1990. It was the Minister of Justice, who requested a revision of the case by the Supreme Court according to applicable procedural provisions¹⁰, that drew the Supreme Court's attention to this very problem. The Court subsequently stated that 'an existence of a monopolistic practice – and consequently – nullity of a whole agreement or its part (...) may also be stated in a civil case between parties to a contract as a prerequisite for ruling on claims resulting from it'. The fact that the claim concerning the potentially 'monopolistic' character of the practice was not analysed by the lower instance courts resulted in the annulment of their rulings.

In an order of 27 October 1995, ref. no. III CZP 135/95¹¹, the Supreme Court refused to answer a preliminary question referred to it by the Court of Appeals in Lodz. The case concerned a dispute between a company managing districts of blocks of flats (Spółdzielnia Mieszkaniowa in S.; hereafter, SM) and an electricity company (Zakłady Energetyczne SA in Ł; hereafter, ZE). SM demanded from ZE the return of the former's expenditure on constructing electricity lines in its districts. The contract for building the lines was concluded in 1989; the lines were transferred to ZE in 1993. The contested lines became part of the electricity system managed by ZE. Although ZE became the owner of the contested lines, it refused to refund their construction costs to SM. According to SE, the refusal to share construction costs was a monopolistic practice by ZE. The preliminary question from the Court of Appeals did not raise any antitrust issues. However, the Supreme Court decided not to answer the preliminary question because of the effect on the original court proceedings of a decision issued already by the competition body (Antimonopoly Office). Unlike the panel of judges that delivered the aforementioned ruling (ref. no. I CRN 238/93), this time the judges took the view that the Antimonopoly Office, a central body of administration, was the sole institution competent to issue a decision on the existence or non-existence of monopolistic practices. The Supreme Court stressed that it is a specific feature of antitrust nullity that a violation of antitrust law required a prior decision of the NCA stating that the contested practice was, in fact, a prohibited monopolistic practice. In the Supreme Court's view, a civil court could declare that a given contract is null and void only when a respective decision of a competition body had already been adopted. This approach proved

¹⁰ This procedure is no longer in force, nowadays the party would stand up on its own with a cassation that replaced 'special revision of a lower instance judgment.

¹¹ OSP 1996 No. 9, item 112.

a real hurdle for the development of private enforcement of competition law in Poland. This realisation is illustrated by the fact that the 1995 judgment was followed by a number of years with no private enforcement cases at all – the next identified case did not reach the Supreme Court until 2004, a noticeable gap even for the underdevelopment Polish private enforcement of competition law field. The question whether antitrust decisions are binding upon civil courts is certainly an important factor in this context, especially since this problem is not resolved by statutory (no *Masterfoods*-like rule in legal provisions) but merely by jurisprudential means in Poland (as presented below).

3. *PKP Cargo/Wilan* (2004)

After a long gap of almost seven years, the Supreme Court delivered its next identified ruling on 28 April 2004, ref. no. III CK 521/02. A company, Wilan, applied for a cassation of a judgment rendered by the Court of Appeals in Krakow whereby it was forced to pay a certain amount of money to Polskie Koleje Państwowe Cargo (Polish Railways Cargo; hereafter, PKP Cargo). The Court of Appeals rejected Wilan's request to suspend its proceedings in order to await the outcome of related proceedings before the Antimonopoly Court¹². The antitrust dispute concerned an alleged abuse of a dominant position by PKP Cargo by way of the imposition of excessive prices and the application of burdensome contract terms, bringing unjustified profits to the dominant undertaking. The Court of Appeals dismissed the application to suspend its civil proceedings until a ruling of the Antimonopoly Court because the only document presented in this context by Wilan was a copy of the latter's motion to initiate antitrust proceedings before the NCA. In truth, this could have merely confirmed the opening of administrative proceedings, not juridical ones.

The Court of Appeals stated that there was no need to suspend its own proceedings because civil courts are exclusively competent to assess the validity of contracts. According to the Court, assessing the validity of the contested contract was, however, not possible here because Wilan did not show which of its clauses were – in its view – infringing the prohibition of an abuse of dominance contained in Article 8 of the Competition Act 2000. The Court of Appeals noticed also an internal discrepancy in Wilan's position. On the one hand, Wilan agreed with PKP Cargo's claims and yet, on the other

¹² The Antimonopoly Court (currently: Court of Competition and Consumer Protection) rules on appeals against decisions rendered by the competition authority. It is a civil, first-instance court which operates within the framework of public enforcement of competition law.

hand, it questioned the validity of a contract being the source of its confirmed obligations towards PKP Cargo.

