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PROTECTION OF INDIVIDUALS AGAINST COMPETITION LAW VIOLATIONS IN THE POLISH LEGAL SYSTEM

Abstract

Six years ago the legal position of individuals in the instigation of proceedings in cases related to anti-competitive practices was significantly weakened in the Polish legal system. The justification for this was an opinion that in proceedings conducted under public law only the most serious competition law violations should be examined. The Author examines whether Polish law excessively restricts the protection of individuals against competition law violations.

One may find a description of the system of protection of individuals against competition law violations in Polish law in the article. The Author also examines the problem of public and private interest in protecting against anti-competitive practices. Remarks relating to the issue of the European Union and Polish constitutional standard can be found in the article as well. The Author concludes that it is necessary to prepare a reform which would render the private enforcement of competition law effective in the Polish legal system.

Keywords

competition law – individuals – enforcement

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INTRODUCTION

In 2007 a reform of the Polish competition law was implemented. One of the most important changes introduced by the new Act on Competition and Consumer Protection¹ was depriving individuals of the possibility of filing motions for instituting antitrust proceedings, which would be binding upon the President of the Office of Competition and Consumer Protection.

Six years following the reform's implementation it is worth examining whether it does not excessively restrict the protection of individuals against competition law violations. Particularly interesting is the question of whether Polish law is in line with European Union standards and with the requirements which can be inferred from the Polish Constitution.

I. PROTECTION OF INDIVIDUALS AGAINST COMPETITION LAW VIOLATIONS IN POLISH LAW

According to Article 49.1 of the Act on Competition and Consumer Protection which is currently in force, antitrust proceedings in cases related to anti-competitive practices, practices violating collective consumer interests or involving imposition of fines shall be instituted on an *ex officio* basis. Article 44.1 of the previous Act on Competition and Consumer Protection² stated that the antitrust proceedings in cases related to anti-competitive practices, control of concentrations, or matters of practices infringing collective consumer interests should be instituted upon a motion or *ex officio*. Article 84.1 stated that the motion for instituting antitrust proceedings in respect of a suspicion of an infringement of the provisions of the Act could be filed by:

- entrepreneur or association of entrepreneurs, which prove their legal interest,
- territorial self-government body,

¹ Act of 16.02.2007, Dz. U. [Journal of Laws] No. 50, item 331 with amendments.

² Act of 15.12.2000, Dz. U. [Journal of Laws] No. 122, item 1319 with amendments.

- body of State inspection, or
- Consumer Ombudsman.

The legal position of individuals in the institution of proceedings in cases related to anti-competitive practices had been significantly weakened by 2007. According to Article 86.1 of the Act on Competition and Consumer Protection which is currently in force, everyone may submit to the President of the Office a written notification concerning a suspicion that anti-competitive practices have taken place. Such notification must be justified. Note that the President is not bound by the notification and he is not even required to issue an administrative decision if he is not going to institute any proceedings. That regulation has deprived individuals interested in instituting administrative procedure against the will of the President of the Office of the possibility of seeking recourse in a court of law. Moreover, according to the opinion expressed in Polish jurisprudence, another consequence of the 2007 changes is depriving individuals of the status of parties to proceedings in cases related to anti-competitive practices, because it has started to be reserved only for entities against which the proceedings were instituted³.

In the justification contained in the draft of the Polish Act on Competition and Consumer Protection from 2007 one may find an opinion that in proceedings conducted under public law only the most serious competition law violations should be examined. It also underlines the fact that individuals who suffered damage as a consequence of competition law violation should pursue their rights in proceedings before civil courts⁴.

The starting point for the reflections on how the 2007 competition law reform affects the situation of individuals who are threatened by competition law violations or have suffered damage as a result thereof should be a comparative analysis of possible decisions which can be issued

³ See A. Jurkowska, D. Miąsik, T. Skoczny, M. Szydło, *Nowa uokik z 2007 r.* [*New Act of 2007 on Competition and Consumer Protection*], *Przegląd Ustawodawstwa Gospodarczego* [Economic Law Review] 2007, no. 4, p. 5.

