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by

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Abstract

This paper's aim is to describe the rules governing the assertion of civil law liability in the event of a competition law infringement. Given the planned adoption and implementation of a new EU legislative package concerning private enforcement, it is useful to determine what legal instruments and procedures are already available under Polish civil law that serve the protection of market players. This paper will specify the legal basis for the assertion of civil claims associated with competition law infringements and present its particularity. Considered will be the provisions of the Polish Civil Code as well as the provisions of the law on combating unfair competition and the law on unfair market practices. Discussed will be the full catalogue of civil law claims that can be asserted in relation to antitrust infringements as well as the specific purposes of civil law liability in this context. The paper will also assess the model of determining the effects of competition law violations and analyse whether private law principles for the calculation of loss can be applied in antitrust infringement cases. Finally, the paper will discuss the issue of settling the convergence of liability problem and the proposal concerning the introduction into the Polish legal system of class actions.

Classifications and key words: private enforcement, court proceedings, damage actions, private parties, collective redress.

I. Introduction

Not only are civil law rules necessary for the institutional protection of competition, they should also ensure the protection of the individual interests of all market participants. The purpose of civil law is to limit the effects of competition restricting practices in the area of private law. By lodging a civil law clam, market participants can individually and directly obtain an enforced protection of their personal interests. That is the function of the provisions of the Polish Civil Code (KC), which govern civil liability.

The possibility of asserting civil law claims based on an infringement of the prohibition of competition restricting practices is a form of competition law enforcement by means of private law. Proceedings before civil courts are related to the protection of substantive rights of the parties and their private interest[1]. The legal basis for the assertion of civil law liability for competition law infringments derives from their "illegal" character, which is a direct result

[1] See A. Jurkowska [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 359; Resolution of the Supreme Court of 23 July 2008, III CZP 52/08, (2009) 7 *Biuletyn Sądu Najwyższego* 6.

of the fact that Article 6(2) and Article 9(3) of the Polish Competition and Consumers Protection Act (hereafter, Competition Act)[2] contain an explicit prohibition of competition restricting practices.

Public courts are competent to apply the rules of civil law liability. They may declare the "invalidity" of a practice and decide other related civil law claims. Where competition restricting practices take place: damages claims, cessation claims and rulings guaranteeing the enforcement of due conduct should be deemed to be admissible. Nothing stands in the way of the application of other civil law instruments to competition law infringements such as, for example, measures serving the purpose of the conservation of claims.

Into civil law, common courts can declare an action contrary to the provisions of the Competition Act to be invalid or adjudicate compensation irrespective of whether the antitrust authority has already decided on the case. Legal proceedings relating to competition law infringements are autonomous with regard to their administrative counterparts. However, a decision of the President of the Competition and Consumer Protection Office (UOKiK) is prejudicial (or even binding if it is final) on a court in the same case[3]. The principles of public and private liability have a complementary character in the context of competition law[4].

Furthermore, under the provisions of Regulation No 1/2003, common courts are also obligated to rule on potential infringements of EC antitrust rules contained in Articles 81 and 82 TEC. The possibility of private enforcement of EC law under domestic civil law regimes is a consequence of the fact that EC rules apply directly within the framework of national legal orders of its Member States[5].

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[2] Competition and Consumers Protection Act of 16 February 2007 (Journal of Laws 2007 No. 50, item 331, with amendments).

[3] See A. Jurkowska [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa*…, p. 359. See: judgement of the Supreme Court of 4 March 2008, IV CSK 441/07, unpublished; Resolution of the Supreme Court of 23 July 2008, III CZP 52/08.

[4] See The Government's standpoint on the Green Paper concerning the assertion of claims for damages in connection with a breach of competition rules adopted by the European Committee of the Council of Ministers on 24 March 2006.

[5] See M. Szpunar, *Odpowiedzialność podmiotu prywatnego z tytułu naruszenia prawa wspólnotowego*, Warszawa 2008, p. 336. See judgements of the ECJ in following cases: C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297, combined cases C-295-298/04 *Vinzenco Manfredi vs. Lloyd Adriatico Asscurazioni SpA, Antonio Cannito vs. Fondiaria Sai SpA and Nicolo Tricarico and Pasqualina Murgolo vs. Assitalia SpA* [2006] ECR I-6619. See also: White Paper on Damages Actions concerning breach of antitrust rules (2008), 165 final, SEC (2008) 404, (2008) 405, (2008) 406.

II. Legal basis for civil actions and their assessment

1. Polish Civil Code

Polish competition law does not contain any provisions providing the means to directly protect individual interests of market participants harmed as a consequence of competition restricting practices. In other words, it is impossible to demand or adjudge compensation under the Polish Competition Act itself. The absence of such instruments within the framework of competition law is compensated by the provisions of the KC. Liability rules stemming from civil law are to be applied if the provisions of competition law are violated in the area of private law. The rules contained in the KC form the basis that guarantees the protection of individual interests of market participants in the event of a competition restricting practice taking place.

Liability rules in tort may form a practical basis for damages and cessation claims related to antitrust infringements. However, an effective assertion of civil law claims depends on whether the general premises of liability in tort are demonstrated. On their basis it is subsequently possible to consider which claims can be asserted (their premises can be inferred from civil law rules). As far as antitrust cases are concerned, it is fair to assume that injunctive relief of the prohibitive type is likely to be raised first – cessation requests are of key importance here since they make it possible to put a stop to an infringement. Later, demands for financial compensation may be considered. A complete settlement of the conditions resultiung from an infringement may be reached once claims for damages or the return of unjust benefits are lodged (see: Article 415 and Article 405 KC).

When deciding on private law relationships within the framework of private enforcement of competition law, common courts do not act directly in favour of the public interest. However, extending the scope of competition law enforcement into the area of private law should help improve the effectiveness of the UOKiK. Still, resorting to general civil law rules may prove insufficiently effective in relation to property-related claims aimed at the protection of antitrust rules. It can be suggested therefore, that, as far as claims based on civil law are concerned, it is appropriate to explore competition law for specific rules.

