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## **Polish Leniency Programme and its Intersection with Private Enforcement of Competition Law**

by

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### ***Abstract***

This paper is devoted to the Polish leniency programme, including the conditions of obtaining lenient treatment and the applicable procedure. The type, scope and form of information that must be submitted are commented on as well as the marker system and summary applications. The intersection of the leniency scheme with private enforcement of antitrust rules is discussed in detail. Special attention is devoted to the possible ways in which private antitrust plaintiffs might access information submitted to the UOKiK by leniency applicants. Thoroughly analysed are the rules regulating the possibility of obtaining relevant documents from the UOKiK and from the defendant in the course of civil proceedings as well

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as the status of the administrative decision in subsequent civil litigation. The paper covers also the scope of the leniency recipient's civil liability and touches upon the possible ways in which it could be limited to enhance the effectiveness of the leniency scheme. Some suggestions *de lege ferenda* are also provided concerning the means of increasing this effectiveness without prejudice to the private parties' right to compensation.

**Classifications and key words:** competition law, leniency, whistle-blowing, cartels, private enforcement, discovery, protection of applications, follow-on actions, scope of damages

## I. Introduction

Polish competition law has evolved fully in line with European trends, at least since Poland's accession to the EU. In particular the modernisation process of EC antitrust rules, started by the 2004 legislation package, made a large impact on Poland. Its main features included: a decentralized application of EU competition law by National Competition Authorities (NCAs) and national courts as well as the strengthening of the fight against the gravest forms of antitrust infringements – cartels, in particular. One of the crucial elements of the enforcement reform has been the Commission's initiative to strengthen private enforcement of antitrust law, so that all parties injured by anti-competitive practices could seek redress of their grievances in national courts. The increased importance of private enforcement is supposed to enable the Commission and the NCAs to concentrate their resources on the fight against cartels. Since US and EU experiences clearly demonstrate that the most effective tool for cartel detection is a leniency scheme ("corporate amnesty"), a successful modernisation of competition law needs both: a successful leniency policy and effective private enforcement. It is thus important to examine their relationship determining, in particular, whether the key features of the reform will complement each other or whether they might clash.

The paper will commence with a short overview of the Polish leniency programme (the current state of private enforcement of Polish competition law has been described in detail elsewhere<sup>1</sup>). The following analysis will focus on three crucial problems in this field: the use of corporate leniency statements as evidence in civil proceedings, the effect of decisions taken by the President of the Polish Office of Competition and Consumer Protection (hereinafter,

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<sup>1</sup> A. Jurkowska, "Antitrust Private Enforcement – Case of Poland" (2008) 1(1) *YARS* 59–80.

UOKiK) on subsequent private lawsuits and, the scope of civil liability of a successful leniency applicant. However, to the best of the authors' knowledge, there have been no judgments of Polish courts in cases related to the leniency programme yet. As a result, the assessment presented in this paper is based on the interpretation of relevant provisions of Polish law, on literature, on case law indirectly related to this issue and on a comparative analysis of US and EU experiences. When no satisfying answers *de lege lata* seem possible, some suggestions *de lege ferenda* shall be made.

## II. Polish leniency programme

### 1. General information

Literature defines leniency as “the granting of immunity from penalties or the reduction of penalties for antitrust violations in exchange for cooperation with the antitrust enforcement authorities”<sup>2</sup>. In Poland, these penalties may take the form of administrative fines only<sup>3</sup>, since no criminal liability for antitrust violations exists in the Polish legal system<sup>4</sup>. The UOKiK President may impose pecuniary sanctions of up to 10% of the undertaking's revenue obtained in the year prior to the year in which the decision is issued<sup>5</sup>.

The Polish leniency programme was introduced in 2004 by an amendment to the Act of 15 December 2000 on Competition and Consumer Protection<sup>6</sup>. It is currently regulated by Article 109 of the Act of 16 February 2007 on

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<sup>2</sup> W. Wils, *Efficiency and Justice in European Antitrust Enforcement*, Oxford and Portland, Oregon 2008, p. 113.

<sup>3</sup> See S. Dudzik, P. K. Rosiak, “Poland” [in:] D. Cahill (ed.), *The Modernisation of EU Competition Law Enforcement in the EU. FIDE 2004 National Reports*, Cambridge 2004, p. 477.

<sup>4</sup> A minor exception is the criminal liability for bid-rigging on the basis of Articles 286 and 305 of the Penal Code (Journal of Laws 1997 No. 88, item 553 with amendments); R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 1668. Polish leniency programme does not provide for immunity from criminal prosecution, therefore it is to be expected that it will not become effective in detecting bid-rigging agreements.

<sup>5</sup> Office of Competition and Consumer Protection, Guidelines on Setting Fines for Competition-Restricting Practices (hereinafter referred to as: Fining Guidelines), UOKiK Official Journal 2008 No. 4, item 33.

<sup>6</sup> Journal of Laws 2004 No. 93, item 891.

Competition and Consumer Protection<sup>7</sup> (hereinafter, Competition Act). Although the new provision is an exact copy of Article 103a of the former Act of 2004, the shape of Polish corporate amnesty has in actual fact substantially changed since 2004. Key new procedural rules<sup>8</sup> were recently introduced by the Regulation of the Council of Ministers of 26 January 2009 concerning the mode of proceeding in cases of enterprises' applications to the President of the Office of Competition and Consumer Protection for immunity from or reduction of fines<sup>9</sup> (hereinafter, the Regulation) and by the Guidelines of the President of the Office of Competition and Consumer Protection concerning the leniency programme<sup>10</sup> (hereinafter, Leniency Guidelines). However, while the Competition Act and the Regulation are acts of universally binding law (see Article 87 of the Constitution of the Republic of Poland of 2 April 1997<sup>11</sup>), the Guidelines are an act of soft-law only which is not formally binding on the UOKiK President. The purpose of the Guidelines is to increase transparency of the provisions of the two binding acts serving as a guide for entrepreneurs (see point 2 of the Leniency Guidelines). Nevertheless, it is very likely that the authority will respect legitimate expectations of the addressees of the Guidelines, even if their language is not as definite as paragraph 4 of the Fining Guidelines, where the UOKiK President unequivocally promises to apply the latter act.

The Polish leniency scheme is generally in line with the Model Leniency Programme of the European Competition Network (hereafter, ECN)<sup>12</sup> although some discrepancies exist. One of the specific features of the Polish scheme is its scope – it is available to parties to every anti-competitive agreement which infringes Article 6(1) of the Competition Act or Article 81 of EC Treaty, irrespective of whether the agreement is horizontal or vertical (see Article 109(1) of the Competition Act). That makes the scope of the Polish leniency programme wider than the Commission's Leniency Notice (hereinafter, Commission Leniency Notice)<sup>13</sup>, the Model Leniency Programme of the ECN (point 4) or the leniency policy of the Office of

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<sup>7</sup> Journal of Laws 2007 No. 50, item 331, amendments: Journal of Laws 2007 No. 99, item 99; Journal of Laws 2007 No. 171, item 1206.

<sup>8</sup> They include summary applications and marker system, which will be further discussed below.