⁴ *Uzasadnienie rządowego projektu ustawy o ochronie konkurencji i konsumentów* [*Justification of the Governmental Draft of the Act on Competition and Consumer Protection*], druk sejmowy nr 1110 z dnia 26.10.2006, see [http://orka.sejm.gov.pl/Druki5ka.nsf/0/06AED0325C1F3B3FC125722600445A4A/\\$file/1110.pdf](http://orka.sejm.gov.pl/Druki5ka.nsf/0/06AED0325C1F3B3FC125722600445A4A/$file/1110.pdf), pp. 18, 19 [last accessed: 21.8.2013].

as a result of administrative competition law proceedings and in a civil law procedure.

Article 10 of the Act on Competition and Consumer Protection states that the President of the Office shall issue a decision recognizing the practice as anti-competitive and ordering its cessation, if he finds that the prohibition specified in Article 6 or 9 of the Act, or in Article 101 or 102 of the Treaty on the Functioning of the European Union was infringed. Contrary to purely semantic interpretation, a line of reasoning according to which decisions of the President of the Office may go further than confirming that violation of Article 6 or 9 of the Act, or of Article 101 or 102 of the Treaty on the Functioning of the European Union occurred, should be accepted. That conclusion is supported from the functional point of view – it increases the effectiveness of competition law enforcement – and by the rule stating that synonymous interpretation is unacceptable⁵. The assumption that according to Article 10 of the Act on Competition and Consumer Protection, the President of the Office may issue only purely declaratory decisions, which can only confirm that violation occurred, would mean that recognizing the practice as anti-competitive is tantamount to ordering cessation of the violation⁶.

In the Polish legal system, the most important, but not the only civil instrument of competition law enforcement is Article 415 of the Civil Code. It provides that anyone who by fault on his part causes damage to another person is obliged to remedy it⁷.

The experiences of many countries have proved that without special regulations plaintiffs are at a disadvantage in compensatory cases in which the damage occurred as a result of competition law violation. Estimating damage and collecting evidence is particularly difficult for them. In 2004, M. Monti, the former European Commission Commissioner, claimed that in reality the possibility of enforcing competition law by civil law means

⁵ See L. Morawski, *Wykładowa w orzecznictwie sądów [Interpretation in Case Law]*, Toruń: Dom Organizatora TNOiK 2002, p. 144.

⁶ Nevertheless it should be noted that the opposite idea has been also expressed in Polish legal literature and that the problem has not been resolved by the case law – see E. Modzelewska-Wąchał, *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa: Twigger 2002, p. 125.

⁷ Act of 23.04.1963, Dz. U. [Journal of Laws] No. 16, item 93 with amendments; Article 415.

was extremely limited⁸. Following his way of reasoning, many European Union Member States developed regulations which strengthen the position of plaintiffs in cases for damages when the damage is a result of a competition law violation⁹. For example, in Germany, in 2005 the so called seventh cartel novel was passed. It introduced the follow on rule, rules for estimating damages which are favorable for plaintiffs, and excluded passing-on defence¹⁰.

The Polish legislator has undertaken nothing to strengthen the situation of plaintiffs seeking damages resulting from competition law violation. The opinion that the likelihood of receiving compensation in such cases is very limited, if not purely theoretical, should not be controversial¹¹.

Under Polish law, declaratory legal action as a civil law instrument of competition law enforcement can be an alternative to a damages claim. Pursuant to Article 189 of the Code of Civil Procedure¹² the plaintiff may demand that the court establish the existence or non-existence of a legal relationship or of a right if he proves his legal interest to do so.

The weakening of the protection of individuals against competition law violations in proceedings before the President of Competition and Consumers Office should result in adopting a plaintiff-friendly attitude by allowing a plaintiff to file a declaratory action. Such action may be allowed when no damage has occurred yet and in situations where Article 189 of the Code of Civil Procedure serves the interests of individuals better than

⁸ M. Monti, *Private litigation as a key component to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation*, Fiesole, 17.09.2004, p. 2, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/04/403&format=HTML&aged=1&language=EN&guiLanguage=en> [last accessed: 21.8.2013].

