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Poland

COMPETITION LITIGATION

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This country-specific Q&A provides an overview of competition litigation laws and regulations applicable in Poland.

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1. What types of conduct and causes of action can be relied upon as the basis of a competition damages claim?

The principal Polish legal act regulating the pursuit of claims for infringement of competition law is the Act of April 21, 2017, on claims for compensation for damage caused by infringement of competition law (the "Damage Act", published in the Journal of Laws of 2017, item 1132), which implemented the EU Directive 2014/104/EU into Polish national law (the" Compensation Directive"). The Damage Act came into force on June 27, 2017, and it defines the rules of liability for damage caused by infringements of competition law and the rules for pursuing claims in civil courts for compensation for such damage. For civil claims filed after the effective date the Damage Act for damage that occurred prior to its effective date, the Damage Act is applied to a limited extent (for instance, orders requiring the disclosure of evidence, binding a civil court by a final non-appealable infringement decision of the President of Office for the Protection of Competition and Consumers ("OCCP") and rules for determining the amount of damage). For civil damage claims filed before the effective date of the Damage Act, the previously existing legal regulations apply, i.e., the provisions of the Civil Code

An infringement of competition law, which is the basis for an aggrieved party to pursue its damage claims, is a violation of Art. 101 or in Art. 102 of the Treaty on the Functioning of the European Union ("TFEU"), or of the Polish law's similar provisions, Art. 6 or Art. 9 of the Polish Act of February 16, 2007, on competition and consumer protection (the "Competition Act"), published in the Journal of Laws of 2021, items 275.

2. What is required (e.g. in terms of procedural formalities and standard of pleading) in order to commence a competition damages claim?

The rules for claims and pleadings are governed by the Code of Civil Procedure.

Damage actions are initiated in the form of a written claim that must meet the formal requirements of a pleading. A claim must contain the designation of the court to which it is addressed, the names and surnames of the parties, the plaintiff's representatives; a description of the claim, including the amount of the requested compensation, presentation of the facts upon which the claim is based, evidence proving each of these facts, and a list of attachments (Arts. 126 and 187 of the Code of Civil Procedure). Importantly, a claim must include all the claimant's evidence. Likewise, in its response, a defendant is obliged to include all its evidence. A violation of this principle of "completeness" will result in a court's denial of a party's later motion to submit additional evidence, unless that party can establish that the evidence was not available to it earlier or that the need to present such additional evidence did not exist earlier.

3. What remedies are available to claimants in competition damages claims?

Pursuant to Art. 3 of the Damage Act, any person harmed by an infringement of the competition law has standing to bring an action for damages. The types of available remedies in a damage action are governed by the Polish Civil Code (published in the Journal of Laws of 2022, item 1360).

Damages should cover actually incurred costs rather than be a means of enrichment of a claimant. Damages include both actual losses as well as the loss of future and certain profits. An injured party has discretion whether to sue for a monetary award or for the restoration of pre-infringement conditions. The latter may, in certain cases, be impossible to achieve, resulting in monetary damages being the only available remedy.

4. What is the measure of damages? To what extent is joint and several liability recognised in competition damages claims?

Are there any exceptions (e.g. for leniency applicants)?

An aggrieved party has the right to claim full compensation.

Pursuant to Art. 441 § 1 of the Civil Code, if several persons are responsible for damage caused by a tort (a breach of competition law is considered a tort), their liability is joint and several. The provisions on joint and several liability contained in Art. 5 of the Damage Act are the equivalent of Art. 11 sec. 2-6 of the Compensation Directive.

Regarding companies released from penalty because of leniency, while they are jointly and severally liable towards their direct and indirect purchasers as well as to their direct and indirect suppliers, they are liable towards other victims only when it is impossible to obtain full compensation from other infringers (Art. 5(2) of the Damage Act).

5. What are the relevant limitation periods for competition damages claims? How can they be suspended or interrupted?

According to Art. 9(1) of the Damage Act, a claim for compensation for damage caused by a competition law violation shall be time barred after five years from the date on which the aggrieved party learned or with due diligence could have learned about the damage and about the person obliged to repair it. The limitation period does not start running during the infringement period and cannot be longer than ten years from the date the infringement ceased.