<sup>9</sup> Journal of Laws 2009 No. 20, item 109.

<sup>10</sup> They can be downloaded from UOKiK's website: <http://www.uokik.gov.pl>, although regrettably only in Polish version.

<sup>11</sup> Journal of Laws 1997 No. 78, item 483.

<sup>12</sup> Available at <http://ec.europa.eu/competition/ecn/documents.html>.

<sup>13</sup> See Commission notice on immunity from fines and reduction of fines in cartel cases, point 1, OJ [2006] C 298/17.

Fair Trading<sup>14</sup> and the Bundeskartellamt<sup>15</sup>, all of which concern cartels only. Leniency for all types of anti-competitive agreements, but not for the abuse of dominance, is possible also in France<sup>16</sup>. The UOKiK President may reduce the fines in cases falling outside the scope of the Leniency Notice, by treating the cooperation with the authorities as a mitigating factor as prescribed in point 4.1(e) of the Fining Guidelines. It can be expected however that, due to the special importance of the fight against cartels, possible reductions on that ground shall be significantly smaller than the 50% which is the maximal reduction available under the leniency programme.

## 2. Conditions and procedure for obtaining leniency

The UOKiK President shall grant total immunity from fines to the undertaking, which has been the first to provide the authority with information sufficient for instituting antitrust proceedings or with proof rendering it possible to issue a decision asserting the practice as anti-competitive. In both cases, certain additional conditions must be met (see Article 109(1) of the Competition Act) and the relevant information or proof cannot be in the possession of the UOKiK at the moment of filing the motion for immunity. The condition of “information being sufficient for instituting antitrust proceedings” should be understood here, in the context of the Commission’s Leniency Notice, as enabling the authority to carry out a targeted inspection<sup>17</sup>. The additional conditions include: full cooperation with the UOKiK and the fact that the applicant cannot be the initiator or a coercer of other undertakings to participate in the practice. A company seeking immunity must also cease its participation in the agreement on the day of filing the application at the very latest (Competition Act Article 109(1)(2-4)). Still, literature argues<sup>18</sup> that an inflexible approach to latter condition of “ceasing participation” is ineffective

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<sup>14</sup> See OFT’s Guidance as to the appropriate amount of penalty, p. 12, available at OFT’s website <http://www.of.gov.uk>.

<sup>15</sup> See Notice no 9/2006 of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases- Leniency Programme of 7 March 2006, available at Bundeskartellamt’s website <http://www.bundeskartellamt.de>.

<sup>16</sup> See art. L 464 – 2 point 4 of Code de Commerce, available at <http://www.legifrance.gouv.fr>.

<sup>17</sup> S. Sołtysiński, “Z doświadczeń programu Leniency w Brukseli i w Warszawie” [in:] C. Banasiński (ed.) *Prawo konkurencji – stan obecny oraz przewidywane kierunki zmian*, Warszawa 2006, p. 47.

<sup>18</sup> D. Piejko, “Leniency w polskich i europejskich przepisach prawa ochrony konkurencji” [in:] *Amerykański i europejski system ochrony konkurencji*, Warszawa 2007, s. 56–57. Similarly R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1672–1673.

because it may alert other members of the agreement, enabling them to destroy or conceal relevant evidence. In the authors' view, as a suggestion *de lege ferenda*, the precise moment of abandoning all anti-competitive activities by the leniency applicant should be set by the competition authority. This would bring the Polish scheme further in line with the Model Leniency Programme of the ECN<sup>19</sup> and the Commission's Leniency Notice<sup>20</sup>.

Abolishing the "ringleader exception", which excludes instigators and coercers from the possibility of using the Polish leniency programme, can also be suggested<sup>21</sup>. While this proposal is certainly more controversial, its aim is to increase the deterrent effect of the scheme which, apart from being an investigatory tool, should stop undertakings from entering into and remaining in anti-competitive agreements by incentivising them to distrust each other. A ringleader that is unable to confess is more trustworthy for other present or future participants. This effect is especially striking in duopolistic markets, when the one approaching the only competitor with a proposal of a market-allocating or price-fixing agreement, would be considered the instigator that is unable to apply for leniency. The other duopolist could then safely enter into the cartel and would have no incentive to confess since its partner would be precluded from doing so. Precluding immunity for ringleaders might therefore lead to perpetuating cartels in highly concentrated, especially duopolistic, markets<sup>22</sup>.

Additional problems could arise in situations of difficulty in identifying the ringleader. The possibility of fraud on the part of a ringleader, who could approach other undertakings with a cartel offer and then "betray" them to the authority, could only add to the deterrent effect of the leniency programme, since distrust is natural between competitors and double so between competitors who contemplate entering into an illegal agreement<sup>23</sup>. In addition, since the leniency programme itself necessitates some sacrifices on the part of the competition authority's determination to punish all wrongdoers, argumentation based on natural justice should not lead to the creation of a scheme which is neither just nor effective. Seeing as it was decided that the interest in detecting and deterring cartels outweighs the interest in punishing

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<sup>19</sup> Part V point 13 section 1.

<sup>20</sup> Point 12 letter b.

<sup>21</sup> For example, immunity for ringleaders is available in France, the Netherlands and the UK. Polish exclusion is compatible with EC Notice and ECN Model Programme, as well as the US and German models. See A. Schwab, Ch. Steinle, "Pitfalls of the European Competition Network – Why Better Protection of Leniency Applicants and Legal Regulation of Case Allocation is Needed" (2008) 29(9) *European Competition Law Review* 525.

<sup>22</sup> See Ch. R. Leslie, "Antitrust Amnesty, Game Theory and Cartel Stability" (2006) 31 *Journal of Corporation Law* 478-481.

<sup>23</sup> *Ibidem*.

every infringer of antitrust law<sup>24</sup>, a leniency programme should be as effective as possible in order to justify the basic departure from the rules of natural justice that lie at its roots<sup>25</sup>.

A reduction of fines is available for undertakings which are not eligible for full immunity<sup>26</sup> but have provided the UOKiK President with evidence which will, to a substantial degree, contribute to issuing a decision asserting the practice as anti-competitive<sup>27</sup> and which have ceased participating in the agreement at the aforementioned time (Competition Act Article 109(2)). The size of the reduction is dependent on the applicant's place in the "queue" – up to 50% for the first undertaking to apply for reduction, up to 30% for the second and up to 20% for subsequent applicants (see Leniency Guidelines, point 31).

According to paragraph 2(2) and (3) of the Regulation and point 8 of the Leniency Guidelines, an application for leniency can be filed either in writing (it may be brought directly to the UOKiK or it may be sent by post, electronic mail or by fax<sup>28</sup>) or orally. An oral application is submitted for the official record, which is prepared by a member of staff of the UOKiK who puts the date and time of submission onto the document<sup>29</sup>. The applicant is required to sign the record in accordance with Article 68(2) of the Administrative Procedure Code (KPA)<sup>30</sup>. When the application is submitted in writing, the UOKiK President provides the undertaking with the confirmation of the date and time of its receipt<sup>31</sup>. There are no provisions regarding the possibility of submitting applications and evidence

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<sup>24</sup> See point 3 of Commission Leniency Notice.