The cassation request concerning the judgment of the Court of Appeals was based on two grounds. First, a procedural irregularity was alleged in the Court of Appeal's refusal to suspend its proceedings until the end of the proceedings before the UOKiK President. Second, a violation of substantive law was asserted (Article 8(3) in relation to Article 9 of the Competition Act 2000) whereby the Court of Appeals was of the incorrect opinion that civil courts are the only ones permitted to assess the validity of contracts concluded through the abuse. The cassation request stated instead that a civil court may affirm the nullity of such contract only if the UOKiK President has already adopted a decision confirming an anticompetitive practice. Concerning the first claim, the Supreme Court stipulated that 'the prejudicial character of rulings based on special regulations and adopted by specialized bodies (as in this case: the UOKiK President and Antimonopoly Court) may often lead to a justified application for suspension of a proceeding. It does not need to suspend a proceeding every time a party to a court proceeding initiates by its own motion an administrative proceeding'. In the Supreme Court's opinion, suspension of proceedings is not applicable mainly when a court sees no prerequisites for the nullity of the contested contract. Since the Supreme Court saw also no grounds for applying Article 8(3) of the Competition Act 2000, the cassation was ultimately dismissed.

4. *Warsaw Apartments* saga (2006, 2007)

The history of antitrust enforcement in Poland has its own 'saga' – a number of cases known as 'Warsaw Apartments' that were reviewed by the Supreme Court twice. A company active in the construction industry, Warsaw Apartments, invested in the provision of water and sanitary pipes to a district of its apartments. In 2000, Warsaw Apartments concluded three contracts with the municipal water supply company (Miejskie Przedsiębiorstwo Wodociągów i Kanalizacji; hereafter, MPWiK). Accordingly, Warsaw Apartments built water and sanitary pipes with its own resources but the right of ownership to these pipes was then transferred to MPWiK. Warsaw Apartments raised a claim based on Article 405 of the Polish Civil Code (provisions on unjustified enrichment).

The Regional Court dealing with the case in the first instance noted that the relevant contracts had been concluded before the entry into force of the Act of 7 June 2001 on Collective Water Supply and Sewage Collection¹³.

¹³ Journal of Laws 2001 No. 72, item 747.

This legislation could thus not form the basis for the assessment of the case. The Court admitted that the only reason for concluding the contracts in question was that MPWiK was the sole water supply company in Warsaw. It held on it a dominant, if not even a monopolistic position. In the Court's view, the contracts between Warsaw Apartments and MPWiK contained some conditions which could be assessed from the perspective of the Competition Act 2000 as burdensome terms, bringing unjustified benefits to the dominant company (Article 8(2)(6) of the Competition Act 2000). If so, these contracts were null and void and Warsaw Apartments could demand the return of any unjustified enrichment from MPWiK up to an amount equivalent to the value of the water and sewage pipes it transferred.

The Court of Appeals in Warsaw disagreed with the Regional Court in its judgment delivered on 3 March 2005 (ref. no. I ACa 963/04). According to the Court of Appeals, the gratuitous transfer of the pipes' ownership by Warsaw Apartments to MPWiK was a necessary condition for integrating a new apartment complex with the existing water supply and sewage collection system. As a result, no anticompetitive behaviour was found and no basis for declaring that the contracts were null. Keeping in mind the aforementioned disparity in the two 1990s Supreme Court judgments that dealt with the binding power of antitrust decisions, the Court of Appeals referred to the later judgment of 27 October 1995 (ref. no. III CZP 139/95). It stated on its basis that declaring a contract null and void required a prior decision of the NCA on the anticompetitive nature of the dominant company's behaviour. When the case reached the Supreme Court, however, which delivered its ruling on 2 March 2006 (ref. no. I CSK 83/05¹⁴ (*Warsaw Apartments I*)) the views of the Court of Appeals were rejected. The panel of judges of the Supreme Court who assessed the Warsaw Apartments case based its decision on the Supreme Court ruling of 22 February 1994 (ref. no. I CRN 238/93) instead.

