EXPERT COMPETITION LAW

# ENSURING A LEVEL PLAYING FIELD

DR. MARCIN S. WNUKOWSKI, PARTNER AT SQUIRE PATTON BOGGS, AND JUSTYNA DERESZYŃSKA, SENIOR ASSOCIATE AT SQUIRE PATTON BOGGS, REFLECT ON THE LAWS GOVERNING COMPETITION BREACH ENFORCEMENT.

Seven years after the Polish Competition Breach Damages Act took effect, we are trying to find out why it is still the subject of theoretical musings. According to EU and Polish antitrust laws, cahooting to curb, eliminate, or breach competition and abuse one's dominant position, is prohibited.

The EU takes a two-pronged approach to strengthen competition protection. While it boosts the efficiency of antitrust authorities, it reinforces the protection of private entities adversely affected by competition law breaches. To this end, it is now easier for such entities to pursue their rights before common courts. While unlawful conduct may be unearthed during administrative procedures—leading to fining the perpetrators—it does not entitle the injured party to any damages from such perpetrators.

The system whereby competition is protected by a competent antitrust authority has been in Poland since 1990. The second one was effected in 2017 by virtue of the Polish Competition Breach Damages Act (the "Act"), which incorporated the EU Parliament and Council Directive 2014/104/UE (the "Directive").

### THE PROS

The Act opened up a faster track for entrepreneurs affected by competition breaches (particularly of Articles 6 and 9 of the Polish Competition and Consumer Protection Act and of Articles 101 and 102 of TFEU) to seek damages from the perpetrators, with several procedural facilities. The objective was to create—in combination with the current public law model with the President of Consumer Protection Office UOKiK and the courts at the helm—a comprehensive, two-pronged protection system.

The facilities include the legal presumptions and novel institutions expediting the evidence process. First, the Act acknowledges the right to seek damages privately. Second, it introduces the perpetrator's presumption of guilt and the presumption of damage caused by breaching the competition law. Another element facilitating the evidence process is enabling the party seeking damage rectification to request that the defendant release evidence conducive to ascertaining any facts that are material to the case.

An interesting solution is the legal definition of a certain kind of damage, i.e. "excessive burden" which is the difference between the price paid by the purchaser and the price that it would have paid had the competition law breach not occurred. The Act provides for the presumption that such peculiar surplus had burdened the purchaser, which however, does not exhaust the definition of "damage". Ultimately, it is the court that determines the amount of the damage.

### PROCEEDINGS BEFORE UOKiK

Pursuing claims in the private law regime does not hinge on conducting and resolving the proceedings before UOKiK. The injured party may lodge its claim before instigating or concluding the parallel antitrust proceedings as it may deem fit. It may also launch a civil suit once the antitrust proceedings have been finally concluded, referring to them as evidence of the competition law breach. The legislator opened up two possibilities by shaping the statute of limitations accordingly. Notably, however, the findings of the final decision issued by the President of UOKiK or of the final judgment issued following an appeal of such a decision, are binding for the court in the competition breach damage rectification proceedings, to the extent of ascertaining such a competition breach. A dispute has already arisen in the writings on the subject as to whether binding the civil court by the antitrust authority's decision ascertaining the breach entails a prejudicial relation between such proceedings and, as a consequence, forces the civil court to suspend the civil proceedings brought by the injured party under the Act. The issue remains unresolved.

The courts' position might have a bearing on the practical application of the Act, since the judgment, more often than not, fails to meet the claimant's expectations and does not serve its business interest. It may be advisable to determine how to interpret the binding nature of decissions issued by President of UOKiK, should the court await it, or may it come to its independent findings, even risking a contrary ruling?

### KEEPING THINGS ON TRACK

At the same time, the Act has certain safeguards against "derailing" the proceedings before the antitrust authority by the concurrent civil suit. For instance, the "whistleblower" is protected against having the statements made before the antitrust authority disclosed in the civil suit. This hinders seeking damages from the "whistleblower".. However, the "super purpose", which the legislator had in mind, was to issue certain guarantees to the individual bringing the breach to the antitrust authority's attention, such as price fixing, which would not have seen the light of day without such an informant.

Despite the Act having been in effect for many years, the number of proceedings instigated under the Act seems negligible. According to court statistics five were pending in 2023. This may indicate that the Act has not landed well with the Polish entrepreneurs.

Without allowing the courts the time to construe and apply the Act in the Polish legal framework, drawing on their expertise and experience gained from resolving unfair competition disputes, it will be difficult to find authoritative answers to the questions.

### EXPANDING ENFORCEMENT

A question arises, how to expand private enforcement under the Act?

The solution seems to be raising entrepreneurs' awareness of whether they can use such an option. The Act, coupled with the possibility of seeking claims in class-action suits may be a useful instrument for pursuing claims.

Another problem appears to be the need to determine the damage amount. An average entrepreneur may find it difficult, as it boils down to speculating "what would have happened if the competition law had not been breached" when such speculation must be backed by evidence. Such calculations are usually complicated and largely unreliable. That said, enlisting the help of private experts is rather costly. The President of UOKiK may step in and lend a hand to both the injured parties and the courts.

Regardless of its flaws, the Act opens up avenues for the development of the so-called private enforcement in the Polish legal framework, which may translate into better protection of Polish entrepreneurs.