<sup>25</sup> See R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1669–1670, 1674. This Author supports the exclusion of ringleaders from the benefits of leniency in light of arguments relating to moral reasons and the rule of retribution, stating that serious wrongdoers should be punished not only by a heavy fine but also by exclusion from the benefits of leniency programmes. It remains to be seen whether moral and retributive reasons justify making leniency programmes less effective than they could be and, in effect, allowing larger number of cartels to exist and flourish without detection and any kind of punishment.

<sup>26</sup> Including ringleaders.

<sup>27</sup> For example, the statements of the company's employees relating to the functioning of the cartel, were considered to constitute such evidence in the decision of the UOKiK President of 18 September 2006, DOK 107/06, available at <http://www.uokik.gov.pl>. See C. Banasiński, E. Piontek (eds.), *Ustawa o ochronie konkurencji i konsumentów*, Warszawa 2009, p. 1010.

<sup>28</sup> When the application is sent by e-mail or by fax, it is necessary to submit the original or duly certified documents to the UOKiK in three days time. If the deadline is met, the application shall be deemed to have been submitted at the moment of sending the e-mail or fax. See point 9 of the Leniency Guidelines. This requirement does not concern e-mails signed with certified electronic signature, see Leniency Guidelines, footnote 4.

<sup>29</sup> Paragraph 2(3) of the Regulation.

<sup>30</sup> Journal of Laws 2000 No. 98, item 1071 with amendments.

<sup>31</sup> Paragraph 2 section 1 of the Regulation.

in hypothetical terms.<sup>32</sup> According to point 7 of the Leniency Guidelines, an entrepreneur may however call a dedicated phone line to present the facts of the case to an employee of UOKiK in hypothetical terms in order to get a preliminary assessment as to the possibility of obtaining lenient treatment.

The application should contain a description of the agreement and, in particular, specify: the undertakings, products or services and the territory covered by the agreement, its purpose, duration and circumstances of its conclusion, the roles of particular participants<sup>33</sup> as well as the names and official posts of individuals playing a significant role in the agreement. The applicant must also specify whether a similar submission was made to a NCA of another EU Member State or to the Commission<sup>34</sup> (paragraph 3(2) of the Regulation). Finally, two additional statements are necessary: one concerning the fact that the applicant ceased its participation in the agreement (specifying the exact date of the cessation) and another, stating that it was not the instigator of the agreement and that it was not inducing others to join it (paragraph 3(3) of the Regulation). Attached should be all relevant evidence in the possession of the applicant such as: minutes of meetings held in relation to the agreement, e-mails, photographs of sms messages, relevant notes, restaurant or hotel bills, airplane tickets, market data from trade associations' reports etc.<sup>35</sup>. The attached documents should be either originals or duly certified copies<sup>36</sup>. When relevant documents or their parts are drawn in foreign language, a duly certified translation into Polish should also be attached<sup>37</sup>.

### 3. New forms of applications

Since 2009, the Polish leniency scheme contains two simplified forms of leniency applications. First, by submitting some basic information about the alleged anti-competitive agreement, companies can now obtain a marker<sup>38</sup> – a

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<sup>32</sup> Compare point 16 letter b and point 19 of the Commission Leniency Notice, see also R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1687.

<sup>33</sup> Especially the identity of the instigator and undertakings coercing others, see point 13.6 of the Leniency Guidelines.

<sup>34</sup> If so, the name of the authority and the date of the application should also be submitted (point 13.8 of the Guidelines).

<sup>35</sup> C. Banasiński, E. Piontek (eds.), *Ustawa...*, p. 1001.

<sup>36</sup> Article 51(1) of Competition Act; point 15 of Leniency Guidelines.

<sup>37</sup> Article 51(3) of Competition Act. UOKiK requires the applicant to attach an official copy of applicant's data from National Court Register and, in case of submitting the application by the attorney, the power of attorney. See C. Banasiński, E. Piontek (eds.), *Ustawa...*, p. 1001.

<sup>38</sup> On the nature of markers in leniency programmes, see e.g. R. Molski, "Programy łagodnego traktowania – panaceum na praktyki kartelowe?" (2004) 1 *Kwartalnik Prawa Publicznego* 198;

“place in the queue” – gaining additional time for gathering enough evidence to submit a full application. The information which has to be provided in order to secure a marker include: list of participants, duration and purpose of the agreement, products/services and territory covered by the agreement and information, whether a leniency application has also been submitted to another NCA or to the Commission. The application should include “preliminary” information or evidence sufficient for instituting antitrust proceedings or issuing a decision asserting the agreement as anti-competitive as well as the statements as to the cessation of participation in the agreement and the fact, that the applicant was not its ringleader<sup>39</sup>. The term “preliminary information or evidence” is unclear; its interpretation is in practice left to the discretion of the competition authority<sup>40</sup>. The UOKiK President confirms the date and time of the receipt of the application and specifies what additional information must be submitted to complete the process as well as the deadline for providing it. If the submission is completed within the specified date, it is deemed to have been received at the moment of filing the first “shortened” application<sup>41</sup>.

Second, after submitting a leniency application to the Commission (when a cartel covers the territories of more than three Member States), a company can secure for itself “the first place in the queue” in Poland. Filing a “summary application”<sup>42</sup> is possible only for companies applying for full immunity (not when the applicant wishes to apply for a fine reduction)<sup>43</sup>. It allows the applicant to save time and effort necessary to file a full application but, at the same time, gives the company the certainty of being able to submit a full application to the UOKiK if the domestic authority chooses to take up the case<sup>44</sup>. A summary application must contain the same information

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R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1690–1693; J. S. Sandhu, “The European commission’s Leniency Policy: a Success” (2007) 28(3) *European Competition Law Review* 150–152; M. J. Reynolds, “Immunity and Leniency in EU Cartel Cases: Current Issues” (2006) 27(2) *European Competition Law Review* 82–85.

<sup>39</sup> Paragraph 5 of the Regulation.

<sup>40</sup> R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1691.

<sup>41</sup> Paragraph 5(4) of the Regulation; point 17 of the Leniency Guidelines.

<sup>42</sup> See paragraph 11 of the Regulation and point 32 of Leniency Guidelines.

<sup>43</sup> Paragraph 11(1) of the Regulation. This solution is consistent with point 46 of ECN Model Leniency Programme.

<sup>44</sup> The possibility of filing summary applications brings the Polish leniency programme in line with the ECN Model Leniency Programme, see point 22. The question of case allocation in the ECN is dealt with in the Commission Notice on cooperation within the Network of Competition Authorities, Official Journal C 101, 27.04.2007, p. 43–53. On problems related to this issue and leniency, see e.g. A. Schab, Ch. Steinle, “Pitfalls...” p. 523–531. On the cooperation within the ECN, see also S. Dudzik, “Wpływ członkostwa Polski w Unii Europejskiej na administrację rządową na przykładzie kooperacyjnego modelu stosowania wspólnotowego prawa konkurencji” [in:] S. Biernat, S. Dudzik, M. Niedźwiedź (eds.), *Przystąpienie Polski do Unii Europejskiej*.

as an application for a marker as well as, additionally, a list of the Member States where evidence of the cartel exists<sup>45</sup>. Summary applications must be complemented by statements relating to the cessation of the participation in the agreement, to the fact that the applicant was not its ringleader and information about submissions to the Commission or other NCAs<sup>46</sup>. Unlike other submissions, the summary application does not have to be accompanied by information or evidence necessary to institute antitrust proceedings or to issue a decision asserting the practice as anti-competitive. A deadline for the completion of the application is specified only if the UOKiK President actually decides to institute proceeding concerning the agreement covered by the summary application. When the deadline is met, the application is deemed to have been received at the moment of the submission of the summary application.<sup>47</sup> The summary application may be submitted either in writing or orally for the record<sup>48</sup>.