The limitation period is suspended when: 1) the OCCP President opens explanatory or antimonopoly proceedings or 2) the European Commission or a competition authority of another Member State opens proceedings on infringement of competition law – the subject of which is an infringement of competition law giving rise to a claim for damages. Pursuant to Art. 9(2) and (3) of the Damage Act, limitation periods that are suspended because of such proceedings by competition authorities shall cease one year from the date of a decision finding a competition law infringement becomes final and non-appealable or the investigatory procedure is terminated in a different manner.

6. Which local courts and/or tribunals deal with competition damages claims?

Competition damage claims fall within the competence of regional courts (Art. 11 of the Damage Act).

7. How does the court determine whether it has jurisdiction over a competition damages claim?

According to the Civil Procedure Code, private competition actions are to be brought before a court with jurisdiction for where the defendant resides, has its registered office or where the damage occurred. Alternatively, a court in a jurisdiction chosen by the parties will be entitled to hear the claim.

Pursuant to Art. 12 of the Damage Act, damage claim may also be filed with a court in which civil proceedings are already pending for compensation for damage caused by the same competition law violation.

8. How does the court determine what law will apply to the competition damages claim? What is the applicable standard of proof?

The liability rules for damage caused by competition law violations are set out in the Damage Act, and for areas not regulated by that Act, the tort provisions in the Civil Code apply (Art. 10 of the Damage Act). The rules for pursuing damage claims for an infringement of competition law are also specified in the Damage Act, whereas any area unaddressed by the Damage Act is governed by the Code of Civil Procedure (Art. 32 of the Damage Act).

A claimant must show that a competition law infringement that caused the damage has occurred. As regards the existence of an infringement, a civil court is bound by a legally valid and non-appealable decision of the President of the OCCP finding an infringement (Art. 30 of the Damage Act). With regard to decisions issued by Member States competition authorities, a court may recognize the infringement of competition law found by the Member State authority on the basis of a factual presumption (Art. 231 of the Code of Civil Procedure). In deciding upon a damage claim resulting from a violation of Art. 101 or 102 of the Treaty, which is already the subject of a Commission decision, a civil court may not adopt a decision contrary to the decision taken by the Commission.

The burden of proving a competition law infringement and the damage it caused rests with the claimant. Once a claimant establishes that a competition law violation occurred, it is a defendant's burden to prove that there was no infringement, the infringement did not cause any

damage, or the overcharge caused by the infringement was transferred to the buyers of the claimant.

There are also rebuttable legal presumptions in the Damage Act. First, it is presumed that a breach of competition law causes harm (Art. 7 of the Damages Act). This presumption in the Damage Act is wider in scope than that in EU Directive 2014/104/EU, which limits the presumption of harm only to cartel infringements (Directive, Article 17). Second, an indirect purchaser may benefit from the presumption of the passing-on of an overcharge to that purchaser. If an infringement results in an overcharge for the direct purchaser, it is presumed that the purchaser passed on the overcharge to its customer, i.e., the indirect purchaser (Article 4 (1) of the Damage Act).

9. To what extent are local courts bound by the infringement decisions of (domestic or foreign) competition authorities?

According to Art. 30 of the Damage Act, a civil court is bound by a final and non-appealable OCCP President decision that a violation of competition law occurred. However, a claimant must still establish all other aspects of the claim such as causal link between the infringement of the competition law and the harm incurred by the claimant.

The Damage Act does not explicitly provide that a civil court is also bound by the decisions of competition authorities of other Member States and does not refer in this respect to the decisions of the European Commission. With regard to decisions of other European national authorities, a civil court may recognize the violation of competition law found by such competition authority on the grounds of presumption of fact (Article 231 of the Code of Civil Procedure). As for the decisions of the European Commission, rules on uniform application of EU competition law apply, as set out in Art. 16(1) of the Council Regulation (EC) No 1/2003 of 16.12.2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.01.2003, p. 1-25). When a civil court rules on damages based on the infringement of Article 101 or 102 of the Treaty, which are already the subject of a Commission decision, civil courts in the EU cannot adopt decisions that are counter to the decision of the European Commission.