The Supreme Court confirmed first that legal activities resulting from prohibited anticompetitive practices are null and void *ipso iure*. In its view, such conclusion derives directly from Article 8(3) of the Competition Act 2000. Second, 'if the protection against competition restricting practices is based on a model of legal prohibition, a decision of the UOKiK President is of a declaratory nature only and does not constitute a new legal situation in the civil law sphere. Therefore, there are no obstacles for a court to make independent arrangements on contracts connected to competition restricting practices'. Third, in its administrative proceedings the UOKiK President protects the public interest; it is the personal (subjective) rights of parties that are protected in civil proceedings. As such, not every single practice

¹⁴ Case unreported.

restricting competition must be confirmed by a decision based on Article 9 of the Competition Act 2000.

The Supreme Court concluded that if proceedings before the UOKiK President had not been initiated yet, or existing proceedings have not yet been concluded with a decision based on Article 9 or 10 of the Competition Act 2000 (decisions declaring that the practice was anticompetitive), a court is competent to decide on its own on the anticompetitive nature of a practice constituting part of a contract, as a prerequisite for declaring the scrutinised contract null and void. Contrary to the views of the Court of Appeals, the Supreme Court also stated that the Act of 7 June 2001 on Collective Water Supply and Sewage Collection should have been applied in this case. This was so especially with respect to its Article 31 which imposed a duty on the interested parties to conclude a contract on the transfer of water and sewage pipes in relations such as those described in this case (between a construction company and a water supply and sewage collecting company). As a result, the judgment of the Court of Appeals in Warsaw was annulled and the case was returned for renewed assessment.

The Court of Appeals delivered its second ruling on 12 June 2006 (ref. no. I ACa 357/06) once again changing the judgment of the Regional Court by stating that the claims submitted by Warsaw Apartments were unfounded. The Court of Appeals noted that the Competition Act 2000, referred to by the Supreme Court, could not be applied in this case because all the contracts between the parties to the dispute had been concluded before it entered into force. There was thus a need to examine if the contracts in question were potentially contrary to Article 5(1)(6) of the Antimonopoly Act 1990. Actually, from the substantive point of view, there was hardly any difference between the two acts as both provisions had the same content – they stated that a prohibited abuse may take the form of the imposition of burdensome terms of contracts bringing unjustified benefits to a dominant company. The Court of Appeals did not find the behaviour of MPWiK abusive and, as a result, did not find any basis for declaring that the contested contracts were null. It was said, moreover, that even if the contracts had been null there would have been no legal basis for accepting a claim for unjustified enrichment because declaring contracts null had an *ex tunc* effect. Instead, Warsaw Apartments should have demanded the fulfilment of the contract and, if not fulfilled, it should have based its claims on *ex contractu* liability (Article 471 of the Polish Civil Code).

The Supreme Court delivered its second ruling on 14 March 2007 (ref. no. I CSK 454/06¹⁵ (*Warsaw Apartments II*)). It assumed therein that the Court of Appeals had ignored its binding statements from the earlier ruling of 2 March

¹⁵ Case unreported.

2006 whereby if contracts had turned out to be null, the claimant could not have demanded the performance of the contract but would have to raise a damages claim. In the subsequent part of the judgment, the Supreme Court focused on issues concerning the core of potential abuse in the light of the Act on Collective Water Supply and Sewage Collection. The cassation was upheld and the second judgment of the Court of Appeals was once again annulled. It can be assumed, even without the possibility to access the third judgment of the Court of Appeals, that it did not have great significance for the development of private enforcement of competition law in Poland since the key legal issues of this dispute seem to have been resolved by the earlier verdicts of the Supreme Court. Still, 'Warsaw Apartments' was not a purely antitrust case, it also related to the regulation of water supply and sewage collection.