#### 4. Decision by the President

Having analysed a leniency application, the UOKiK President notifies the submitting party in writing whether the conditions for obtaining immunity or a fine reduction are met. However, this notification has only a preliminary nature – its permanence depends on the applicant's further cooperation with the authority. At this point, the applicant is also informed of the order in which its submission was received<sup>49</sup> (the order is established without consideration of these applications which were dismissed<sup>50</sup>). An application can be withdrawn at any moment before the President issues his/her decision ending the proceedings. The withdrawal does not affect the already assigned place in the queue of the remaining applications<sup>51</sup>. The final determination as to the granting of immunity or fine reduction is made by the UOKiK President in a decision concerning the agreement referred to in the application<sup>52</sup>.

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*Traktat akcesyjny i jego skutki*, Kraków 2003, p. 231–259; J. Bazylińska, “Współpraca w ramach Europejskiej Sieci Konkurencji” (2007) 11 *Przegląd Ustawodawstwa Gospodarczego* 2–12.

<sup>45</sup> Paragraph 11(2) of the Regulation.

<sup>46</sup> Paragraph 11(3) and (4) of the Regulation.

<sup>47</sup> Paragraph 11(5) and (6) of the Regulation.

<sup>48</sup> Point 35 of the Leniency Guidelines

<sup>49</sup> Paragraph 8 of the Regulation.

<sup>50</sup> Paragraph 9 of the Regulation.

<sup>51</sup> Paragraph 10 of the Regulation.

<sup>52</sup> R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1695.

According to Article 107(1) and (3) of KPA, administrative decisions must be reasoned concerning the facts and the law of the case. Public authorities must specify the facts which were considered proven in the course of the proceedings, the evidence considered persuasive and the reasons for denying credibility to other pieces of evidence. Thus the leniency application and any other evidence submitted by the applicant must be mentioned in the decision of the UOKiK President. They are usually used to justify the authority's findings as to the existence and functioning of the agreement and the level of fines imposed (in particular, when the applicant is granted immunity or receives a major reduction). The fact of the applicant's participation in the agreement and its subsequent cooperation with the authority is explicitly mentioned<sup>53</sup>. Decisions of the UOKiK President are published on the authority's official website<sup>54</sup>. Some of them are also published in its Official Journal<sup>55</sup>. The decisions of the UOKiK President can be appealed to the Court of Competition and Consumer Protection in Warsaw<sup>56</sup>. Its judgments are subject to appeal to the Court of Appeals<sup>57</sup> whose judgments are, in turn, subject to cassation by the Supreme Court<sup>58</sup>. The decisions of the UOKiK President become final if no appeal is lodged within two weeks from the moment of their delivery or if a decision was sustained by the court.

16 leniency applications were submitted to the UOKiK President between 2004 and the end of 2008. The number of applications per year seems to have started raising in 2007 (2 received in 2006, 6 in 2007, 5 in 2008)<sup>59</sup> but the scheme can still not be said to be working in a fully satisfactory manner. It remains to be seen whether the procedural changes of 2009 will improve the situation.

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<sup>53</sup> A good example can be found in the decision mentioned in footnote 15 (DOK 107/06) declaring as anti-competitive an agreement on minimal prices between a producer of paints and lacquers and several large construction supermarkets. The cooperation of Castorama sp. z o.o., the first to benefit from the Polish leniency scheme, is often mentioned in the text of the decision, the letters and documents it submitted are referred to as evidence and the dates on which those documents were sent are given. While some data was removed from the decision (business secrets), the content of the submitted documents can easily be inferred from the argumentation of the decision.

<sup>54</sup> Available at <http://www.uokik.gov.pl>.

<sup>55</sup> Article 32 of Competition Act. Published version of a decision does not contain information qualified as business secrets.

<sup>56</sup> Article 81 of Competition Act.

<sup>57</sup> Article 367 § 1 of Civil Procedure Code (KPC), Journal of Laws 1964 No. 43, item 296 with amendments.

<sup>58</sup> Article 479<sup>35</sup> § 2 of KPC. See K. Weitz, "Postępowanie w sprawach z zakresu ochrony konkurencji i konsumentów", [in:] T. Wisniewski (ed.), *Postępowanie sądowe w sprawach gospodarczych*, Warszawa 2007, p. 156–160.

<sup>59</sup> See UOKiK Report on Activities 2008, p. 19, available at <http://www.uokik.gov.pl>.

### III. Access to leniency statements

#### 1. General rules on documentary evidence

One of the most important points on intersection between private antitrust enforcement and leniency schemes is the possibility of using an application for immunity or fine reduction (and potentially also other documents submitted by the applicants) as evidence in civil litigations. On the one hand, such a possibility would certainly strengthen the position of those seeking remedies for antitrust violations, since evidentiary difficulties are often listed amongst the gravest obstacles of private antitrust enforcement<sup>60</sup>. On the other hand, it might significantly reduce the attractiveness of leniency programmes, adopted at both domestic and EU level, resulting in fewer and/or less comprehensive submissions<sup>61</sup>. For the sake of preserving the effectiveness of leniency schemes, considered to be an important public enforcement tool, the Commission suggests that all leniency applications should receive special protection against disclosure<sup>62</sup>. For the same reason, it has intervened, as *amicus curiae*, in American civil proceedings, arguing that European leniency statements should not be subject to discovery in the US<sup>63</sup>.

The Polish legal system does not contain an equivalent of “pre-trial discovery”, a procedure typical for common law countries<sup>64</sup>. As a result, parties are not obliged to exchange documents or other types of evidence at the pre-trial stage. A litigant may induce its adversary to submit a certain document only by obtaining a court order to that effect<sup>65</sup>. Motions of that kind can be included in the statement of claims or filed at a later stage. They are generally admissible until the closure of the hearing<sup>66</sup>, with one important exception applicable to proceedings in commercial matters, conducted

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<sup>60</sup> See, e.g., Green Paper – Damages actions for breach of the EC antitrust rules, COM(2005) 672 final (hereinafter: Green Paper), point 2.1; White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final (hereinafter: White Paper), point 2.2.

<sup>61</sup> See Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, point 272.

<sup>62</sup> See White Paper, point 2.9.

<sup>63</sup> See, e.g., K. Nordlander, “Discovering Discovery – US Discovery of EC Leniency Statements” (2004) 25(10) *European Competition Law Review*, p. 646.

