

The Pursuit Before Polish Courts of Actions for Damages Based on Competition Law Infringements. Warsaw, 20 April 2016

The Conference entitled “The pursuit before Polish courts of actions for damages based on competition law infringements” (*“Dochodzenie przed sądem polskim roszczeń odszkodowawczych z tytułu naruszenia reguł konkurencji”*) took place in Warsaw on 20th April 2016. It was organized by the Centre for Antitrust and Regulatory Studies (CARS, University of Warsaw). The Conference was dedicated to issues connected to the implementation into the Polish legal order of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (hereinafter, Damages Directive).

Professor Stanisław Piątek (Faculty of Management, University of Warsaw) opened the conference on behalf of Professor Tadeusz Skoczny (CARS Director), welcomed the participants and briefly described outline of the conference. He then informed the audience that the conference would be preceded by the Great Owl Award Ceremony – the Great Owl is an Honorary Award granted by CARS for overall achievements in the field of law and economics of competition. In 2016, the jury decided to award the Great Owl to Professor Stanisław Sołtysiński (of counsel at Sołtysiński Kawecki & Szlęzak – Kancelaria Radców Prawnych i Adwokatów Spółka komandytowa, Poland). As a member of the Great Owl jury, Professor Marek Szydło (Faculty of Law, Administration and Economics of the University of Wrocław, Poland) spoke next of the many reasons for awarding the Great Owl to Professor Sołtysiński, emphasizing his great scientific achievements in the competition law field. Professor Anna Fornalczyk (the first President of the Polish Anti-Monopoly Office) stressed next that Professor Sołtysiński exercised a major impact on the competition law application practice in Poland and proceeded to present Professor Sołtysiński with the Great Owl Award. Professor Sołtysiński thanked for the award and briefly described his role in the negotiations of the Polish EU accession treaty and his beginnings with competition law.

As Professor Piątek stated during the opening speech, the conference was convened to discuss issues referred to in the monograph “The pursuit before Polish courts of actions for damages based on competition law infringements” edited by Professor



Anna Piszcz (Faculty of Law of the University of Białystok, Poland) and Dr Dominik Wolski (in-house lawyer in Jeronimo Martins, Katowice Scholl of Economics, Poland) published by CARS.

The first session of the conference was moderated by Professor Sołtysiński; it was devoted to substantive law aspects of private competition law enforcement.

Dr Dominik Wolski (in-house lawyer in Jeronimo Martins, Katowice Scholl of Economics, Poland) delivered the first paper dedicated to key issues connected to the implementation of the Damages Directive into the Polish legal order. Speaking about principles of liability for damages arising from competition law infringements, he emphasized that there is a need to ensure consistency between the principles of private and public competition law enforcement. He stated that the introduction of “special” liability for claims arising from competition law breaches would not be justified. In particular, it would not be recommended to introduce objective illegality. He also indicated that pursuing claims by persons indirectly injured was controversial. However, if there was a rule of law that would expressly enable persons indirectly injured to claim damages, any doubts in this matter should be waived. Dr Wolski stated also that there are objections as to the moment from which the injured person may claim interests. According to the Damages Directive, interests should be due from the moment when the harm occurred until the time when compensation is paid. He indicated that the Damages Directive is clear in this context but such solution may be contrary to the principle of justice. In case of damages claimed on a legal basis other than competition law infringements, interests are, as a rule, due after the summons for payment. The speaker mentioned that the definition of overcharges would probably not solve the problems with the quantification of harm. As to the role of a competition authority in the process of the quantification of harm, he stated that the authority should not be the one that quantifies it – its role should be limited to helping in this process as the courts may not have enough knowledge to quantify the harm properly.

Professor Paweł Podrecki (Faculty of Law and Administration of the Jagiellonian University in Kraków, Poland) and Katarzyna Wiese (The Truple Konarski Podrecki & Wspólnicy Law Firm, Poland) presented jointly a paper on joint liability of competition law infringers and focused on its limitations. Professor Podrecki briefly explained the elements of joint and several liability and stated that the basic function of compensation was to compensate the damage. The full compensation rule means that the injured person cannot claim compensation exceeding the amount of the damage. However, there is a problem here with legal rules on interests due from the moment when the harm occurred. The speaker stated also that the limitations of joint liability of SMEs as well as that of recipients of immunity from competition law fines (leniency) might cause practical problems in claiming damages. Those limitations lead to a modification of the general liability principle, because if one of the severally liable entities is either a SME or benefits from leniency, other severally liable entities will not be able to recover an appropriate contribution from them. Katarzyna Wiese discussed subsequently issues connected to the limitations of joint liability of SMEs and immunity recipients focusing in particular on the conditions that SMEs have to fulfil in order to limit their liability.