2. Law on Combating Unfair Competition

Those affected by the consequences of competition restricting practicies may enjoy individual protection provided by a court under the law on unfair competition. The Act of 16 April 1993 on Combating Unfair Competition[6] (hereafter, Unfair Competition Act) is primarily aimed at the protection of the public interest. However, it also protects the interests of business entities and customers. Its provisions are intended to create the means necessary to eliminate conduct that adversely affects competition relations. Article 18(1) lists the applicable claims: damages and cessation claims, claims to hand over unjust profits and to remove the effects of an illegal action, claims to make a single or repeated statement of a given content and in a given form as well as claims to pay an adequate sum of money to benefit a specific social purpose related to the support of Polish culture or protection of national heritage. Where the protection into civil law rules converges with the protection under the law on combating unfair competition, the entitled entity may choose which claim serves best the protection of his or her private interests.

A civil law structure of tort-based liability is applied to the infringements of the provisions of the Unfair Competition Act. Article 3(1) declares that an act of unfair competition consists of an activity contrary to the law or good practice which threatens or infringes the interest of another business entity or customer. This definition is supplemented by an exemplary list of specific unfair competition acts contained in Articles 5–17 of the Unfair Competition Act. The premise of being "contrary to the law", set in Article 3(1), is fulfilled with regard to activities meeting the statutory characteristics of unfair competition acts – they may include, in particular, competition law infringements. Thus, the concept of being "contrary to the law" should be understood as covering infringements of the prohibition of competition restricting practices specified in Article 6(2) and Article 9(3) of the Competition Act. Thus, a competition restricting practice can be qualified as an act of unfair competition which gives civil law protection to those injured by an antitrust violation. As a result, it is possible to apply the sanctions listed in Article 18 of the Unfair Competition Act to competition law infringement. Specific acts of unfair competition, as described in Article 15 of the Unfair Competition Act, may also serve as a legal basis for the aforementioned claims. Article 15 contains a catalogue of unfair competition acts that impede other business entities access to the market (entry barriers).

[6] Consolidated text: Journal of Laws 2003 No. 153, item 1503 with amendments.

Among those relevant to antitrust, the impediments may include prohibited price practices, discrimination and boycotts[7].

3. Law on Counteracting Unfair Trade Practices

Considering the scope of competition restricting practices, it is also possible that consumer interests might be infringed as a consequence of their application in the private law area. The protection of consumers may now be carried out in proceedings initiated against a business entity in connection with competition restricting practices and practices infringing upon the collective interests of business entities, the latter beeing a form of conduct that prevents the development of competition[8]. Legal rules intended to provide a high level of consumer interest protection were introduced into the legal systems of EU Member States on the basis of Directive No. 2005/29/EC of the European Parliament and Council of 11 May 2005 concerning Unfair Business-to Consumer Practices in the Internal Market[9]. In Poland, it was implemented by the Law on Counteracting Unfair Market Practices (hereafter, Unfair Market Practices Act)[10].

The structure of the prohibition of unfair market practices should be stressed. It is expressed through the premises of the general clause contained in Article 4 of the new Act. According to the statutory definition, a market practice of a business entity is deemed to be unfair to consumers if it is inconsistent with good practice and materially does, or may, distort the market behaviour of an average consumer prior to, in the course of, or after the entry into a product-related agreement. They are exemplified by misleading and aggressive market practice and the use of an illegal best practice code.

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[7] See T. Skoczny (in:) J. Szwaja (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, 2nd ed., Warszawa 2006, p. 553 and subs.

[8] Pursuant to its Article 23a, a practice violating the collective interests of consumers is understood as an illegal practice of a business entity infringing upon that interest. A sum of individual interests of consumers does not equal their collective interest. Among practice deemed to violate the collective interest of consumers are: infringements upon the obligation of providing consumers with correct, accurate and complete information, unfair or misleading advertisement. The defence provided by the Unfair Market Practices Act does not preclude the protection of collective interests of consumers under other legislation such as the Unfair Competition Act.

[9] OJ 2005 L 149/22.

[10] Counteracting Unfair Market Practices Act of 23 August 2007 (Journal of Laws 2007 No. 171, item 1206).

It should also be noted that while intended to guarantee effective enforcement of consumers' rights, Article 12(1) of the Unfair Market Practices Act authorizes a consumer to fail individual claims only. A consumer may submit a claim to cease the given practice, to remove its effects, to make a single or repeated statement of a given content and in a prescribed form and to repair the damage inflicted in accordance with general principles. A consumer can also request the invalidation of the agreement with an obligation of mutual return of conducted acts and the refund of the costs related to the acquisition of the product. Finally, consumers can submit a claim to adjudicate a given sum of money to a specific social purpose related to the support of the Polish culture or the protection of the national heritage or consumers. The Unfair Market Practices Act also contains a legal instrument that shifts the burden of proof onto the business entity charged with the use of misleading market practices. Its introduction, correct in principle seeing as it is meant to help consumers take advantage of the protection provided by the law, may however encourage them to submit many unsubstantiated claims.

III. Types of pecuniary claims in the event of a competition law infringement

1. Injunctive relief

Civil law instruments, the purpose of which is to elevate the effects of an infringement, are covered by civil law liability. The assertion of claims related to antitrust infringements is based on a choice between actions of a negative character and compensatory instruments.

Injunctive relief may include cessation claims and claims for the removal of the effects of the unlawful practice. The claim to make a given statement holds a special position and, due to its nature, should be treated as a specific type of claim. The basic purpose of injunctive relief is to stop the infringement and remove its effects by way of a specific action of the obligor. It is therefore different to compensatory claims that are meant to settle the legal situation that occurred as a consequence of an infringement. Undoubtedly, a claim to cease an infringement and a claim to remove its effects are intended to create a legal situation consistent with the law. In the case of negative claims, it is sufficient to determine which event constituted an infringement and show the premises of its illegality. Not taken into account are subjective circumstances concerning the incorrectness of the actions of the infringer such as, in particular, his guilt.