<sup>64</sup> A. Sánchez Graells, “Discovery, Confidentiality and Disclosure of Evidence Under the Private Enforcement of EU Antitrust Laws” (September 8, 2006), *Instituto de Empresa Business School Working Paper No. WPED06-05*, p. 7, available at SSRN: <http://ssrn.com/abstract=952504>

<sup>65</sup> There are no rules in the Polish civil procedure that would specify how detailed the description of the requested document must be.

<sup>66</sup> Article 224 § 1 KPC.

pursuant to Article 479<sup>1</sup>–479<sup>22</sup> of the KPC. In private antitrust cases the abovementioned provisions apply when both plaintiff and defendant are entrepreneurs, whereas if the claim is filed by a consumer, the proceedings are conducted under general rules. In the former case, a rule of preclusion provided for in Article 479<sup>12</sup> KPC requires the plaintiff to specify all its assertions, as well as the evidence supporting them, already in its statement of claims. A similar time limitation binds the defendant who is obliged to include its assertions, as well as indicate all relevant evidence, in the reply to the statement of claims, which is mandatory (Article 479<sup>14</sup> § 2 KPC)<sup>67</sup>. Evidentiary motion submitted at a later stage will be dismissed unless the moving party shows that it was impossible to file the motion earlier or, that the need to file it did not occur before. The preclusion rule has been criticized by some authors as a serious burden for plaintiffs in antitrust suits<sup>68</sup>.

The court may (acting upon a motion or *suo motu*) oblige anyone to submit a document (which is in that entity's possession) that constitutes proof of a material fact relevant to the case. This applies to the litigants as well as third parties, including public authorities<sup>69</sup>. An addressee can decline to produce the requested document only in specified instances: when it contains state secrets or when the person has the right to refuse to testify as a witness on circumstances referred to in that document (alternately – if he/she possesses the document on behalf of a third party whose refusal to submit it would be justified for the same reason)<sup>70</sup>.

Finally, it should be mentioned that the Polish Civil Procedure Code provides for a possibility of securing evidence, including documents which can be easily destroyed. Such a possibility exists also before the commencement of the court proceedings (before the statement of claims is filed). In order to have a certain piece of evidence secured, it must be shown that its presentation might be impossible/excessively difficult in the future or, due to other reasons, the actual state of affairs needs to be verified<sup>71</sup>.

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<sup>67</sup> For further details see T. Szanciło, “Prekluzja w postępowaniu gospodarczym” (2007) 6 *Przegląd Prawa Handlowego* 14.

<sup>68</sup> See M. Bernatt, “Prywatny model ochrony konkurencji oraz jego realizacja w postępowaniu przed sądem krajowym” [in:] E. Piontek (ed.), *Nowe tendencje w prawie konkurencji UE*, Warszawa 2008, p. 340; A. Jurkowska, “Antitrust Private Enforcement...”, p. 77.

<sup>69</sup> See T. Ereciński [in:] T. Ereciński (ed.), *Kodeks postępowania cywilnego. Komentarz*, vol. 1, Warszawa 2006, p. 573.

<sup>70</sup> Article 248 KPC.

<sup>71</sup> Article 310 KPC.

## 2. Obtaining documents from the UOKiK President

The wording of general procedural rules might suggest that civil courts can oblige the UOKiK President to submit almost any document for the purpose of evidentiary proceedings. The Competition Act provides, however, for special protection of documents collected by the authority. Pursuant to its Article 73(1): “Information received in the course of the proceedings [carried out by the UOKiK President – authors’ note] may not be used in any other proceedings based on separate provisions” but for the exceptions exhaustively listed in subsequent paragraphs. The list contains two types of proceedings conducted, in part, before the courts, both of which are penal in nature<sup>72</sup>. It follows from the above that the legislator did not provide any explicit exceptions applying to civil lawsuits. In this respect, some authors have considered a possibility of relying on Article 73(2)(5) of the Competition Act but rightly rejected the idea.

The aforementioned provision authorizes the UOKiK President to “provide competent authorities with information which may indicate that any separate regulations have been infringed”. It should be assumed that the term “competent authorities” should be understood as referring to public bodies which may institute proceedings *ex officio* – civil courts do not have such power<sup>73</sup>. Therefore, in civil lawsuits, courts cannot oblige the UOKiK President to submit a leniency application or any other documents collected during antitrust proceedings – if a party moves for such an order, the motion should be dismissed. This solution has been criticized by advocates of private antitrust enforcement<sup>74</sup> as incoherent with the legislator’s intention to increase the number of civil lawsuits brought against antitrust law infringers<sup>75</sup>. It was

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<sup>72</sup> I.e. penal proceedings exercised by a public-complaint procedure and fiscal penal proceedings.

<sup>73</sup> C. Banasiński, E. Piontek (eds.), *Ustawa...*, p. 689.

<sup>74</sup> See M. Bernatt [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 1298.

<sup>75</sup> This intent was manifested by the elimination of public (administrative) antitrust proceedings initiated upon a motion. Under the previous Act of 15 December 2000 on Competition and Consumer Protection (Journal of Laws 2005 No. 244, item 2080, with amendments) private parties could formally request the UOKiK President to take actions; such a possibility no longer exists – proceedings are currently commenced only *ex officio*, except for merger cases. See A. Jurkowska, D. Miąsik, T. Skoczny, M. Szydło, “Nowa uokik z 2007 r. – kolejny krok w kierunku doskonalenia podstaw publicznoprawnej ochrony konkurencji w Polsce”, (2007) 4 *Przegląd Ustawodawstwa Gospodarczego* 4; A. Jurkowska, “Perspektywy prywatnego wdrażania prawa ochrony konkurencji w Polsce na tle doświadczeń Wspólnoty Europejskiej” (2008) 1 *Przegląd Ustawodawstwa Gospodarczego* 25.

pointed out in comparison<sup>76</sup> that the Commission assists national courts in their application of EC competition law by passing on information that it holds<sup>77</sup>. However, while the transmission of information is generally permitted in the EU, certain kinds of data enjoy special protection<sup>78</sup>. In contrast, Article 73 of the Polish Competition Act applies to all information obtained by the UOKiK President<sup>79</sup>.

Additional protection is given to leniency statements. Article 70 par. 1 of the Competition Act states that: “Any information and evidence received by the President of the Office under the procedure of Article 109 [i.e. leniency procedure – authors’ note], including information on the undertaking’s request for renouncement of imposing a financial penalty or reducing thereof (leniency), shall not be rendered accessible, subject to Paragraphs 2 and 3.” This provision substantially limits procedural rights of those subject to proceedings before the UOKiK President<sup>80</sup> in comparison to general procedural rules of the Administrative Procedure Code (KPA) which state that every party has a right to inspect files, receive information from public authorities and actively participate in the proceedings<sup>81</sup>. As a result of the abovementioned limitation, parties to antitrust proceedings will not have access to any information or evidence submitted by a leniency applicant until prior to passing a decision by the President of UOKiK (Article 70(2) of the Competition Act). However, no provision of Polish law specifies the exact moment when the UOKiK President should make the said information and evidence accessible<sup>82</sup>, although it is generally agreed, that parties must be given enough time (and a real possibility) to inspect and comment on all the evidence before the decision is issued<sup>83</sup>. The scope of protection against disclosure, set out in Article 70, is very broad

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<sup>76</sup> M. Bernatt [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1299.