5. *MPEC (2008)*

The judgment of the Supreme Court of 4 March 2008 (ref. no. IV CSK 441/07¹⁶) concerned a dispute between a local company supplying thermal energy (Miejskie Przedsiębiorstwo Energetyki Ciepłej; hereafter, MPEC) and a local company managing blocks of flats (Spółdzielnia Mieszkaniowa 'P'; hereafter, SM). The case originated before the Regional Court in Białystok when MPEC demanded from SM a payment (plus interest) for thermal energy delivered in May 2002. In accordance with applicable provisions, the President of the Energy Regulatory Office stated on 4 October 2001 that a sales contract on thermal energy was concluded between MPEC and SM. Fulfilling this contract, MPEC delivered thermal energy to SM in May 2002 with an invoice of over 692,000 PLN. In a decision of 19 September 2002, the UOKiK President recognized as anticompetitive the imposition of burdensome contract terms by charging a tariff that was partly invalid as a consequence of the Act of 26 May 2000 amending the Energy Law Act. The prohibited practice was implemented by MPEC between 1 July 2000 and 30 September 2000. Because of the partly invalid tariff, SM overpaid more than 210,000 PLN in this period. As a result, the court reduced the sum to be paid by SM to MPEC by this amount. Both the Regional Court and the Court of Appeals accepted the possibility of recouping the overpaid amount. The Supreme Court, deciding on the cassation in this case, shared the view of the Court of Appeals that a decision of the UOKiK President was binding upon a civil court.

¹⁶ LEX no. 376385.

6. TPPD (2008)

The Supreme Court dealt with private enforcement of competition law most recently in a resolution delivered on 23 July 2008 (ref. no. III CZP 52/08) as a response to a preliminary question posed to the Civil Chamber of the Supreme Court by the Regional Court in Torun. The case concerned a dispute between a state forestry enterprise (Skarb Państwa – Nadleśnictwo Dobrzejewice; hereafter, SP) and a company active in the timber industry (Toruńskie Przedsiębiorstwo Przemysłu Drzewnego SA; hereafter, TPPD). Both entities concluded a contract on the write off of bad debts. SP claimed that the contract should be considered invalid as it was concluded as a result of the abuse of a dominant position by TPPD who made its conclusion a condition for the sale of wood. The Local Court (court of first instance) dismissed SP's demand, which in turn appealed the first instance judgment to the Court of Appeals in Torun. The latter sought a preliminary ruling from the Supreme Court, asking if a decision issued by the NCA declaring that a certain practice infringed the abuse prohibition is binding in a civil case in which one of the prerequisites is the nullity of a contract. Supposing that the answer to the first question was yes, the Court of Appeals asked whether a commitment decision issued by the UOKiK President was also binding.

The Supreme Court stated that if it is necessary to find nullity of a legal activity, a court may independently decide on an infringement of the abuse of dominance prohibition, unless the UOKiK President has already issued a final decision on such violation. Referring to the second question, the Supreme Court pointed out that a commitment decision could not be treated as final because it is only based on the probability of an anticompetitive practice rather than on its certainty. In the Court's view, the finding that a legal activity constitutes an abuse of a dominant position is equivalent to stating that a company restricted competition. However, in court proceedings this assessment is only a condition (prerequisite) for the finding of nullity of a legal activity. The Supreme Court stressed that private interests are protected in court proceedings by declaring a legal activity ineffective where it was undertaken through the abuse of a dominant position¹⁷.

¹⁷ This case was broadly discussed in Polish doctrine: see e.g. A. Jurkowska, 'W stronę umocnienia prywatnoprawnego wdrażania zakazów praktyk ograniczających konkurencję – glosa do uchwały SN z 23.07.2008 r. (III CZP 52/08)' (2010) 5 *Europejski Przegląd Sądowy*; R. Poźdźnik, 'Glosa do uchwały SN z 23 lipca 2008 r., sygn. III CZP 52/08' (2009) 7-8 *Orzecznictwo Sądów Polskich*; R. Trzaskowski, 'Kompetencja sądu do ustalania nieważności czynności prawnych będących przejawem nadużywania pozycji dominującej oraz nieważności porozumień ograniczających konkurencję' (2009) 9–10 *Palestra*.

7. Zinc (2009)

Two companies active in the market for zinc-processing concluded a contract whereby one of them obliged itself not to contract with a certain number of co-operators (an exclusivity clause). Breach of this condition was subjected to a penalty payment of 100,000 EUR. The said party ultimately breached its obligation but did not want to pay the penalty because it claimed that the non-competition clause was contrary to Article 6 of the Competition Act and thus invalid. The court of first instance decided that a contract cannot be considered invalid, resulting from an infringement of the Competition Act, if there were no antitrust proceedings confirming the infringement of the relevant prohibition. The Court of Appeals in Warsaw did not share the views of the first instance court and annulled the judgment in a ruling of 25 November 2009 (ref. no. VI ACa 422/09¹⁸). The Court of Appeals noted that settled jurisprudence does not require any preconditions (such as completing antitrust proceedings) for a civil court to rule on the invalidity of a contract which is contrary to the Competition Act.