1.1. Cessation claims

In competition law, cessation claims contain a request to issue a prohibition to continue an illegal activity. The request may pertain to a situation where an unlawful act was committed, where there is a risk of repetition or in cases of a real risk that an illegal act will be committed in the future. A cessation claim is a typical prohibitive claim in relation to competition law. It should specify the method of the prohibition such as, for instance, a ban on trading of goods that were illegally labelled or the price of which was determined in violation of antitrust rules. No general ban on conduct may be requested – the prohibition should be related to particular activities only. A direct relationship exists between a precise specification of a ban and enforcement proceedings where its effects can only be examined in relation to the forms of activities specified in the cessation request[11].

A cessation order cannot attempt to make it impossible for its addressee to conduct business activities – the purpose of a cessation order is limited to stopping illegal practices only[12]. In particular, jurisprudence has expressed the view that cessation claims cannot contain a request to liquidate the competitive operations of an infringer[13]. Furthermore, prohibitive claims cannot contain positive obligations (the purpose of a prohibitive claim is not to compensate loss) – a cessation request only pertains to the abandonment of unlawful activities. It is based on the demonstration of the capacity to sue and so the plaintiff must demonstrate the substantive basis for the cessation claim. The entitled person lodges a request at the point when the infringement occurred. Already the determination of the very events of which the infringement consists may be important for the legal situation of the parties. In particular, such determination may form the basis for further damages claims. The moment of making a request for protection may influence the scope of the injunction granted. It should also be demonstrated that the infringement continues or that a repeated infringement is possible[14].

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[11] See J. Szwaja [in:] J. Szwaja (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2008, p. 835–836 and subs.

[12] See judgment of the Supreme Court of 26 February 2004, I KZP 47/03, (2004) 3 *Orzecznictwo Sądu Najwyższego – Izba Karna i Izba Wojskowa*, item 35.

[13] See judgment of the Administrative Court in Gdańsk of 12 January 1996, I ACr 950/95, (1996) 6 *Orzecznictwo Sądów Administracyjnych*, item 26, p. 21. See J. Szwaja [in:] J. Szwaja (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2008, p. 836.

[14] As a comparison, it is useful to refer to the principle of *equity* applicable in the US where, in order to obtain a cessation order, the following circumstances must be substantiated the fact that: 1) the plaintiff will suffer non-compensable loss if the defendant does not cease the violation; 2) other means available will not compensate the loss; 3) the consideration of affliction on the entitled person and the perpetrator, speaks in favour of a cessation order; 4) no

1.2. Claim to remove the consequences of an infringement

A claim to remove the consequences of an unlawful practice falls into the category of restitutive measures (*restitutio ad integrum*). It can be associated with claims to make a statement, to redress loss and to return unjust profits. It can be asserted independently or jointly with other claims and, in particular, it can supplement a cessation request. Cumulating claims depends on the factual status of the case. The purpose of this claim is to remove the actual effects of an infringement – it is not aimed at other goals such as the plaintiff gaining an unreasonable competitive advantage thanks to the litigation. Article 363 § 1 KC can be used to try to determine the relationship between individual claims[15]. A claim to remove the effects of a violation of an exclusive right is not a compensatory measure. Submitting a claim to remove the effects of a violation, the plaintiff should prove that the defendant committed an infringement the results of which persist. He must also demonstrate a nexus between the violation and the negative consequences in the area of the operation of the infringement. Most of all, the plaintiff should describe the character of the violation and its effects on the plaintiff's market situation.

Polish law does not contain a catalogue of activities and measures intended to remove the effects of an infringement and thus, any form of a permitted order can be applied provided that its purpose is to restore lawful conditions and that it bears a factual relationship with the contested conduct. The removal of the effects of an infringement should apply to its normal and direct consequences. When analysing such a claim, the effects of the violation of the sphere of the plaintiff's interests should be assessed. They may take the form of an infringement of the interests of the injured business entity and, as a result, potential loss of clients. This sort of claim can address effects such as: a drop in production, the liquidation of all or part of the injured party's operations and a reduction of the number of employees etc.

According to Article 187 § 1(1) of the Polish Code of Civil Procedures (KPC), the plaintiff must precisely specify in the statement of the claim what activities must the defendant perform in order to remove the effects of the unlawful activity and enable the enforcement of the judgment in the enforcement proceedings (Article1050 KPC)[16].

public interest speaks against such verdict. See: M. du Vall, *Prawo patentowe*, Warszawa 2008, p. 410 and the ruling of the Supreme Court of the United States of America in the legal position issued for the Federal Court of Appeals (Ceriorari) dated 15 May 2006 in re: E-bay Inc. Et.al. v. Mercexchange, LLC – Fed.Circ.2006, No. 05-130, available at http://www.supremecourts.gov/opinions/05pdf/05-150.pdf.

[15] See J. Jakubecki, *Restitutio ad integrum w sądowym postępowaniu cywilnym*, Lublin 1993.

[16] See J. Szwaja [in:] J. Szwaja (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2008, p. 842.

1.3. Claim to make a statement

In light of the law on unfair competition, a claim to issue a statement or publish the content of a judgment may be asserted as a specific form of an action to remove the effects of an unlawful activity or as an independent claim as referred to in Article 18(1)(3) of the Unfair Competition Act. Statement claims are meant to restore the conditions that existed prior to the infringement. Making a statement of a given content is also a special method of regulation of the effects of an infringement. Legal doctrine emphasizes that statement claims may perform a compensatory, instructive and preventive function[17].