<sup>77</sup> See Article 15 para. 1 of the Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ [2003] L 1/1) and paras 21-26 of the Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ [2004] C 101).

<sup>78</sup> These include information voluntarily submitted by a leniency applicant – see para. 26 of the Commission Notice referred to above.

<sup>79</sup> See M. Bernatt [in:] T. Skoczny, A. Jurkowska, T. Skoczny (eds.), *Ustawa...*, p. 1299.

<sup>80</sup> *Ibidem*, p. 1279. Pursuant to Article 88(1) of the Competition Act: “The party to the proceedings shall be every person against whom the proceedings on the application of competition restricting practices are instituted.”

<sup>81</sup> See Article 73, 9 and 10 of KPA.

<sup>82</sup> According to the Leniency Guidelines, it should take place not later than when the UOKiK President calls upon the parties to finally inspect all evidence gathered in a given case (point 29).

<sup>83</sup> C. Banasiński, E. Piontek (eds.), *Ustawa...*, p. 677; M. Bernatt [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1282.

covering accepted as well as rejected leniency applications<sup>84</sup>. Information obtained in the course of leniency proceedings can be revealed neither to the parties (subject to Article 70(2)) nor to third persons<sup>85</sup> including victims of antitrust violations who could file a lawsuit against the infringers. Nevertheless, if an undertaking applying for leniency gives its written consent, the UOKiK President may (but is not obliged to<sup>86</sup>) grant access to the submissions of that particular applicant.

### 3. Obtaining documents from the defendant

Theoretically, an antitrust victim who sues a leniency applicant could try to obtain a copy of a leniency application directly from its adversary and not from the authority. Under general rules of civil procedure<sup>87</sup>, a motion to the court for ordering the submission of a document by the defendant may be included in the statement of claims (Article 187 § 2(3) of KPC) or filed later (unless the rule of preclusion applies). Nevertheless, in the authors' opinion, that possibility does not seriously threaten the attractiveness of the Polish leniency programme.

First, leniency applications can be made orally<sup>88</sup> in which case the applicant is left with no official document describing its statement. Second, the court is not bound by evidentiary motions so it lies within its discretion to decide whether a certain document should be submitted. While making such a decision in relation to leniency statements, civil courts ought to consider a number of factors – including public interest in maintaining the effectiveness of the leniency scheme. Unfortunately, to the authors' best knowledge, there are no Polish judgements concerning this issue. It seems highly unlikely, however, that Polish courts would generously grant a motion for the submission of a leniency application. Finally, even if such a motion was granted, the disobedient defendant would not be subject to any major sanctions since the Polish Code of Civil Procedure (KPC) does not contain solutions similar to the US, where a failure to comply with a discovery order may have far-reaching consequences for the defendant including a default judgement against it or

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<sup>84</sup> R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1694.

<sup>85</sup> C. Banasiński, E. Piontek (eds.), *Ustawa ...*, p. 678.

<sup>86</sup> For the sake of the effectiveness of the scheme, the UOKiK President should be able to protect gathered evidence against disclosure even when leniency applicants waive the protection – see *ibid.*, p. 678. In this respect, compare the Commission's proposal in the White Paper (point 2.9) concerning voluntary disclosure of leniency statements.

<sup>87</sup> See point III. 1. above

<sup>88</sup> See point II above.

holding it in contempt<sup>89</sup>. Unlike third parties, litigants cannot be fined for an unjustified refusal to produce requested documents<sup>90</sup> and so risk only that the court would interpret their disobedience unfavourably while assessing the evidence<sup>91</sup>.

#### IV. Effect of the UOKiK President's decisions on subsequent civil lawsuits

It would be inappropriate to limit this discussion only to the protection received by leniency applications directly, seeing as the substance of the submission gets published in the UOKiK President's decision. Possible private plaintiffs could make good use of these administrative acts, considering that they clearly state the fact that the applicant participated in an antitrust infringement. It is thus necessary to discuss the legal status of UOKiK President's decisions in civil proceedings. If defendants were unable to question their findings in response to follow-on damages suits, the attractiveness of the leniency programme would decrease<sup>92</sup>. Still, when the defendant was found to have infringed competition law, a mechanism that would ease the burden placed on private plaintiffs could greatly incentivise the development of private enforcement. A good example of such solution exists in the US where a final judgment in civil or criminal proceeding brought by or on behalf of the US, declaring that the defendant has violated antitrust laws, is *prima facie* evidence in any proceedings brought by a third party against this defendant under antitrust laws<sup>93</sup>.

Polish jurisprudence contains varying answers to the question whether administrative decisions have a binding effect on civil courts – the issue must be treated as not unequivocally resolved yet<sup>94</sup>. As a rule, courts are not bound by administrative decisions as to the assessment of the facts. Judicial freedom in evaluating evidence<sup>95</sup> can be limited on specific legal grounds only. In Poland, this is possible exclusively in relation to the binding effect

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<sup>89</sup> Federal Rules of Civil Procedure, Rule 37(b)(2)(A).

<sup>90</sup> See Article 251 KPC.

<sup>91</sup> Article 233 § 2 KPC.

<sup>92</sup> See K. Nordlander, "Discovering Discovery ..." , p. 655.

<sup>93</sup> Clayton Act §5 (a), U.S.C. §16 (a).

<sup>94</sup> The discussion of the Polish Supreme Court jurisprudence concerning a related problem – whether a decision by the UOKiK President is a necessary prerequisite for filing a civil action for damages for antitrust infringement – can be found in A. Jurkowska, "Antitrust Private Enforcement...", p. 70-74.

<sup>95</sup> See Article 233 of KPC.

of a judgment of a criminal court finding that a crime was committed<sup>96</sup>. Therefore, civil courts are not bound by an administrative decision as to the evaluation of the facts of a case<sup>97</sup>. However, the Polish constitutional order is based on the separation of powers principle (Article 10 of the Constitution). Courts are therefore precluded from adjudicating upon a matter reserved by the law for administrative bodies. Hence, courts must respect legal situations created by final administrative decisions<sup>98</sup>.

Nevertheless, a decision of the UOKiK President classifying an agreement as restrictive of competition is declaratory in nature<sup>99</sup>. Anti-competitive practices contrary to the prohibitions contained in Article 6 of the Competition Act (and possibly Article 81 of EC Treaty) are void *ex lege*<sup>100</sup>. It would seem therefore, that courts should be able to decide if an agreement is anti-competitive independently of the UOKiK President. A similar position was taken by the Supreme Court in its resolution of 23 July 2008<sup>101</sup>. The resolution states that if a final administrative act declares the assessed conduct as anti-competitive, the court is bound by this conclusion but, in the absence of a UOKiK President's decision, civil courts can decide the matter independently. Current jurisprudence seems to point in the direction of civil courts being bound by final decisions of the UOKiK President, even though, there is no specific legal basis for such a restriction of judicial discretion. There is no *stare decisis* doctrine in Poland and the Supreme Court does not create law. In practice however, its resolutions and judgments are followed by lower courts. It is therefore likely that courts will accept the fact of a defendant's participation in an unlawful agreement on the basis of an administrative decision to that effect<sup>102</sup>.