⁹ See. C. Hodges, *Competition Enforcement, Regulation and Civil Justice: What is the Case?*, *Common Market Law Review* 2006, no. 5, p. 1396; I. Segal, *Public v. Private Enforcement of Antitrust Law: A Survey*, *European Competition Law Review* 2007, no. 5, p. 306.

¹⁰ Gesetz gegen Wettbewerbsbeschränkungen, BGBl. I (No. 44), p. 2114 et seq. – see M. Będkowski-Koziół, *Prywatne wdrażanie prawa antymonopolowego w RFN [Private Enforcement of Antitrust Law in Germany]*, *Przegląd Ustawodawstwa Gospodarczego [Economic Law Review]* 2007, no. 12, p. 15.

¹¹ See I. B. Nestoruk, *Nowa ustawa o ochronie konkurencji i konsumentów [New Act on Competition and Consumer Protection]*, *dodatek do Monitora Prawniczego [Supplement to Law Monitor]* 2007, no. 15, p. 8.

¹² Act of 17.11.1964, Dz. U. [Journal of Laws] No. 43, item 293 with amendments; Article 189.

a damages claim¹³. It must be underlined that this question is highly controversial and that, to the best of my knowledge, Article 189 of the Code of Civil Procedure has never been applied in practice in cases related to competition law.

Even if the most friendly attitude towards individuals threatened or damaged by competition law violations with regard to Article 189 of the Code of Civil Procedure was adopted, it would not lead to any increase in protection which would correspond with the level existing before the 2007 reform. This is a consequence of the fact that according to Article 189 of the Code of Civil Procedure, only declaratory decisions may be given. The range of decisions which may be issued by the President of Competition and Consumers Protection Office seems to be wider.

Note that pursuant to Article 10 of the Act on Competition and Consumer Protection, the President of Competition and Consumers Protection Office enforces not only Polish, but also the European Union competition law. The influence of that fact upon the current state of the Polish competition law enforcement system is analyzed under point 3 of this paper.

II. PUBLIC AND PRIVATE INTEREST IN PROTECTION AGAINST ANTI-COMPETITIVE PRACTICES

One of the most important general ideas behind the 2007 competition law reform was a clear separation of public and private law elements. In the justification of the draft of the new Act on Competition and Consumer Protection, there is a statement according to which “the point is to enable the President of the Office to enforce in practice, solely on the basis of public interest, the competition law against undertakings distorting (...) fair competition. This is because the President of the Office, by definition, does not realize individuals’ interests”¹⁴.

¹³ See A. Szpunar, *Ustalenie odszkodowania w prawie cywilnym* [Establishment of Damages in Civil Law], Warszawa: Wydawnictwa Prawnicze 1975, p. 203; J. Klimkowicz, *Glosa do wyroku SN z dnia 13.04.1965 r., II CR 266/64* [Comment to the Judgment of the Supreme Court of 13.04.1965, II CR 266/64], *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych* [Case Law of Polish Courts and Arbitration Commissions] 1966, no. 7–8, item 66, p. 334.

¹⁴ *Supra* note 4, p. 19.

It is worth comparing the cited part of the justification with opinions expressed in United States jurisprudence. E. Macintyre underlined that the view according to which private plaintiffs fulfill a quasi-public role in antitrust cases is widely accepted¹⁵. A. P. Komninos claims that “the private litigant in an US antitrust has been considered a «private attorney-general»”¹⁶. This is similar to the way of reasoning by D. K. Meyers and I. Horovitz¹⁷ as regards injunction relief. They stressed that “not only can private parties be protected through careful use of injunction relief, but public purposes may be served as well”¹⁸.

The opinion of the President of the Office in the decision of 24 September 2004 is also interesting. According thereto, before starting to assess behavior based on competition law rules, it is necessary to consider the issue of public interest¹⁹. This problem was raised even more explicitly in the decision of the President of the Office of 17 June 2003, in which one may find a statement that “to recognize that a case has a competition law character, it is necessary to establish if public interest was violated”²⁰.