The examination of the range of the defendant's activities should be of essential guidance when formulating statement claims. It should be assessed, in particular, whether the contested practice took place in the entire or only a given part of the country, whether it affected all or only a group of clients, what effects it had on consumers, how long the infringement lasted and what consequences it had (e.g. in the press or mass media). When adjudicating an obligation to make a statement, the court has the right to determine the form of the statement on the basis of an assessment of the conduct of the perpetrator. If the defendant is found guilty, the content of the statement may include the announcement of that guilt.

Aside from statement claims to be made by the defendant, the plaintiff may also request the publication of the judgment in whole or in part. This type of request seems to fall into the category of statement claims or claims to remove the effects of an infringement. An intentional publication of a verdict without the consent of the court is not permitted, where it may pose a risk to the interests of the parties to the legal proceedings (also the defendant). In such a case, the principle of proportionality should be applied, which delineates the limits of the activities that should be taken in order to remove the effects of an infringement.

2. Compensatory claims

Compensatory claims constitute another category of civil law claims relevant to private enforcement of competition law. They include damages claims and claims to return unjust profits gained in relation to the unlawful practice. As far as damages claims are concerned, it is appropriate to use the tort regime of

[17] Ibidem, p. 846; E. Nowińska, M. du Vall, *Prawo własności przemysłowej*, Warszawa 2005, p. 191. See E. Wojcieszko-Głuszko, "Roszczenie o złożenie oświadczenia w prawie nieuczciwej konkurencji" (2004) 88 *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej* 220 and subs.; I. Mika, "Roszczenie o ogłoszenie oświadczenia w prawie wynalazczym" (1997) 67 *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej* 40–41.

the KC. In compensatory claims, the change in the financial situation resulting from a competition law infringement may be assessed in the context of the assets of the entitled person or the infringer or both. Depending on which point of view is adopted, either damages claims or claims to return unjustified profits may be used.

2.1. Damages claims

Damage repair claims constitute the basic means of compensation that protects those affected by the results of an unlawful conduct into civil law. The general principles of the KC may be applied to claims to redress damages under competition law including: liability for damages (Article 361 KC) and liability in tort (Article 415 KC). The extent of the liability for damages is generally determined with regard to a specific entity that is part of the group that can participate in the legal proceedings as a defendant (passive legitimacy). According to Article 422 KC, this group includes abettors and accessories. Joint and several liability of cooperators is the rule in industrial property law (Article 441 KC)[18]. Damages claims and their individual forms are based on general principles of damage liability, as well as on Article 363 § 1 KC. Pursuant to this provision, loss should be redressed at the injured party's discretion, either through the restoration of pre-infringement conditions or through the payment of a given sum. However, if restoration is impossible or entails excessive burdens or costs for the obligor, the injured party's claims are limited to pecuniary solutions only.

Among the fundamental issues relating to the specification of damages claims lies the method used to determine the extent of the loss and the amount of the unjustified benefits subject to return. Damages claims are based on the general structure of civil law liability that makes it necessary to show the loss that follows from the infringement and its amount as well as the infringer's guilt and their nexus.

[18] When determining the liability of more than one infringer, it should be indicated that an entrepreneur is accountable for his own conduct which constitutes an act of unfair competition as well as those of his subordinates. Liability is based on the tort regime under Article 430 KC. The determination of accountability for the conduct of subordinates is facilitated by un-named guilt – liability is not precluded by the anonymity of the one who caused loss within organizational structure of the business organisation. It is only the nexus between the perpetrator and the business entity that has to be substantiated. The basis for the nexus may be employment or a civil law relationship. It should also be demonstrated that the activity of the perpetrator resulted from an activity he or she was entrusted with. In accordance with the general rules of the KC, liability for an act of unfair competition also includes the form of tort based on guilt in choice (*culpa in eligendo*).

Under the law on combating unfair competition, general principles of the KC should be applied to claims to redress loss (Article 18(1)(4) of the Unfair Competition Act)[19]. The concept of loss is construed in an analogue way in the law on combating unfair competition and in civil law, in particular, within the scope of liability in tort. Therefore, one may maintain that the model of liability pertinent to the commitment of an act of unfair competition is convergent with the model of liability in tort.

2.2. Effects of a competition law infringement – calculation of loss

The determination of the amount of loss under competition law constitutes a very difficult task directly related to evidence hearings. The amount of damages claims is determined in accordance with general principles – neither the KC nor the Unfair Competition Act provide a possibility to redress loss in case of liability in tort in accordance with alternative principles[20]. Thus, antitrust damages are calculated in accordance with general principles on the basis of the principle of full compensation. As a result, the method should be emphasised that considers the adverse economic effects of the given event to be a relevant consequence to the entire financial situation of the injured party. The method also takes into account the calculation of loss in accordance with the differentiating method[21].

The differentiating method of determining the amount of damages is based on a comparison between the current financial condition of the injured party and its hypothetical situation likely to have existed had no infringement occurred. A hypothetical course of events must be presented in each specific case that would illustrate likely events.[22] The differentiating method is a basic theory of compensative law which has been adopted in many legal systems which can be applied to its full extent in relation to the calculation of financial loss as part of liability under competition law. Clearly, one should consider

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[19] See J. Szwaja [in:] J. Szwaja (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2008, p. 853 and the above-referred literature.

[20] Claims for lump-sum compensation are possible under the intellectual property law; See: Directive enforcement.

[21] See A. Koch, *Związek przyczynowy jako podstawa odpowiedzialności w prawie cywilnym*, Warszawa 1975, p. 59.