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<sup>96</sup> Article 11 of KPC.

<sup>97</sup> See W. Siedlecki, Z. Świeboda, *Postępowanie cywilne. Zarys wykładu*, Warszawa 2004, p. 45–46.

<sup>98</sup> See the resolution of the seven judges of the Supreme Court of 9 September 2007, III CZP 46/07, (2008) 3 *Orzecznictwo Sądu Najwyższego – Izba Cywilna*, item 30.

<sup>99</sup> K. Kohutek [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Wolters Kluwer, Warszawa 2008, p. 421–425. It should be noted that the part of a decision where the President orders the addressee to do or refrain from doing something has a constitutive character.

<sup>100</sup> See Article 6(2) of Competition Act.

<sup>101</sup> The resolution of the Supreme Court of 23 July 2008, III CZP 52/08, (2009) 7–8 *Orzecznictwo Sądów Polskich*, item 86.

<sup>102</sup> See A. Jurkowska, "Antitrust Private Enforcement...", p. 74. The plaintiff would still have to prove the damage sustained, fault on part of defendant and the normal causal link between the unlawful act and the damage, see Article 415 of Civil Code.

This conclusion, even though reasonable in terms of uniform application of antitrust law<sup>103</sup>, is still controversial seeing as it lacks direct legal basis. The Supreme Court has relied on Article 16 of Regulation 1/2003 to justify the binding effect of UOKiK President's decisions on civil courts, even though this provision applies to decisions issued by the Commission only<sup>104</sup>. This conclusion is also called into doubt by an analysis of relevant literature from the period prior to the resolution. At that time, Polish doctrine predominantly believed that, even though a binding effect of administrative decisions finding an antitrust violation on civil courts adjudicating private claims seemed a rational and wanted solution, it was not yet introduced in any provision of Polish law<sup>105</sup>.

Hence, a small possibility exists that a court might allow the defendant, who was an addressee of a final UOKiK President's decision, to question its findings. The administrative act would then be treated like any other official document subject to free evaluation by the court<sup>106</sup>. Even so, it would be extremely unlikely for the defendant to be able to rebut such evidence considering that the decision was based on its own leniency statement. To conclude, leniency applicants should be ready to concentrate their defence in possible follow-on damages suits on the question of the amount of damage sustained by the plaintiff and the causal link between the execution of the agreement and the damage. Whether or not the court finds itself bound by the UOKiK President's decision, it would certainly treat it as the most important piece of evidence in the civil case. Considering, in particular, the confessional nature of leniency statements, a UOKiK President's decision is likely to be practically binding as to the fact that the defendant infringed antitrust rules<sup>107</sup>. So far, the negative impact of this state of affairs on the incentives to "blow the

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<sup>103</sup> The binding effect of Commission's decisions on Member State courts is stipulated by Article 16 of the Regulation 1/2003. Even before the enactment of his provision, such a rule existed by virtue of the case-law of the European Court of Justice – see *C-344/98 Masterfoods Ltd v. HB Ice Cream Ltd* [2000], ECR 2000 I-11369.

<sup>104</sup> See commentary to Article 16 of Regulation 1/2003 in K. Kohutek, *Komentarz do rozporządzenia Rady (WE) nr 1/2003 z dnia 16 grudnia 2002 r. w sprawie wprowadzenia w życie reguł konkurencji ustanowionych w art. 81 i 82 Traktatu (Dz.U.UE.L.03.1.1)*. Stan prawny: 2005.12.01, LEX/el 2006 and R. Whish, *Competition Law*, London 2003, p. 285–286.

<sup>105</sup> See M. K. Kolański, "Odpowiedzialność cywilna za szkody powstałe w wyniku naruszenia wspólnotowych zakazów stosowania praktyk ograniczających konkurencję i nadużywania pozycji dominującej" (2007) 11 *Przegląd Prawa Handlowego* 20–21; A. Jurkowska „Perspektywy...”, p. 28; *Biuletyn prawo konkurencji na co dzień* 6/2007, UOKiK, Warszawa 2007, p. 16.

<sup>106</sup> M. K. Kolański, "Odpowiedzialność...", p. 21.

<sup>107</sup> See B. Nowak-Chrzęszczuk, „Roszczenie odszkodowawcze w postępowaniu w sprawie o naruszenie wspólnotowego prawa konkurencji” [in:] E. Piontek (ed.) *Nowe tendencje w prawie konkurencji UE*, Warszawa 2008, p. 447.

whistle” has been limited seeing as it is fair to describe private enforcement of competition law in Poland as underdeveloped<sup>108</sup>.

## V. The scope of leniency recipients’ civil liability

The US is a good example of how the participation in a leniency scheme may affect the scope of the infringer’s civil liability and thus impact private antitrust enforcement. A statute enacted in 2004<sup>109</sup> (with a five-year sunset clause, recently extended by one year<sup>110</sup>) introduced major changes to the federal enforcement scheme, strengthening both types of incentives for applying for leniency – the “carrot” as well as the “stick”<sup>111</sup>. As far as the former is concerned, successful applicants are now offered a rebate on damages and removal of joint and several liability, if they provide “satisfactory cooperation” with claimants in follow-on civil lawsuits<sup>112</sup>. If the court determines that this condition was met, immunity recipients are held liable only for actual (rather than treble) damages attributable to their own share in the commerce affected by the violation. A similar limitation of the liability of a successful leniency applicant to its direct and indirect contractual partners, was suggested, although extremely cautiously, by the Commission in its White Paper on Damages Actions for breach of the EC antitrust rules (point 2.9).

Under Polish law, cooperating with the UOKiK President does not result in any change in the scope of the infringers’ liability towards private parties. Undertakings which obtain immunity or reduction of fines can receive no rebates on civil damages in subsequent lawsuits. They remain jointly and severally liable for the whole damage caused by their anti-competitive behaviour though with a right to contribution<sup>113</sup>. At the same time, none of the rules governing the Polish leniency scheme mentions redress, or any kind of assistance to antitrust victims as an additional requirement for whistleblowers. It is fair to say that in the US, interdependence between corporate amnesty and private enforcement is much closer – apart from the obligation to cooperate with the plaintiff

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<sup>108</sup> See A. Jurkowska, “Antitrust Private Enforcement...”, p. 75.

<sup>109</sup> Antitrust Criminal Penalty Enhancement and Reform Act (hereinafter: Antitrust Reform Act), Public Law No. 108-237, 118 Stat. 665 (2004).

<sup>110</sup> See Antitrust Criminal Penalty Enhancement and Reform Act of 2004 Extension Act, Public Law No. 111-30, signed by the US President on 19 June 2009.

<sup>111</sup> Pursuant to sec. 215 of the Antitrust Reform Act, sections 1, 2 and 3 of the Sherman Act were amended to substantially increase the penalties for antitrust violations.

<sup>112</sup> See sec. 213 of the Antitrust Reform Act.