Every competition law violation is detrimental to public interest. Providing individuals with effective instruments for enforcing private competition law is justified from the perspective of both public and private interest.

III. THE EUROPEAN UNION STANDARD

In the justification of the draft of the 2007 Act on Competition and Consumer Protection there is a statement that “the change was inspired by the European Union policy, which aims to promote the private pursuit of

¹⁵ See. E. Macintyre, *The Role of the Private Litigant in Antitrust Enforcement*, The Antitrust Bulletin 1962, p. 114.

¹⁶ A. P. Komninos, *EC Private Antitrust Enforcement*, Oxford, Portland, Oregon: Hart Publishing 2008, p. 9.

¹⁷ D. K. Meyers, I. Horovitz, *Private Enforcement of the Antitrust Laws Works Occasionally: Board of Regents of the University of Oklahoma v. NCAA, a Case in Point*, Oklahoma Law Review 1995, vol. 48, p. 674.

¹⁸ Ibid.

¹⁹ RPZ-23/2004.

²⁰ RKT-05/2003.

claims arising from the European Union competition law”²¹. The above encourages us to reflect upon the standpoint represented by the European Union institutions as regards the problem connected with private instruments of competition law enforcement.

It is beyond any doubt that the European Union recommends that Member States should develop some private instruments for enforcing competition law. The opinion of the European Commission is clear. The Green Paper on “Damages actions for breach of the EC antitrust rules” states that “While Community law therefore demands an effective system for damages claims for infringements of antitrust rules, this area of the law in the 25 Member States presents a picture of «total underdevelopment»”.

The Manfredi case²² dated 13 July 2006 gives a full picture of the standpoint represented by the Court of Justice of the European Union. The court expressed an opinion that “as regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be recalled that the full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition”.

In the justification of the Manfredi judgment one may also find a statement that “(i)n the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)”. Underlining the principle of effectiveness is fully in line with the Charter of Fundamental Rights of the European Union, which in Article 47 provides that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right

²¹ Supra note 4, p. 21.

²² [2006] ECR I - 6619.

to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

According to Article 7.1 of the Council Regulation 1/2003²³ the Commission in cases connected with Article 101 or 102 of the Treaty may act on a complaint or on its own initiative. Article 5.1 of the Commission Regulation 773/2004²⁴ provides that the complaint may be lodged by any natural and legal persons which can show a legitimate interest. Moreover, according to Article 6, the person who filed the complaint is allowed to participate in the proceedings. Article 7.1 provides that where the Commission considers that on the basis of the information in its possession there are insufficient grounds for acting on a complaint, it shall inform the complainant of its reasons and set a time-limit within which the complainant may make known his or her views in writing²⁵.

It should be particularly stressed that if the complainant makes known its views within the time-limit set by the Commission and the written submissions made by the complainant do not result in a different assessment of the complaint, the Commission shall reject the complaint by issuing a decision (Article 7.2). According to the established case law, such decision may be challenged in a court²⁶. Nevertheless, the Commission, as the public enforcer, has a margin of discretion to set priorities in its enforcement activity and is entitled to give different degrees of priority to complaints made to it. The Commission may refer to the Union interest presented by a case as a criterion of priority and may reject a complaint when it considers that the case does not display a sufficient Union interest to justify further investigation²⁷.

²³ 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.

²⁴ Commission Regulation (EC) No. 773/2004 of 7.04.2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty.

²⁵ See E. Elhauge, D. Gerardin, *Global Competition Law and Economics*, Oxford, Portland: Hart Publishing 2007, p. 42.

²⁶ See *Bureau Européen des Médias et de l'Industrie Musicale (BEMIM) v. Commission of the European Communities*, [1995] ECR II-147; point 77 of the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [2004] O. J. C 101/65; J. Faull, A. Nikpay, *The EC Law of Competition*, New York: Oxford University Press 2007, p. 122.

²⁷ See points 27 and 28 of the Commission Notice, *supra* note 26.