III. Legal, structural and institutional background of private enforcement of competition law in Poland

The key feature of the legal, structural and institutional background of private enforcement of competition law in Poland is that there is no single special procedural provision for this purpose. Competition cases are treated as 'normal' civil law cases. Claims can be based either on the Civil Code or on the Combating Unfair Competition Act of 16 April 1993¹⁹ (hereafter, CUCA). Article 3(1) of the latter provides a broad concept of 'unfair competition practice' which also covers anticompetitive practices²⁰. However, CUCA can form the basis for claims for entrepreneurs only, not for consumers. An issue under discussion at the moment is whether consumer claims can be based on the Combating Unfair Market Practices Act of 23 August 2007²¹. This act should, on the one hand, be seen as complementary (from the consumers'

¹⁸ LEX No. 1120262.

¹⁹ Consolidated text: Journal of Laws 2003 No. 153, item 1503, as amended; hereafter, Unfair Competition Act.

²⁰ See T. Skoczny, M. Bernatt, [in:] J. Szwaja (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2012, p. 566; J. Sroczyński, M. Mioduszewski, [in:] M. Zdyb, M. Sieradzka (eds), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2011, p. 477.

²¹ Journal of Laws 2007 No. 71, item 1206; hereafter, Unfair Market Practices Act.

point of view) to the Combating Unfair Competition Act – while the latter allows claims by entrepreneurs, the former should create the legal basis for consumer claims. On the other hand, however, it is uncertain if the legal definition of ‘an unfair market practice’ contained in Combating Unfair Market Practices Act can easily be applied to practices restricting competition within the meaning of the Competition Act. Naturally, competition restricting practices can influence the situation of an individual consumer. Nevertheless, it cannot be said that an anticompetitive practice in the meaning of Articles 6 or 9 of the Competition Act 2007 ‘significantly distorts or may distort the market behaviour of an average consumer (...)’, as required by Article 4(1) of the Combating Unfair Market Practices Act²².

There are no special courts or tribunals dealing with competition cases in private litigations. Even if these are unfair-competition-type cases, they are judged by ‘normal’ civil courts (disputes between entrepreneurs are resolved by a subcategory of civil courts called ‘commercial courts’). Within the public enforcement system, there is a special competition court – the Court of Competition and Consumer Protection Court that delivers judgments on appeals against decisions of the UOKiK President. Its jurisprudence, as well as that of other courts engaged in public enforcement of competition law (the Court of Appeals in Warsaw and the Supreme Court – Chamber of Labour, Social Insurance and Public Matters), can be seen as an important source of intellectual inspiration for civil courts in assessing competition cases.

Till 3 May 2012, the Civil Procedure Code used to contain separate procedural rules for proceedings before commercial courts (proceedings between entrepreneurs). This legal solution was changed by amendments to the Civil Procedure Code which abolished the contested rule of ‘evidence limitation’ whereby a plaintiff used to be obliged to contain in his action (initiating a proceeding) all of his statements and all of the supporting evidence²³ (if any evidence was missing at this point, only the court could exceptionally agree to presenting new evidence later in the proceedings). The rule of ‘evidence limitation’ was seen as inhibiting court proceedings in commercial cases (including competition cases). Its elimination from

²² Views supporting the possibility of using the Unfair Market Practices Act as basis for private litigation in competition matters are expressed by: P. Podrecki, ‘Civil Law Actions in the Context of Competition Restricting Practices Under Polish Law’ (2009) 2(2) *YARS*; A. Piszcz, ‘Still-unpopular Sanctions: Developments in Private Antitrust Enforcement in Poland After the 2008 White Paper’ (2012) 5(7) *YARS* 67; A. Stawicki, ‘Poland’, [in:] G. Blanke, R. Nazzini (eds), *International Competition Litigation: A Multi-jurisdictional Handbook*, Kluwer Law International BV 2012, p. 572.

²³ *Ex Art.* 479¹² i 14 of the Civil Procedure Code.

Polish civil procedure rules can be seen as facilitating private enforcement of competition law.

