

Sue me, sue you

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Enforcing competition law infringement claims will soon get easier

If a company's supplier or competitor abuses its dominant position or is a member of a cartel, its actions may inflict damage on other businesses. Until recently, claims for damages arising from these types of infringements have been more notional than real in Poland. This is set to change with the implementation of the Damages Directive (2014/104/EU) of November 26, 2014. Its purpose is to facilitate the pursuit of compensation claims for violating antitrust laws in EU member states. This may mean that it will be easier for companies to obtain compensation if they experience problems with cartels or other antitrust practices and offenders will face a greater risk of civil liability for collusion.

Forks in the road

There are a number of issues regarding how companies may sue for damages that the Damages Directive seeks to address. First, a company seeking compensation in Poland has to prove the value of the damage incurred, i.e. to quantify the losses (or lost profit) caused by the wrongful actions. That is not easy, not least due to the limited possibility of reviewing documents held by the offenders. Under Polish civil law, you first have to file a statement of claim with a request for the other party to disclose its evidence. The request must be limited to documents constituting factual evidence that has a bearing on the given proceedings.

Another practical problem is how to strike a balance between overcoming obstacles in obtaining evidence and protecting the confidentiality of information presented to the antitrust authorities in leniency requests. In such instances, offenders make a voluntary disclosure to the Office of Competition and Consumer Protection (UOKiK) and provide evidence enabling it to find a viola-

tion. This is done to entirely avoid or significantly reduce the fine imposed by the authority. On the one hand, the evidence and explanations provided by offenders in leniency requests would be very interesting and helpful in the context of private claims. On the other hand, the option to make them available to claimants would discourage offenders from submitting leniency requests, which significantly contribute to successful public enforcement of competition law.

Poland is not the only country experiencing problems with competition law infringement claims. To date private enforcement in the EU has only developed in Germany, the UK and the Netherlands. Implementation of the Damages Directive, which member states are required to carry out by December 27, 2016, is set to harmonize the rules for pursuing claims through private enforcement procedures and at the same time provide a level playing field for claimants in all EU jurisdictions. Cartels and other competition-restricting practices are a problem for the entire EU. According to the European Commission, the damage caused by illegal collusion alone costs around EUR 37 billion per year.

Simpler suing

The new regulations mean many simplifications, and their implementation in Polish law will benefit anyone who has suffered a loss from competition infringements. For instance, the simplified procedure for obtaining evidence, partially based on the common law, may offer a great chance for jurisdictions of Continental Europe. However, this depends on whether the opportunity is taken and the directive is thoughtfully implemented. If this succeeds, aggrieved companies will have easier access to documents, under court supervision, which in consequence will enable them to

prove an infringement and assess the damage suffered. In certain cases, the aggrieved party will be able to request that the evidence collected in the proceedings conducted by the Office of Competition and Consumer Protection concerning a particular violation be made available.

Another important matter is that the statute of limitations will be extended to a minimum of five years from the date when the aggrieved party learned of the violation. The limitations period will not run while the antitrust authorities take action, and the period will not end earlier than one year after a final decision in antitrust proceedings is issued. At present the limitation period is much shorter, which often prevents companies from pursuing their claims.

Case studies

The practicality of private enforcement has already been noticed by major corporations based in Western Europe and the US. Companies are increasingly resorting to this type of claim as an additional source of earnings. Deutsche Bahn is an interesting example right on our western doorstep. The German railway company proudly boasts of its team of specialist lawyers who handle only select cases and supervise the work performed by outside law firms in pursuing claims through private enforcement actions. The company even has a website where it posts news on its case against cartel members in the air freight market. The amount sought by the company, in excess of EUR 2 billion, proves that there is something worth fighting for.

There is another interesting and fairly recent example from the Netherlands. The court ordered HAS Alstom, a power company, to pay EUR 14.1 million in damages to TenneT, a Dutch power grid operator, for inflated

prices charged because of Alstom's participation in a cartel in the gas-insulated switchgear market.

The Polish market has also witnessed legal precedents. At the end of 2014 Orange Polska and Netia reached a settlement regarding Netia's claims stemming from Orange abusing its dominant position, which the European Commission had previously found in a decision. The parties agreed to settle the claims, with Orange Polska paying Netia around EUR 33 million net. It seems that the telecommunications sector will play a vital role in the development of private enforcement in Poland, as there is another unprecedented case pending before the Warsaw District Court involving violations on the telecommunications market.

More legal work

Poland, like other EU member states, is required to implement the EU solutions by the end of 2016. Following public consultation of draft assumptions of the act implementing the directive in Poland carried out in April, the Ministry of Justice is now working on a draft bill, which should soon be published. Regardless of the final shape of the Polish regulations, we can assume that the new solutions will strengthen the position of aggrieved parties and result in an increase in the number of claims filed for violation of competition law. But this is a double-edged sword. When assessing antitrust risks stemming from their market behavior, companies must consider not only the risk of fines imposed by the Office of Competition and Consumer Protection, but also the risk of possible damages. This is because the Damages Directive gives the right to seek full compensation, which, as shown by Polish and foreign practice, may run into many millions of euros.