IV. POLISH CONSTITUTIONAL STANDARD

The core of the right to a fair trial in the Polish Constitution is created by Articles 45.1 and 77.2. The first provision states that everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial, and independent court. According to the latter, no statutes shall bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.

In the judgment of 10 May 2000²⁸ the Polish Constitutional Court expressed a view that “as long as Article 45.1 positively formulates the right to a fair trial, Article 77.2 contains the prohibition of preventing a person from seeking recourse in the courts for enforcing violated rights and freedoms and thus complements (supplements, develops) the right to a fair trial. The universal right to a fair trial means that no-one may be prevented from seeking recourse in the courts in the scope determined by Article 77.2 of the Constitution”.

In the said judgment, the Polish Constitutional Court also concludes that “there are no doubts that the subjective scope of the right to a fair trial includes not only criminal, but also civil and administrative cases”. It is particularly important that the Court is of the opinion that “undoubtedly, the category of rights decided by courts encompasses not only rights that are protected directly by constitutional guarantees, but also all remaining ones stemming from all binding regulations under substantive law”. That idea was further elaborated by the Constitutional Court in the judgment of 18 May 2004²⁹, where one may find the following sentence “from Article 45.1 of the Constitution stems the clear will of the legislator that the scope of the right to a fair trial encompasses the broadest range of cases possible, which fully justifies the application of the interpretative rule forbidding restrictive interpretation of the right to a fair trial”.

It should be stressed that, as was already mentioned, according to European Union case law, competition law creates rights for individuals

²⁸ Application no. K 21/99, *Orzecznictwo Trybunału Konstytucyjnego – Zbiór Urzędowy [Constitutional Court Review – Official Review]* 2000, no. 4, item 109.

²⁹ Application no. SK 38/03, *Orzecznictwo Trybunału Konstytucyjnego – Zbiór Urzędowy [Constitutional Court Review – Official Review]* 2004, no. 5/A, item 45.

who have suffered a damage or are in danger of suffering a damage as a result of its violation. The evolution of Polish case law goes in the same direction³⁰. It seems to be right to accept the opinion that the right to a fair trial protects those who have suffered a damage and those who are in danger of suffering a damage as a result of competition law violation.

Thinking about the 2007 competition law reform in Poland one should also have in mind Article 31.3 of the Polish Constitution. It states that any limitation in respect of the exercise of constitutional freedoms and rights may be imposed only by statute and only when deemed necessary in a democratic state in order to protect the state's security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

The fact of depriving individuals in 2007 of the possibility of filing motions for instituting antitrust proceedings in cases related to anti-competitive practices, which would be binding upon the President of the Office of Competition and Consumer Protection, was justified only by arguments derived from praxeology, i.e. that the solution was supposed to render the work of the President of the Competition and Consumer Office more effective. The link between the effectiveness of public administration and prerequisites established in Article 31.3 of the Polish Constitution is too distant to consider the limitation of the protection of individuals against anti-competitive practices as being in line with the Constitution. Nevertheless, the Constitution does not establish the manner in which the protection should be provided. In the said judgment of 2000, the Polish Constitutional Court held that in such cases it is necessary to take into account the legal system as a whole. Full implementation of the constitutional standards requires the limitation of the effectiveness of administrative protection of individuals against anti-competitive practices to be compensated by increasing the effectiveness of the relevant private law instruments. This has not happened in Poland after 2007.

³⁰ See Jurkowska, Miąsik, Skoczny, Szydło, *supra* note 3, pp. 5, 6.

CONCLUSIONS

The mere fact of depriving individuals of the possibility of filing motions for instituting antitrust proceedings, which would be binding upon the President of the Office of Competition and Consumer Protection, violated neither the European Union nor Polish constitutional standards. The 2007 reform should have been accompanied by changes which would increase the effectiveness of the private enforcement of competition law.

The Polish system of protecting individuals' rights arising from competition law does not meet the requirements established in European Union law or in the Polish Constitution. It is thus necessary to prepare a reform which would render the private enforcement of competition law really effective.