A standard set of claims that can be submitted in the case of a violation of competition law includes: 1) a claim to repair the damage which can be shaped as tort (Article 415 of the Civil Code) or contractual civil liability (Article 471 of the Civil Code); Article 18(1)(4) CUCA; 2) a claim to cease an unlawful action (Article 439 of the Civil Code; Article 18(1)(1) CUCA); 3) a claim to remove the results of unlawful actions or to restore a situation existing before a breach (Article 363(1) of the Civil Code; Article 18(1)(2) CUCA); 4) a claim to hand over unjustified benefits (Article 405 and following of the Civil Code; Article 18(1)(5) CUCA); 5) a claim to confirm the existence of a legal relationship (that is, a claim to decide on potential nullity of a legal activity; Article 189 of the Civil Procedure Code). An entrepreneur whose interests may have been threatened or violated can additionally demand a single or repeated statement of a given content and in a prescribed form (Article 18(1)(3) CUCA) and/or an adjudication of an adequate amount of money to a determined social goal connected with the support of Polish culture or related to the protection of national heritage (provided the act of unfair competition was deliberate; Article 18(1)(6) CUCA).

Regarding civil liability for damages, the Polish Civil Code requires proof of the damage, proof of the action that caused the damage and of a factual relationship between them. It is also necessary to prove fault (on the part of the entity violating antitrust law). In tort liability, the concept of fault primarily covers deliberate activities so it might sometimes be difficult to prove damage resulting from certain abuses of a dominant position. In contractual liability, the concept of fault covers either an intention not to fulfil an obligation or involuntary negligence in performing an obligation. Standard compensation covers real damage, lost profits and – if a case so requires – interest; the current annual rate established by the Council of Ministers is 13%. Article 415 of the Civil Code (deals with civil liability for tort) is also seen as the basis for the compensation of non-material damages that are excluded from contractual liability. Due to general civil liability rules, exemplary or punitive damages cannot be claimed. Still, the Polish Copyright Law Act recognizes multiple damages²⁴, modelled on US treble damage, in its Article 79(1)(3)(b)²⁵.

As liability in competition cases is based on general rules of civil law, it can also be based on joint liability. If damage is paid by a given member of

²⁴ A critical approach to this type of damage in Polish law see: P. Podrecki, *Środki ochrony praw własności intelektualnej*, Warszawa 2010, p. 300.

²⁵ Act of 4 February 1994 on Copyright Law and Neighbouring Rights (consolidated text: Journal of Laws 2006 No 90, item 631, as amended).

a cartel, the latter will have a claim for a contribution against other members of that cartel.

There are no obstacles to raising either stand-alone or follow-on actions. According to the analysed jurisprudence, a decision of the NCA is not a necessary condition for submitting a claim to a civil court. However, jurisprudence confirms also that for follow-on actions a prior final antitrust decision, which declares that a practice restricts competition, is binding upon a civil court; this rule does not apply to commitment decisions. Where court proceedings and administrative proceedings before the NCA are concurrent, courts are not obliged to suspend their own proceedings awaiting an antitrust decision. However, stalling civil proceedings is allowed according to Article 177(3) of the Civil Procedure Code; suspending them was also recommended by jurisprudence. Neither legislation nor jurisprudence provide any rules on the potential influence of prior civil court judgments on antitrust decisions. However, the separation of powers principle would appear to exclude such possibility²⁶.

As mentioned, there are no special rules for private litigations in competition cases. As a result, the general provision on the burden of proof applies – Article 6 of the Civil Code presumes that the burden of proof rests fully on a claimant.

Regarding standing in competition cases, both entrepreneurs (competitors, contractors) as well as consumers may submit a claim. It must be stressed once again that consumer claims cannot be based on the Combating Unfair Competition Act. Because of the requirement to prove a direct factual relationship between the alleged damage and the illegal activity, it is unlikely that an indirect purchaser could be successful in claiming damages or that a defendant could benefit from a passing-on defence.

No special rules on discovery (disclosure) of evidence are available in civil cases including those based on competition law; the exchange of information between parties may also only be of an informal nature. Disclosure-like procedures are seen in Polish legal literature as a breach of the burden of proof rule and a limitation of the privilege against self-incrimination. Parties may, however, ask the court to place an obligation upon another party to provide particular evidence, but a court is not bound by such requests. A court may decide on its own to issue an order forcing a party to provide particular evidence or documentation²⁷.

²⁶ A. Jurkowska-Gomułka, *Publiczne i prywatne egzekwowanie zakazów praktyk ograniczających konkurencję: w poszukiwaniu zrównoważonego modelu współistnienia*, Warszawa 2013, p. 317–319.