[22] See: judgment of the Supreme Court of 11 October 2001, II CKN 578/00, (2002) 6 *Orzecznictwo Sądu Najwyższego* 2002, item 83, (2002) 6 *Orzecznictwo Sądów Polskich*, p. 310, with an annotation by M. Kępiński; see comments to the above judgment: J. Jastrzębski [in:] (2003) 4 *Przegląd Prawa Handlowego* 50; J. Piś-Barganowska [in:] (2003) 2 *Przegląd Sądowy* 89; A. Kołodziej [in:] (2003) 7–8 *Przegląd Sądowy* 168. B. Gadek, "Szkoda wyrządzona czynem nieuczciwej konkurencji – zagadnienia wybrane" [in:] *Odpowiedzialność cywilna. Księga pamiątkowa ku czci Profesora Adama Szpunara*, Kraków 2004, p. 637.

certain difficulties following from this method. They derive primarily from the problems associated with the determination of the factual background of a case (hypothetical conditions that would have existed had no loss-inflicting event occurred), which is based on probable approximations. In practice, the credibility of particular scenarios is verified by economic experts[23].

The method of structuring damages claims should not generally be called into question in the field of competition law. Critical comments pertain to the way it is carried out in practice. It is often extremely difficult, if not even impossible, to prove the exact amount of loss specified in the request. Thus, there is frequently the need to rely on judicial assessment and the rules of equity. However, the latter approach should have a subsidiary function – it should be applied only where the evidence offered in connection with an infringement turns out to be insufficient to precisely judge the loss incurred.

The particularity of the assertion of claims under competition law might also be a reason to supplement substantive law, within the framework of general principles of damages liability, with the application of procedural rules that support the legal situation of the entitled person. For instance, if the amount of a damages request cannot be exactly substantiated, Article 322 KPC offers judges the possibility to adjudicate a sum, according to their own assessment, based on the examination of all the facts of a case. This provision should be applied very prudently – even if the plaintiff has indeed great difficulties in presenting the necessary evidence, he is not released from the obligation to substantiate his loss and its amount in accordance with general principle specified in Article 6 KC.

That method of adjudging damages is purposeful – the method of calculating compensation associated with competition law infringements is characterized by the absence of exact and unambiguous sums. Concurrently, the application of Article 322 KPC does not give unlimited discretion to judges[24] – the burden of proof regarding the substantiation of the amount of loss cannot be shifted to the infringer. Under Polish law, the principle *ex aequo et bono* cannot be applied in a discretionary fashion to the basis on which the loss is established and its amount determined. However, the way in which Article 322 KPC is applied may vary as far as the determination of the amount of loss is concerned, depending on the function attributed to civil law liability.

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[23] See A. Duży, "Dyferencyjna metoda ustalania wysokości szkody" (1993) 10 *Państwo i Prawo* 57.

[24] See T. Dybowski, *System prawa cywilnego* (Vol. III Zobowiązania), Ossolineum 1986, p. 282 and judgment of the Supreme Court of 16 December 1963, I CR 412/62, (1964) 10 *Orzecznictwo Sądu Najwyższego*, item 212.

2.3. Proposal for new principles for the calculation of loss

If the effects of an infringement are not easily identifiable in the assets of the injured party, then the application of the differentiating method might not lead to a specific determination of loss incurred and its extent. Instead, the application of "objective criteria" for the determination of compensation under competition law can be contemplated considering the characteristics of infringements that may be qualified as such. This method of calculating compensation is characterized by its partial detachment from the individual situation of the injured entity and the attempt to determine the amount of loss in abstract terms. The objective criteria of calculating loss are based on neutral measurement factors such as the normal value of the object of the right or an average market value of the transaction. Indeed, in same cases the actual amount of loss is no being determined at all in light of the major difficulties, or even impossibility, of the application of traditional loss-calculating methods.

Although the adoption of objective criteria (essentially abstract) may yield practical benefits, it also raises many problems. Among them lies the question of whether the basis for liability is found in the amount of loss or whether the decision concerns compensation only? Doubts raised in this context include also the question of whether this is a method of calculating the amount of loss or a regulation of "objective loss"? The abstract method ignores the need to show a nexus between the infringement and the loss of a specific amount, it is based on the fictional assumption that profits generated by the infringer correspond to the amount of profits that would have been generated by the entitled person. For that reason, the abstract method of calculating loss is deemed to be a neighbouring institution that does not fall within the general framework of damages liability, rather than a method of compensating loss.

The objective method of calculating loss also includes the determination of the amount of loss on the basis of a license fee and the calculation of loss in relation to the amount of profits generated by the infringer. Civil law liability may include models different from its general principles such as lump sum compensation, repeated compensation or punitive compensation. Introduced may also be principles limiting the obligation to redress damages or the possibility of determining loss without considering the question of guilt, that is, based solely on objective criteria (e.g. the very fact of finding a law infringement)[25]. The said solutions are generally justified by the type of legal relationships under assessment and, in particular, the type of infringements

[25] See T. Dybowski, *System*…, p. 197. It is worthwhile mentioning that Article 361 § 2 of the KC provides for an option of departure from the general principles of redressing loss. Pursuant to the said standard: "unless otherwise provided by the statutes", different principles for determination of liability for damage may be introduced as a specific solution.

(e.g. in consumer turnover or the specific character of relationships with the participation of a professional)[26]. Thus, other relationships falling within the scope of competitive relations may also be open to different solutions due to difficulties in evidence presentation and the scale of infringements. Changes to general principles are undoubtedly meant to reinforce the protection given to market participants.

The aforementioned comments should be considered in the pending discussion concerning the system of competition law protection, in particular, with regard to the structuring of claims vested in the entitled person. The extensive catalogue of available claims could, in theory, provide strong protection for market participants. However, the question of whether they are actually effective depends on which claims are used, on their mutual relationship and their assertability in a lawsuit.

2.4. Claim to hand over unjust benefits

In an event of a competition law violation, the assertion of a claim to return unjustified profits should be considered in addition to actions for damages. The law on unfair competition expressly accepts the application of the provisions on unjust enrichment contained in the KC. Article 18(5) of the Unfair Competition Act deals with the return of benefits generated unjustly pursuant to "general principles", in other words, according to the provisions of Article 405 and subsequent of the KC[27].