10. To what extent can a private damages action proceed while related public enforcement action is pending? Is there a procedure permitting enforcers to stay a private action while the public enforcement action is pending?

Private damage actions may proceed at the same time as a competition authority's related investigatory proceedings. The OCCP cannot require that a civil damage claim case be suspended during its ongoing administrative investigation.

Under the Polish Civil Procedure Code, a court may suspend an ongoing case if it deems it expedient to do so until the case is resolved by the OCCP. Moreover, pursuant to Art. 16(1) of Regulation 1/2003, a national court may assess whether it is necessary to stay its proceedings to fulfill its obligation to avoid conflicts with decisions contemplated by the Commission in proceedings it has initiated.

Finally, a civil court may suspend its proceedings at the joint request of the parties.

11. What, if any, mechanisms are available to aggregate competition damages claims (e.g. class actions, assignment/claims vehicles, or consolidation)? What, if any, threshold criteria have to be met?

The Act on pursuing claims in class proceedings (the "Group Claims Act") concerns claims in cases in which one type of claim is sought by at least 10 natural/legal persons. The scope of the Group Claims Act is limited to, among others, consumer rights cases, dangerous product liability cases and tort actions. Infringements of the Competition Act are torts that can be pursued under the Group Claims Act.

If the court decides that it is possible to hear the case in class action proceedings, it will order the publication in the press of an appropriate announcement on the initiation of proceedings and will allow persons to join the proceedings within a period not shorter than one and not longer than three months from the date of press announcement. Only those persons who expressly agreed to be included can be members of the group (opt-in). The Group Claims Act allows for claiming both pecuniary and nonpecuniary claims. Cases concerning pecuniary claims are allowed on the condition that the claimed value for each group member is unified, taking into consideration all common circumstances of the case. Thus, the amount of a claim must be generally unified for each member of the group, although the unification may be done in subgroups. A sub-group must consist of at least two persons. A group must be represented by a claimant or representative, a person

who is a group member or a consumer ombudsman.

12. Are there any defences (e.g. pass on) which are unique to competition damages cases? Which party bears the burden of proof?

Art. 4 of the Damage Act introduced a rebuttable presumption of the passing on of an overcharge to the indirect purchaser. This presumption establishes the principle that a direct purchaser of products or services from an infringer of the competition law has passed on the overcharge to an indirect purchaser to whom he sold (at a correspondingly higher price) the products or services to which the infringement relates. Thus, the direct purchaser, by increasing the prices of its products or services, transferred all or part of the overcharge to its own customers, has reduced the negative impact of the overcharge in its costs and thus reduced its harm.

This legal presumption of the passing on of an overcharge may be invoked only by an indirect purchaser who seeks damages directly from the infringer. It is a defendant's burden to prove that the claimant passed on the alleged overcharge to its own customers (Art. 4 of the Damage Act, Art. 232 of the Code of Civil Procedure, and Arts. 12-14 of the Compensation Directive).

13. Is expert evidence permitted in competition litigation, and, if so, how is it used? Is the expert appointed by the court or the parties and what duties do they owe?

The use of evidence and testimonies of experts and economists is not uncommon. An important distinction, however, is the weight of the evidence provided by a private expert; that is, one called by a party versus a court-appointed independent expert. There is no general limitation placed upon a party from hiring an expert to draft and submit an opinion on the claimed violation or damages. Such an expert is referred to as a private or party-appointed expert. The weight of such evidence is low and considered to be on par with the weight of any witness called by a party. The reason is that the Polish judicial system assumes that a private expert will be 'biased' towards the party that calls (and usually commissions) him or her, and thus such opinions will be considered as part of that party's evidential submissions.