²⁷ *Ibidem*, p. 273–282.

Applicants submitting follow-on claims have little chance to gain access to the case file of the respective proceedings before the UOKiK President. In fact, the Competition Act 2007 guarantees access to the case file only to the parties of the actual antitrust proceedings (only entrepreneurs against whom the proceedings have been initiated); potential victims of a cartel or an abuse of dominance do not have access to the case file. The only way to view evidence collected in antitrust proceedings is in accordance with the Access to Public Information Act of 6 September 2001²⁸. A recent judgment of the Supreme Administrative Court of 17 June 2011 (ref. no. I OSK 490/11) confirms that some data collected by the NCA in its antitrust proceedings should be treated as public information with free public access. The Supreme Administrative Court stated also that even documents formulated by an entrepreneur as a form of implementing an antitrust decision (such as a new form of contracts for instance) can be seen as public information under the Act. The position of the judiciary gives hope for a rather favourable interpretation of the Access to Public Information Act for applicants in private litigations cases based on competition law.

Providing access to information collected by the UOKiK President in the context of civil proceedings faces also difficulties caused by the unclear content of Article 73 of the Competition Act 2007. Article 73(1) prescribes that ‘information received in the course of the proceeding may not be used in any other proceedings based on separate provisions (...)’. A literal interpretation of this provision could exclude data gathered in antitrust proceedings from the duty to provide access to the case file. However, Article 73(2)(5) states that the aforementioned provision shall not apply to ‘providing competent authorities with information which may indicate that other separate provisions have been infringed’. It is unclear whether Article 73(2)(5) of the Competition Act 2007 extends the term ‘competent authorities’ to civil courts in competition cases²⁹.

It should be noted that civil courts can assist parties in discovering evidence. Pursuant to Article 248(1) of the Civil Procedure Code, everyone is obliged to present – upon a demand of the court – a document that can prove a fact crucial for resolving a case (unless it contains secret information). There is no reason to exclude the NCA from the duty to present parts of its case files upon a demand from a civil court.

Private litigation in competition cases cannot be supported by the UOKiK President as *amicus curiae* because there is no legal provision for such role for entities other than non-governmental organizations. In my view, there are also

²⁸ Journal of Laws 2001 No 112, item 1198, as amended.

²⁹ See e.g. M. Bernatt, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 1303; B. Turno, *Leniency – program łagodzenia kar pieniężnych w polskim prawie ochrony konkurencji*, Warszawa 2013, p. 551.

no provisions granting such standing to the European Commission pursuant to Article 15 of Regulation 1/2003.

The Competition Act 2007 provides for a special limitation period to institute antitrust proceedings before the UOKiK President – the time limit extends to a year since the end of the year when the alleged infringement of competition law was terminated. The expiry of this limitation period does not influence the possibility to submit a claim based on the Civil Code or the Combating Unfair Competition Act. General limitation periods established in the Civil Code apply to competition cases also – the time limit for bringing an action for damages resulting from a tort generally passes after three years from the moment when the injured party discovered the damage and found out the identity of the person obliged to redress it. The absolute limitation period is ten years from the moment the action resulting in the alleged damage took place (Article 442 of the Civil Code). The limitation period in commercial cases (cases with entrepreneurs as parties) is three years regardless of whether they are based on the Civil Code or the Combating Unfair Competition Act.

Pursuant to the Act of 28 July 2005 on Court Costs and Fees in Civil Matters³⁰, the fee for lodging a claim regarding material rights (pecuniary claims) amounts to 5% of the value of the object of the dispute, not less than 30 PLN (about 7.5 EUR) and not more than 100,000 PLN (about 25,000 EUR). In a claim for immaterial rights (non-pecuniary claims), there is a fixed fee, regardless of the value of the dispute, which is not less than 30 PLN and not more than 5,000 PLN (not exceeding 1,250 EUR). If the value of the dispute cannot be determined, the president of the court settles an interim fee (between 30 PLN and 1,000 PLN). However, what Poland really struggles with is not necessarily the amount of the fee, but the fact that civil court proceedings last an average of 540 days. During this period, the plaintiff's fees are 'frozen' – such long term monetary investment in court proceedings is seen as another factor discouraging claims in competition cases. Another factor deterring civil claims in competition cases is that the maximum amount of attorney's fees that may be awarded to the winning party is 10,000 EUR. This is a rather low figure considering the complex nature of antitrust disputes.