A claim to hand over unjustified profits makes it possible to request the return of benefits generated in kind or, should this be impossible, refund of their value in cash. The premises for such a claim consist of the enrichment of one party and the impoverishment of another, provided there is a nexus between the enrichment and the impoverishment and the former is unjust[28]. The burden of proof of the premises pursuant to Article 6 KC rests with the party seeking the return of unjustified benefits. Hand over claims entail significant evidentiary difficulties in practice, which are comparable to the assertion of damages claims. In specific circumstances, it should be precisely specified that subject to return are not the entire proceeds (gross amount) or whole income (net amount) generated by the unjustly enriched party, but only

[26] See the regulations concerning insurance, transport, mail; see Article 849 of KC.

[27] The view that Article 405 KC and subsequent may be applied under the law on unfair competition finds approval of J. Szwaja [in:] J. Szwaja (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2008, p. 869.

[28] See J. Szwaja [in:] J. Szwaja (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2008, p. 869, and the referrals quoted therein.

that portion which is related to the infringement[29]. Asserting a hand over claim jointly with a damages claim (or other financial claim) brings about a risk of excessive compensation to the injured party and thus, must to be avoided in accordance with the dictum *ne quis damo sup lucrum faciat*[30].

3. Other claims

3.1. Claim to determine a legal relationship or right

In addition, an action may also be lodged with the aim to determine a legal relationship or right. Lodging a determination claim is possible in light of the invalidity sanction contained in the Competition Act. The invalidity sanction is a civil law consequence of the violation of the prohibition of practices restricting competition. It is the only civil law norm that is *expresis verbis* contained in the Competition Act[31]. It follows from the content of its Article 6(2) and Article 9(3), that their violation results in the invalidity of the relevant practice in whole or in part. The invalidity pertains substantially to effects under private law, the very concept of invalidity is regulated into civil law. Jurisprudence and doctrine confirm[32] that the sanction contained in Article 6(2) and Article 9(3) of the Competition Act has an *erga omnes* character – any entity may claim invalidity. In particular, the partiets to an agreement as well as third parties may claim invalidity if they have an interest in challenging its legality[33].

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[29] See ibidem, p. 872; E. Łętowska, *Bezpodstawne wzbogacenie*, Warszawa 2000, p. 53 and 72; A. Kołodziej, Annotation to judgment of the Supreme Court of 11 October 2001, II CKN 578/99 (2003) 7-8 *Przegląd Sądowy* 168.

[30] See: J. Szwaja [in:] J. Szwaja (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2008, p. 873; W. Dubis, "Zbieg roszczeń a skarga z bezpodstawnego wzbogacenia" (2002) 1 *Przegląd Sądowy* 33; E. Łętowska, *Zbieg norm w prawie cywilnym*, Warszawa 2002, p. 99 and subs.

[31] See P. Podrecki, *Porozumienia monopolistyczne i ich cywilnoprawne skutki*, Kraków 2000, p. 220.

[32] See Decision of the President of the Office of Protection of Competition and Consumers of 30 April 2007, DOK-53/2007; see also resolution of the Supreme Court of 23 July 2008, III CZP 52/08; judgment of the Antimonopoly Court of 29 December 1993, XVII Amr 44/93, (1994) 6 *Wokanda*.

[33] See E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2002, p. 87, S. Gronowski, *Ustawa antymonopolowa – komentarz*, Warszawa 1999, p. 170: "in addition to civil law sanctions, the entry into an arrangement prohibited under Article 5(1), which has not been legalized under Article 6 or 7, always entails simultaneous administrative and legal consequences. They include, in particular, that the UOKiK President declares it to be a competition restricting practice and issues an order to cease it (See: Article 9(1) and Article 11a of the Law) or the imposition of a fine (See: Article 101(1)(1) of the Law).

Invalidity is always an immediate sanction with respect to the parties to an illegal agreement.

Only a common court, acting pursuant to Article 189 KPC while declaring the existence or non-existence of a legal relationship or right, or examining a case of execution of an invalid agreement, is compentent to deliver a verdict. Claims to determine a legal relationships are not regulated by specific provisions of substantive laws – they are based on Article 189 KPC instead. From its content, a general division of claims can be inferred: "positive actions", where the existence of a right or legal relationship is ascertained and "negative actions", where the absence thereof is claimed by the plaintiff. In antitrust cases, a request to determine that an agreement is invalid is considered to be a negative action because the plaintiff requests in the content of the claim that the court declares that no legal relationship exists between the parties in the light of an antitrust infringement. It is not generally possible to demand the finding of a factual status or fact in such proceedings[34].

An action to determine a legal relationship or right may be preventive under the assumption that the proceedings are meant to remove uncertainty with regard to a legal relationship or right[35]. In the context of Article 189 KPC, prevention seems to be understood as a possibility to clarify the legal situation of the plaintiff before financial claims are filed. A verdict delivered under Article 189 KPC performs then the function of a preliminary ruling. Still, determination claims continue to be independent actions aimed at a clear determination of a legal situation from the point of view of the plaintiff's legal interests.

3.2. Payment of an adequate sum of money to a social goal

Pursuant to Article 18(6) of the Unfair Competition Act, an entitled person may demand the adjudication of an adequate sum of money to a specific social purpose related to the support of Polish culture or protection of national heritage, provided that the act of unfair competition was deliberate. In theory therefore, such an action may be lodged in connection with competition law

[34] See: judgment of the Supreme Court of 22 May 1953, I C 22/53, (1954) 3 *Orzecznictwo Sądu Najwyższego* 58. However, jurisprudence accepts the admissibiloty of requesting that a fact of a lawcreating character is established if it is aimed at the determination of a right or legal relationship. See: judgment of the Supreme Court of 8 October 1952, I C 1514/52, (1953) 8–9 *Państwo i Prawo* 369 and judgment of the Supreme Court of 11 September 1953, I C 581/53, (1954) 3 *Orzecznictwo Sądu Najwyższego* 65.