Aleksander Stawicki (Senior Partner at WKB Wierciński, Kwieciński, Baehr law firm, Poland) delivered a paper – prepared jointly with Dr Bartosz Turno (WKB Wierciński, Kwieciński, Baehr law firm, Poland) – on the limitation periods in competition law enforcement. Mr Stawicki briefly mentioned basic provisions on limitation periods. He stated that in Dr Turno’s and his own opinion, one may be sure that there was an infringement once a decision issued by the President of the Office of Competition and Consumer Protection (UOKiK – the Polish National Competition Authority, NCA) becomes final. The speaker indicated that the proceeding initiated by the UOKiK President or before the Court of Competition and Consumer Protection would not interrupt the running of the limitation period. He also emphasized that the limitation period will not start until the infringement ceased. In this scope, there may be a practical problem with establishing when the infringement has ceased. In his opinion, the introduction of the five-year minimal limitation period provided by the Damages Directive was sufficient, albeit the Polish legislator should also introduce a second limitation period, the course of which would not depend on the damaged entity’s knowledge of the infringement. He proposed that the second limitation period could last ten years from the date of the act which caused the harm, or from the date when the infringement ceased. In his opinion, the introduction of such second limitation period – despite the fact that it has not been covered by the Damages Directive – will not be contrary to the Damages Directive.

The first conference session closed after a discussion focusing in particular on the issue of the quantification of harm, including the cooperation between the UOKiK President and national judiciary with respect to this matter.

The second session was chaired by Katarzyna Lis-Zarrias (judge, Ministry of Justice, Poland); it was dedicated to procedural issues of competition law enforcement.

Professor Agata Jurkowska-Gomułka (Higher School of Information Technology and Management in Rzeszów) presented the first paper in this session speaking about public and private enforcement of competition law in the EU and in Poland. She first indicated that the European model of competition law enforcement is seen as a public model rather than a private one and that the Damages Directive reflects what had already been mentioned in the jurisprudence. She also emphasized that the model of private enforcement, introduced in the Damages Directive and in the act that will implement this Directive into the Polish legal order, is not likely to have an impact on the development of private competition law enforcement. Professor Jurkowska-Gomułka noted that the reason for this does not arise from the Damages Directive stating that the European model of competition law enforcement is built mainly as public competition law enforcement. She also indicated that the number of cartels is not that great in Poland.

Maciej Gac (Jagiellonian University in Kraków, Poland) covered in his speech the issue of disclosure of evidence of competition law infringements. He emphasized that in Poland the mechanism of gaining evidences from the opposing party rests currently in Article 248 of the Civil Procedure Code. However, the existing legal provision could prove insufficient in private competition law enforcement. The procedure of disclosure of evidence is not yet known in Poland and so it is necessary to introduce the procedure

of the disclosure of evidence as described in Article 5 of the Damages Directive. In his opinion, the limitations on the disclosure of evidence included in the files of a competition authority is one of the key issues regarding the disclosure of evidence.

Professor Anna Piszcz delivered the next paper on the effects of a domestic infringement decision. She indicated that the Damages Directive has introduced two types of effects of a domestic infringement decision: a cross-border effect (Article 9(1) of the Damages Directive) and a non-cross-border effect (Article 9(2) of the Damages Directive). She emphasized that Article 9(1) of the Damages Directive should be implemented by the introduction into the Polish legal order of an irrefutable legal assumption. This would mean that for the purpose of a damages claim on the basis of Articles 101 or 102 TFEU and equivalent national provisions, it would be assumed that a competition law infringement had taken place if it was so declared in a prior final decision of the NCA or the reviewing court of that EU Member State. It is crucial to expressly indicate that evidence to the contrary is not permitted. As to the implementation of Article 9(2) of the Damages Directive, she proposed that the Polish legislator should introduce a refutable legal assumption. This would mean that for the purpose of a damages claim on the basis of Articles 101 or 102 TFEU and equivalent national provisions, it would be assumed that a competition law infringement had taken place if it was so declared in a prior final decision of a NCA or reviewing court from another EU Member State. However, it should be possible to attempt to disprove this legal assumption.

Małgorzata Modzelewska de Raad (Modzelewska & Paśnik law firm) presented a paper on consensual resolution of disputes resulting from competition law violations. In her opinion, it is commendable that the Damages Directive also covers the issue of the effects of consensual settlements on subsequent actions for damages. She emphasized that public administration bodies are not involved in consensual resolution of disputes. The manner of solving those disputes depends on general legal culture, since alternative dispute resolution requires the consent of the parties of the dispute. The speaker indicated that a given arbitration court should apply public competition law and stated that a decision issued by a competition authority becomes a part of the legal order. Therefore, the arbitration court should not make its own assessment as to the infringement if there was a prior final decision of a competition authority declaring that a competition law violation had indeed taken place. She indicated that arbitration courts are more predestined to quantify the harm than common courts.

The second session closed after a discussion focusing in particular on the effects of consensual settlements on subsequent actions for damages and the limitations of liability for immunity recipients.

The conference was briefly summarised by Professor Piszcz and Dr Wolski. Subsequently, Professor Piątek thanked the participants and closed the conference on behalf of Professor Tadeusz Skoczny and CARS.

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