Either party or the court itself may call for the appointment of an independent expert witness from the official list of court expert witnesses. The evidential weight attributed to such a witness is higher than that attributed to a private expert witness. Typically, a court will consult with the parties before choosing and instructing an expert. A court-appointed expert most often submits a written opinion to the court. The selection of the expert as well as the content of the opinion may be challenged by the parties.

14. Describe the trial process. Who is the decision-maker at trial? How is evidence dealt with? Is it written or oral, and what are the rules on cross-examination?

A civil case for competition damages begins with the filing of a claim. The court is the decision-maker at trial. Initially, a court will assess whether a claim meets jurisdictional and pleading requirements. If so, the court will ask the defendant(s) to submit its statement of defense. It is in the discretion of the court whether to order further pleadings at this stage. Subsequently, a court will schedule a hearing date.

During a hearing, a court will hear and assess the written and oral evidence provided. There are no specific rules on direct or cross examinations of a witness. The testimony of a witness begins with an oath to tell the truth. The first questions are posed by the court, followed by questions of the party calling the witness and then by questions of other parties to the case.

15. How long does it typically take from commencing proceedings to get to trial? Is there an appeal process? How many levels of appeal are possible?

To date, damage action cases last for a few years in a court of first instance. A judgment of the first-instance court may be appealed to the court of second instance. Depending on the circumstances of the judgment, the parties may also be entitled to other extraordinary remedies such as a cassation to the Supreme Court. The Supreme Court will accept only cases based on misinterpretation or misapplication of substantive law or on procedural errors which substantially influenced the outcome of the case.

16. Do leniency recipients receive any benefit in the damages litigation context?

A benefit is that leniency statements cannot be disclosed to civil litigants (Art.18 of the Damage Act). If a leniency statement is only part of a document, the remainder of the document may be disclosed.

As regards companies released from penalty because of leniency, while they are jointly and severally liable towards their direct and indirect purchasers as well as to their direct and indirect suppliers, they are liable towards other victims only when it is impossible to obtain full compensation from other infringers (Art. 5(2) of the Damage Act).

17. How does the court approach the assessment of loss in competition damages cases? Are "umbrella effects" recognised? Is any particular economic methodology favoured by the court? How is interest calculated?

Competition private damage claims are calculated on the basis of the principle of full compensation. Pursuant to Art. 31(1) of the Damage Act, when determining the amount of damage caused by infringement of competition law, the court may use the guidelines contained in Commission Communication 2013 / C 167/07 on quantifying damage in pursuing claims for damages for breach of Art. 101 or Art. 102 of the Treaty on the Functioning of the European Union and the guidelines of the European Commission, referred to in Art. 16 of Directive 2014/104 / EU of the European Parliament and of the Council.

One of the methods that has been used in Poland for calculating damages is the differentiating method. This method is based upon a comparison between the current financial position of an injured party with the hypothetical situation likely to have existed had no illegal conduct occurred. The differentiating method, similar to other methods of determining the value of economic loss resulting from an infringement, often calls for the assistance of an economic expert.

If the basis for determining compensation are prices from a date other than the date of determining compensation, the aggrieved party is also entitled to statutory interest for the period from the date on which the prices were the basis for determining compensation, until the date of the due date of the claim for compensation (Art. 8 of the Damage Act).

"Umbrella effect" claims are not regulated in Polish Damage Act. To our knowledge, there have not been any cases filed in a Polish court.

18. Can a defendant seek contribution or indemnity from other defendants? On what basis is liability allocated between defendants?

A defendant may pursue recourse claims from other defendants, see the answer to question 4.

19. In what circumstances, if any, can a competition damages claim be disposed of (in whole or in part) without a full trial?

Pursuant to the Code of Civil Procedure, if a court discerns obstacles preventing the substantive resolution of the case, it may dismiss the claim (e.g., for a lack of standing). In such a case, the matter will not be considered further and will end at the preliminary stage.

Since the entry into force of the Damage Act and at the time of writing this article, we see that in the initial stages of certain civil damage cases, first instance courts have dismissed claims on the basis that they were time-barred (see the judgment of the District Court in Katowice of December 15, 2021, file reference XIII GC 284/21 / BŁ; judgment of the District Court in Gliwice of July 9, 2021, file reference number X GC 114/20).