Finally, the opportunity for collective redress was introduced in Poland quite recently, in July 2010, on the basis on the Collective Redress Act of 17 December 2009. Practical experience with collective redress remains limited and thus many questions are still open regarding the operation of this mechanism. The Polish solution is designed as an opt-in model. The collective redress regime can be applied in consumer cases, defective product liability

³⁰ Journal of Laws 2005 No 167, item 1398 as amended.

cases and tort liability cases. Although Article 1(2) of the Collective Redress Act does not mention competition disputes directly, they can be treated as tort liability cases and as such, they are subject to the Collective Redress Act. Only entities which hold claims of ‘one kind based on the same facts’ (Article 1(1) of the Collective Redress Act) are entitled to participate in collective redress. There are no other limitations with respect to who is entitled to use it. The applicability of the Act is not limited to consumers or natural persons – it also covers legal persons and even organizational entities without legal personality. This broad scope of potential claimants for collective redress was subject to strong criticism during the public consultation process of the draft act. Nonetheless, this is a positive solution for private enforcement of competition law seeing as it potentially enhances the effectiveness of private litigation in competition cases.

Either pecuniary or non-pecuniary claims can be submitted as collective actions – although this realisation is not expressed directly in the Act, it can be interpreted *a contrario* from its Article 2(1). All members of the group are entitled to a unified amount of damage provided the ‘circumstances of the case are the same’. Despite the fact that it is not actually possible to assess the Collective Redress Act in practice, views on it are generally quite negative. There is considerable scepticism on whether the current regime can be effective. It is certain also that collective redress in Poland is not particularly consumer-oriented.

The Polish legal system has not created any incentives for private litigations in competition cases. Recent years saw a number of opportunities to change this situation being wasted. In 2011, the Civil Procedure Code was fundamentally amended and yet no reference to private litigation in competition cases was made. Similarly, the UOKiK President announced in May 2012 a draft amendment to the Competition Act 2007 with no effect upon its private enforcement either³¹. Neither were there any relevant proposals made during the public consultations process on the draft amendment. Still, it is of little wonder that private litigation issues were not covered by Poland’s recent legislative proposals. The Commission White Paper has generated hardly any debate on private enforcement of competition law, and private litigations in competition cases have clearly not been a hot topic for Polish legal doctrine³².

³¹ The draft proposes a few new institutions for Polish competition legislation such as settlements, fines for antitrust breaches imposed on individuals or ‘leniency plus’. The amendment act was submitted to the lower chamber of the Polish Parliament in August 2013; the legislative works are still in progress as of October 2013.

³² See A. Piszcz, ‘Pakiet Komisji Europejskiej dotyczący powództw o odszkodowania z tytułu naruszenia unijnych reguł konkurencji oraz zbiorowego dochodzenia roszczeń’ (2013) 5(2) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.

Absence of special legal provisions does not mean that private enforcement is not possible – competition cases can be litigated in Poland pursuant to general rules on civil liability. However, adapting general civil procedure rules for antitrust cases can be quite challenging for courts.

IV. Conclusions

Since the Ashurst Report in 2004, private enforcement of competition law in Poland has not undergone any substantial changes. It is still underdeveloped, especially regarding consumer redress – the few cases that can be identified in the history of Polish private litigations in competition matters involved entrepreneurs only. This is somewhat surprising seeing as private litigations remain the sole manner in which consumers can intervene directly against anticompetitive practices. Antitrust proceedings can only be instituted *ex officio* in Poland by the UOKiK President. Consumers, as well as any other entities, are allowed to submit to the NCA non-binding information on a suspected infringement, but they cannot force the UOKiK President to act upon it. A stronger incentive is surely needed to intensify private enforcement of competition law in Poland. In the opinion of the Author, there is no chance for a legislative initiative in this area at the national level without any EU law ‘inspiration’. Moreover, court proceedings are seen as time and money consuming, with a low likelihood of success. As a result, a sort of disbelief in the national judicial system forms another obstacle for the development of private enforcement of competition law in Poland. The best scenario for developing private litigation in domestic competition cases would probably be a consumer success story, preferably in a cartel case, against well-known companies, on a relevant market for commonly used products (a Polish ‘*Manfredi*’ case). Such a precedent would surely be an important factor in encouraging potential private litigants.

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