[35] See: E. Nowińska, M. du Vall, "Powództwo o ustalenie z zakresu własności przemysłowej" (2007) 100 *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej* 337 and subs. and the judgment of the Supreme Court of 14 July 1972, quoted therein, III CRN 607/71, (1973) 4 *Orzecznictwo Sądu Najwyższego* 64.

infringements. The function and significance of this provision needs to be discussed in the context of all the other legal rules guaranteeing civil law protection. First, a general question needs to be answered concerning the function of claims where a payment is demanded to be made by the infringer in favor of a social organization or institution acting in the public interest? Second, is such solution needed in the competition protection system?

The function of this type of action is clearly to impose an additional sanction on the infringer. Under the assumption that it has a repressive character – the amount of the adjudicated payment influences the scope of the infringer's external operation. As a result, the action's aim is general prevention. Even if it falls within the ambit of civil law claims, a request to pay "punitive and exemplary damages" (*nawiązka*) has the character of a penal sanction. In this case, the civil law character of liability is combined with penal repression. The mixed character of this type of action is comparable to the institution of punitive and exemplary damages and the so-called "*pokutne*" (claim to pay a specific sum of money in favor of a specific organization for its statutory purposes, if the infringement was deliberate).

Literature has criticised such actions due to their unwanted repressive role and the penal character of measures offered in civil law provisions[36]. A request of that type is based on the demonstration of the infringer's guilt, a fact which suggests its close relationship to the damages liability regime. However, the adjudication of such a claim is not meant to compensate the loss of the injured party. The claim to make an adequate payment (in favor of a social goal) is also independent from hand over of unjust benefits claims (in favor of the injured party). This is a measure disproportionate to antitrust infringements of property-related rights because its scope goes far beyond the basic compensatory function of civil law.

3.3. Class actions

Polish law does not contain the possibility of class actions. The provisions of the KPC permit a court to jointly examine actions lodged by several different plaintiffs only if their claims are based on an identical factual and legal basis (formal joint participation, see also: Article 72 § 1(2) KPC). Pursuant to Article 73(1) and Article 74 KPC, each plaintiff acts in his or her own name and has the right to individually support the case. Summoned to the trial are all joint participants with respect to whom the case has not been yet completed.

It can be assumed, based on the general provisions of the KPC, that anyone affected by the consequences of the prohibition of competition restricting

[36] See: J. Szwaja [in:] J. Szwaja (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2008, p. 873; E. Nowińska, *Prawo własności przemysłowej*, Warszawa 2005, p. 163.

practices should have the option to initiate legal proceedings. In addition to business entities and parties devoid of such status, the possibility of the initiation of proceedings by a consumer or a social organization permitted to act under applicable provisions even if it has no legal personality (Article 64 and 65 KPC) should also be considered.

Authorizing consumers to sue will only be an effective contribution to the effectiveness of antitrust enforcement if class actions are permitted. The possibility of filing a single combined lawsuit may indeed greatly improve the effectiveness of private enforcement of competition law. Among the main legal and economic reasons why class actions should be permitted is the possibility of asserting civil law liability in cases where the value of the object of dispute is very low. That is true, in particular, where legal costs discourage individual consumers from taking legal actions. The possibility of filling class actions effectively eliminates that obstacle.

Class actions are frequent in the US whereby an individual plaintiff brings an action as a representative of a whole grope of injured parties that do not need to participate in the procedural activities. Ultimately, the court distributes the adjudged compensation among all members of the group. A professional attorney-*ad-litem*, who organizes and conducts the proceedings, plays a key role in such proceedings.

No equivalent solution exists within the normative framework of EC law. However, the establishment of such an institution is by no means precluded by the rule that every person entitled to claim that an infringement of Article 81 TEC took place is thus entitled to claim invalidity of an activity prohibited by this provision[37]. This was confirmed in April 2008 in the Commission's White Paper concerning claims for compensation of loss resulting from competition law infringements.

IV. Purpose of civil law liability in connection with competition law infringements

The success of private enforcement of competition law dependents on finding the right balance between its compensatory and preventive function. When adjudicating claims, one should balance the risk of unjust enrichment of the injured party (at the expense of the infringer) with the guarantee of sufficient compensation at the very least.

[37] See: C-295-298/04 *Manfredi and others*, para. 59 and 60; D. Waelbroeck, D. Slater, G. Even-Shoshan, *Study on the conditions of claims for damages in case of infringement of EC competition rules - Comparative Report*, Brussels 2004, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf

The restoration of the conditions prior to the infringement and compensation belong to fundamental rules of civil law. All claims raised into civil law should be treated as a means to restore the pre-infringement property status of the injured party. Literature often quotes the *ne quis ex damno suo lucrum faciat* dictum. In its light, one should avoid adjudicating damages in an amount causing that the injured party is better off than he or she would have been had the event that was the source of the loss not occurred – compensation may neither exceed the extent of the loss nor perform punitive functions[38]. Thus, damages liability should be separated from liability serving different purposes including, in particular, financial repression[39]. Clearly, one may exceptionally depart from the compensatory character of civil law damages. However, the principle of full compensation may only be limited by restrictions stemming from legislation or a contract.

In competition law, the character of claims is financial but their economic value is calculated with respect to what would be lost if the infringement is not discontinued. A question may be asked whether the entity injured as a result of a competition law infringement, which may request adjudication under the provisions of civil law, will not obtain more than that which resulted from the illegal act. Depending on the scope of claims and their mutual relationships, it may turn out that the asserted claims may perform different functions and have a different character in specific circumstances.

First, the compensatory function plays a fundamental role in civil law, which should lead to the restoration of the property balance violated by an illegal practice. Moreover, this very function guarantees protection against illegal property shifting. Such understanding of the function of civil law liability is noticeable in most EU countries[40].