20. What, if any, mechanism is available for the collective settlement of competition damages claims? Can such settlements include parties outside of the jurisdiction?

Pursuant to Art. 6 of The Damage Act, if an aggrieved party enters a settlement with one of the infringers jointly and severally liable, the aggrieved party may claim from the other infringers compensation for the damage minus the amount corresponding to the amount that the infringer who entered into the settlement would be obliged to repay. To the extent that the aggrieved party may not obtain compensation from the other infringers, it may demand such compensation from the infringer with whom it has entered into a settlement agreement, unless the settlement agreement provides otherwise.

21. What procedures, if any, are available to protect confidential or proprietary information disclosed during the court process? What are the rules for disclosure of documents (including documents from the competition authority file or from other third parties)? Are there any exceptions (e.g. on grounds of privilege or confidentiality, or in respect of leniency or

settlement materials)?

If a document contains business secrets or other secrets that are subject to legal protection – upon the request of a party, a third party or ex officio, a court may issue a decision limiting the right to inspect the document or indicating specific conditions for its inspection or use, including limiting or excluding the possibility of recording or copying its content (Art. 23 of the Damage Act).

Leniency and Settlement proposals cannot be disclosed to civil litigants. If a leniency statement or settlement proposal is only part of a document, the remainder of the document may be disclosed (Art.18(1) of the Damage Act). Moreover, pursuant to Art. 18(2) of the Damage Act, it is only after the conclusion of the proceedings conducted by the competition authority, that the disclosure can be made of: any information prepared by a person or a company for the purposes of proceedings of a competition authority; information prepared by a competition authority and provided during the proceedings to parties; and withdrawn settlement proposals.

22. Can litigation costs (e.g. legal, expert and court fees) be recovered from the other party? If so, how are costs calculated, and are there any circumstances in which costs recovery can be limited?

Litigation costs include court fees, attorneys' fees and expenses for expert opinions and witnesses. According to the provisions of the Civil Procedure Code, an unsuccessful party should reimburse its opponent, at its request, for the costs of the proceedings, i.e., the necessary costs incurred to pursue its rights and/or defend itself. However, a court decides in accordance with the principle of equity, so in particularly justified cases, the court may award only part of the costs from the losing party, or even waive their award. As a rule, the court decides about the trial costs in each ruling ending the case. A party represented by counsel is entitled to remuneration, which is the cost of legal representation. The reimbursement of attorneys' fees, however, is limited to the amounts set out in the Regulations on Attorneys' Tariffs of Legal Advisors and Advocates.

23. Are third parties permitted to fund competition litigation? If so, are there any restrictions on this, and can third party funders be made liable for the other party's costs? Are lawyers permitted to act on a contingency or conditional fee basis?

Non-governmental organizations ("NGOs") of entrepreneurs whose statutory tasks include the protection of the market against practices constituting an infringement of competition law or the protection of consumer rights, may, with a plaintiff's written consent, bring an action on their behalf or join them in pending proceedings falling within the scope of the Damage Act. An NGO may be exempt from paying a court fee if certain conditions are met.

Although lawyers are prohibited by the ethics codes of the Polish bar associations from charging only success or contingent fees, they may do so if such fees are an addition to hourly or per-matter fees.

There are no prohibitions or legal requirements on third party funding.

24. What, in your opinion, are the main obstacles to litigating competition damages claims?

An obstacle is the relatively lengthy period to resolve a case. Obtaining evidence of an infringement of competition law, such as of a cartel, may also discourage potential litigants, especially in stand-alone actions.

25. What, in your opinion, are likely to be the most significant developments affecting competition litigation in the next five years?

In consideration of the increase of such actions in the last few years, it may be expected that private enforcement of the competition law will become more common. The knowledge of entrepreneurs about their rights should increase, which will make them more willing to file damage actions. The experience of civil courts in these cases will also increase, which will certainly lead to more positive cost-based analysis of potential plaintiffs in assessing whether to file a damage claim.

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