<sup>113</sup> Article 441 of the Polish Civil Code (the Act of 23<sup>rd</sup> April 1964 – Civil Code, Journal of Laws 1964 No. 16, item 93 with amendments).

(a condition of obtaining a rebate), corporations applying for immunity are expected to make restitution to injured parties “where possible”<sup>114</sup>. Despite the lack of a comparable solution in the Polish scheme, the question of redress might nevertheless be taken into account as a factor for determining the amount of the fine. According to the Fining Guidelines, voluntarily removing the effects of the infringement shall be treated as a mitigating circumstance. When it exists, the amount of the fine, set at earlier stages, can be decreased by up to 50%<sup>115</sup>. It seems fairly clear that restitution to injured parties can be considered a “removal of the effects” of antitrust infringements.

In terms of *de lege ferenda* considerations, the chances of introducing a limitation on the recovery from successful leniency applicants are scarce in the Polish legal system. The prevailing opinion in the doctrine is that civil liability’s primary function has always been compensatory<sup>116</sup> – any departure from the principle of full compensation will cause a dispute. Still, in the opinion of the Constitutional Tribunal the said principle cannot be derived directly from the Polish Constitution. Instead, it was said to derive from a “regular” statute – the Civil Code. Consequently, it could be at least somewhat limited by another “regular” statutory provision<sup>117</sup>.

Such a provision applying to damages for antitrust infringements, if ever drafted, would certainly have many opponents. One author points out that a legislative act depriving antitrust victims of their right to seek redress from a leniency recipient would be similar to expropriation and thus require some form of state compensation<sup>118</sup>. However, the same author accepts the idea of limiting the scope of damages recoverable from a successful leniency applicant to *damnum emergens* only. Nevertheless, some commentators disagree because compensation for *lucrum cessans* often constitutes a substantial part of damages awarded in commercial cases<sup>119</sup>. Moreover, when the application of EC antitrust rules comes into play, limiting recovery to *damnum emergens* would be incompatible with the jurisprudence of the European Court of Justice<sup>120</sup>.

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<sup>114</sup> See point A. 5. of the US Corporate Leniency Policy, available on Department of Justice Antitrust Division website: <http://www.usdoj.gov/atr/public/guidelines/0091.htm>.

<sup>115</sup> See point 4. 1 c) of the Fining Guidelines.

<sup>116</sup> See J. Kuźmicka-Sulikowska, “Funkcje cywilnej odpowiedzialności odszkodowawczej” (2008) 9 *Przegląd Sądowy* 13.

<sup>117</sup> Judgement of the Constitutional Tribunal of 2 June 2003, SK 34/01, (2003) 6A *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy*, item 49.

<sup>118</sup> S. Sołtyśński, “Z doświadczeń...”, p. 47.

<sup>119</sup> M. K. Kolasiński, “Wspólnotowa polityka zwalniania z grzywien i zmniejszania ich wysokości w sprawach kartelowych po reformie z 2006 r.” (2008) 6 *Europejski Przegląd Sądowy* 29.

<sup>120</sup> See para. 100 of the ECJ judgement of 13 July 2006 in joined cases C-295/04 to C-298/04 *Vincento Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-06619.

In an official comment to the Commission's White Paper, the Polish Government expressly opted against using limits on damage liability as an incentive for the participation in a leniency scheme<sup>121</sup>. It stressed that public antitrust enforcement and private lawsuits should remain independent considering that they serve very different aims. The official statement concludes that providing the UOKiK with information revealing an infringement of antitrust law can be taken into account by civil courts as a fact justifying a moderation of the damages awarded against the whistleblower potentially because the defendant has contributed to minimizing the harm caused by the anti-competitive conduct. In the authors' view however, such a suggestion *de lege lata*, finds no support in general rules of civil liability. In particular, informing the UOKiK of an antitrust violation contributes to the prevention of future damage, rather than to harm already done for which the plaintiff may seek redress. The whistleblower remains jointly and severally liable for damages caused by an anti-competitive agreement from the moment it entered into it, to the moment it ceased participation.

Having considered the above, one might wonder whether the "full compensation versus an attractive leniency policy" problem could be solved by the introduction of multiple damages for, at least some, antitrust infringements. Although ultimately abandoned, such a proposition was put forward by the Commission in its 2004 Green Paper with respect to horizontal cartels<sup>122</sup>. Its clear advantage would be the possibility to grant a conditional rebate on damages to a successful leniency applicant without leaving any part of the plaintiff's harm uncompensated. In the authors' view, there are no serious obstacles against introducing double, or even treble, damages for antitrust violations in Poland especially, because such legal institution already exists in the Polish legal system<sup>123</sup>. Nevertheless, to the author's best knowledge, no such reform is to be expected, at least not in the nearest future.

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<sup>121</sup> Uwagi Rządu Rzeczypospolitej Polskiej dotyczące Białej Księgi Komisji Europejskiej z dnia 2 kwietnia 2008 r. w sprawie roszczeń odszkodowawczych wynikających z naruszenia wspólnotowych reguł konkurencji [COM(2008) 165 wersja ostateczna], available on the Commission's website: [http://ec.europa.eu/competition/antitrust/actionsdamages/white\\_paper\\_comments/rzad\\_pl.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/rzad_pl.pdf)

<sup>122</sup> See Option 16

<sup>123</sup> On the basis of Article 105 of the Polish Copyright Act (the Act of 4 February 1994 on copyright and related rights, consolidated text: Journal of Laws 2006 No. 5, item 31), an author whose economic rights have been infringed may, instead of seeking recovery under general rules, sue for "double or, where the infringement is culpable, **triple** the amount of the appropriate remuneration in the moment of its claiming" (emphasis added).

## VI. Concluding remarks

It is still difficult to draw definite conclusions about the intersection between the leniency scheme and private antitrust enforcement in Poland. Both of those instruments of deterring anti-competitive conduct are relatively new to the domestic legal system and civil actions, in particular, have so far been barely used in the area of competition law. In its current state, private enforcement is not a serious threat to the attractiveness of the leniency programme. Applications for immunity or a reduction of fines submitted to the UOKiK President are well protected against disclosure and, basically, cannot be used by private claimants without the applicant's consent. The only possibility of gaining access to them against the applicant's will is via a court order<sup>124</sup> and, in the authors' view, the chances of obtaining such an order seem weak. While it is true that this solution does not facilitate redress for antitrust victims, special protection of leniency statements seems fully justified considering that its lack could undermine the effectiveness of the whole scheme. That, in turn, would be disadvantageous to the injured parties as well since the existence of a final decision declaring an antitrust infringement makes civil litigation a lot less burdensome. Irrespective of whether or not UOKiK President's decisions formally bind civil courts – and in the authors' opinion this question still needs clarification – the perspective of follow-on actions may prevent some undertakings from applying for lenient treatment. That will be true however only if private enforcement actually gains popularity. Still, it might be necessary to consider introducing additional incentives for possible leniency applicants in the future, including the removal of joint and several liability or even a rebate on damages (the latter, however, would be highly controversial) but as for the present, any radical reforms of that kind do not seem necessary.

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<sup>124</sup> See point III.3 above.

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