Second, in the private law area, claims based on an antitrust infringement may also fulfill a repressive function. Repression takes place where it is assumed that it is needed provided that it is justified because the means of private law need to be used for the protection of the public interest. In the civil law area, repressive functions are associated with the method of determining

[38] See W. Czachórski, A. Brzozowski, M. Safjan, W. Skowrońska-Bocian, *Zobowiązania*, Warszawa 2008, p. 98.

[39] See: W. Warkałło, *Odpowiedzialność odszkodowawcza. Funkcje, rodzaje, granice*, Warszawa 1972, p. 85.

[40] A departure from adjudicating punitive damages has also been taken into account in Article 24 of the Draft Proposal of the Regulation of the European Parliament and of the Council concerning the Law Governing Non-Contractual Obligations (Rome II), Document COM (2003) 427 final, which explicitly forbids the application of rules that may cause the adjudication of non-compensatory damages. Also, the application of the law of a third-party state containing provisions on non-compensatory damages (e.g. exemplary damages or punitive damages) is contradictory to EU public policy.

the amount of the hand over of unjust benefits. If the amount is determined separately from the assessment of the financial situation of the entitled person, a specific burden may be placed on the infringer (as a result of the refund of the property value) that the entitled person would not have generated. Aside from its compensatory function, repressive liability is mean to establish the means of legal protection based on the illegal conduct alone. However, this entails a risk of abuse of the repressive function of liability. The repressive purposes of liability, noticeable in different legal systems such as the US, may justify the adjudication of damages in higher amounts than the loss incurred, provided that it can be demonstrated that the infringer can bear the risk of uncertainty the source of which was his own illegal activity. Such reasoning is based on the concepts of justice and public order[41].

Third, civil liability might fulfill a preventive function through the application of such rules or means that will prevent future infringements. If effective models of asserting liability can be found that do not go beyond its compensatory functions, then the effectiveness of civil liability can show the market that violating competition rules does not pay off.

Civil law measures intended to compensate for the consequences of an infringement fall within the scope of civil law financial liability. The assertion of claims under competition law consists of a selection of claims with a negative or compensatory character.

Literature

Czachórski W., Brzozowski A., Safjan M., Skowrońska-Bocian W., *Zobowiązania* [*Obligations*], Warszawa 2008.

Duży A., "Dyferencyjna metoda ustalania wysokości szkody" ["Differentiating Method of Setting an Amount of a Damage"] (1993) 10 *Państwo i Prawo*.

Dubis W., "Zbieg roszczeń a skarga z bezpodstawnego wzbogacenia" ["Concurrence of Claims and Unjust Enrichment Claim"] (2002) 1 *Przegląd Sądowy*.

Dybowski T., *System prawa cywilnego*. Tom III. *Zobowiązania* [*System of Civil Law*. Vol. III. *Obligations*], Ossolineum 1986.

Gadek B., "Szkoda wyrządzona czynem nieuczciwej konkurencji – zagadnienia wybrane" ["Damage out of unfair competition actions – selected problems"] [in:] *Odpowiedzialność cywilna. Księga pamiątkowa ku czci Profesora Adama Szpunara* [*Civil Liability*. *Anniversary Book Dedicated to Professor Adam Szpunar*], Kraków 2004.

Gronowski S., *Ustawa antymonopolowa – komentarz* [*Antimonopoly Act. Commentary*], Warszawa 1999.

[41] See T.P. Ross [in:] T. P. Ross (ed.), *Intellectual Property Law, Damages and Remedies*, New York 2000, p. 4–14.

Jakubecki J., *Restitutio ad integrum w sądowym postępowaniu cywilnym* [*Restitutio ad integrum in Court Civil Proceeding*], Lublin 1993.

Koch A., *Związek przyczynowy jako podstawa odpowiedzialności w prawie cywilnym* [*Causal Nexus as the Basis for Liability in Civil Law*], Warszawa 1975.

Łętowska E., *Zbieg norm w prawie cywilnym* [*Concurrence of Norms in Civil Law*], Warszawa 2002.

Mika I., "Roszczenie o ogłoszenie oświadczenia w prawie wynalazczym" ["Claim for an Anouncement of a Declaration in Innovative Law"] (1997) 69 *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej*.

Modzelewska-Wąchal E., *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [*Act on Competition and Consumer Protection. Commentary*], Warszawa 2002.

Nowińska E., du Vall M., "Powództwo o ustalenie z zakresu własności przemysłowej" ["Declaratory Action in Industrial Property"] (2007) 100 *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej*.

Nowińska E., du Vall M., *Prawo własności przemysłowej* [*Industrial Property Law*], Warszawa 2005.

Podrecki P., Porozumienia monopolistyczne i ich cywilnoprawne skutki [*Monopolistic Agreements and Their Civil Law Effects*], Kraków 2000.

Ross T.P. (ed.), *Intellectual Property Law, Damages and Remedies*, New York 2000.

Skoczny T., Jurkowska A., Miąsik D. (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [*Act on Competition and Consumer Protection. Commentary*], Warszawa 2009.

Szpunar M., *Odpowiedzialność podmiotu prywatnego z tytułu naruszenia prawa wspólnotowego* [*Liability of Private Entity for a Breach of EC Law*],Warszawa 2008.

Szwaja J. (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz* [*Act on Combating Unfair Practices. Commentary*], Warszawa 2006 or 2008.

Warkałło W., *Odpowiedzialność odszkodowawcza. Funkcje, rodzaje, granice* [*Liability for Damages. Functions, Types, Limits*], Warszawa 1972.

Wojcieszko-Głuszko E., "Roszczenie o złożenie oświadczenia w prawie nieuczciwej konkurencji" [Claim for Making a Statement in Unfair Competition Law"] (2004) 88 *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej*.

du Vall M., *Prawo patentowe* [*Patent law*], Warszawa 2008.