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Still-unpopular Sanctions: Developments in Private Antitrust Enforcement in Poland After the 2008 White Paper

by

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Abstract

The European Commission published a White Paper on 2 April 2008 on damages actions for breach of EU antitrust rules. The content of the White Paper is since then being prepared to be converted into EU legislation on private antitrust enforcement. This paper presents the developments in private antitrust enforcement in Poland after 2 April 2008. It commences with an outline of EU actions in this field which act as an introduction to the more detailed analysis of recent jurisprudential and legislative developments in Poland. The latter part of the paper covers, in particular, the 2009 Act on the Pursuit of Claims in Group Proceedings and the 2011 Act Amending the Civil Procedure Code and Some Other Acts which abolishes all specific elements of commercial proceedings, including the statutory

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'non-admission of evidence' principle. These two legal acts are assessed in order to establish whether their introduction is likely to help facilitate private antitrust enforcement in Poland and to consider to what an extent are these developments responding to the challenges outlined by the European Commission.

Résumé

Le 2 avril 2008 la Commission européenne a publié le Livre blanc sur les actions en dommages et intérêts pour infraction aux règles communautaires sur les ententes et les abus de position dominante. Le contenu du Livre blanc est dès lors en cours de préparation pour être converti en législation de l'UE sur l'application des règles de la concurrence par des particuliers. Cet article présente le développement de l'application des règles de la concurrence par des particuliers en Pologne après le 2 avril 2008. Il commence par un aperçu des actions de l'UE dans ce domaine qui agit comme une introduction à l'analyse plus détaillée de la jurisprudence récente et les évolutions législatives en Pologne. Cette dernière partie du document porte, en particulier, sur la Loi de 2009 sur la poursuite des revendications dans les procédures collectives et la Loi 2011 modifiant le Code de procédure civile et certaines autres lois qui abolissent tous les éléments spécifiques de la procédure commerciale, y compris le principe de «non-admission de la preuve». Ces deux actes juridiques sont évaluées afin de déterminer si leur mise en place pourrait faciliter l'application des règles de la concurrence par des particuliers en Pologne et d'examiner à quel point ces développements répondent aux défis formulés par la Commission européenne.

Classifications and key words: private enforcement; bipolar system of enforcement; quantification of harm; follow-on actions; collective redress; non-admission of evidence; consultation document

I. Introduction

The European Union shares with its Member States the tradition of regulating competition in the public interest. Competition restraints within the internal market of the European Union that may affect trade between Member States fall within the ambit of EU antitrust law¹. Those with no effect

¹ For the purposes of this paper antitrust law is seen as area of public laws protecting competition, other than merger control and state aid regulation (an American-style convention). The European Commission has in the last years started using the term 'antitrust' alongside the traditional term 'competition law' – the two terms are used interchangeably in this paper; W.P.J. Wils, *Is Criminalization of EU Competition Law the Answer?* [in:] C.D. Ehlermann, I. Atanasiu (eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Oxford – Portland 2007, p. 278.

on EU trade are covered by national competition rules. Core antitrust values have clearly been identified as related to the public interest².

Victims of competition restraints should be fully compensated for the injuries they suffered, irrespective of the fact whether such restraint affects trade between Member States or not. But public antitrust enforcement is not a direct way to compensate those who suffered from competition law infringements. At the same time, antitrust enforcement in the private interest of individual market players always seemed to be in eclipse in Europe.

The European Commission made it clear in its Green Paper of 2005 – Damages actions for breach of the EC antitrust rules (hereafter, the 2005 Green Paper)³ as well as White Paper on damages actions for breach of the EC antitrust rules issued on 2 April 2008 (hereafter, the 2008 White Paper)⁴ that some kind of ‘revaluation of values’ is needed. Demand for a more modern victim-oriented form of antitrust enforcement exists alongside the growing feeling that the period of ‘autocracy’ of public antitrust enforcement should come to an end. The European Commission worked out its own theory on how to balance the public interest with the private interests of those injured by competition restraints. It presented its approach in the two aforementioned Papers stating ‘(...) the measures put forward in this White Paper are designed to create an effective system of private enforcement by means of damages actions that complements, but does not replace or jeopardise, public enforcement’. These lines are quoted from the opening chapter of the 2008 White Paper. The most important measures proposed therein relate to nine factors said to influence effective private antitrust enforcement: 1) standing (indirect purchasers and collective redress); 2) access to evidence (disclosure *inter partes*); 3) binding effect of decisions by national competition authorities; 4) fault requirement; 5) calculation of damages; 6) passing-on of overcharges; 7) limitation periods; 8) costs of damages actions and; last but not least, 9) interaction between leniency programmes and actions for damages.

This paper focuses on the Polish approach to private enforcement of competition law (both EU and Polish antitrust rules) attempting, at the same time, to relate them to the scheme proposed by the European Commission. In this context, the question can be justifiably asked whether any attempts were made after the 2008 White Paper to fill existing gaps in Polish legislation regarding antitrust enforcement. Another question that arises here is whether it is possible to balance the public interest with the private interests of those who suffered from competition restraints or, in other words, whether it is possible

² See C. Kosikowski, *Publiczne prawo gospodarcze Polski i Unii Europejskiej*, Warszawa 2010, p. 314, 322 et seq.

³ COM(2005)672.

⁴ COM(2008)165.

to balance public enforcement with private enforcement in Poland. Would it be possible to replicate, even only partially, the success of private enforcement in the United States?⁵ While the ineffectiveness of private antitrust enforcement in Poland has been known for at least a decade⁶, have the authorities done anything to identify how to best address this problem? Have they learnt necessary lessons from other jurisdictions and taken any legislative actions in this area? Although a good deal of academic research has been devoted to this issue in recent years⁷, its results are yet to be used for legislative purposes.

II. EU developments after the 2008 White Paper

The need for a mechanism enabling the aggregation of individual claims of antitrust victims has been identified as a problem to be solved in the 2008 White Paper. At the end of 2008, the Commission published a Green Paper on consumer collective redress⁸ as part of its wider initiative in this field (managed by the Directorate-General for Health and Consumers).

⁵ Private plaintiffs brought 96.76% of the 555 civil antitrust lawsuits filed in US federal courts in the 12 months ending 31 March 2011 (97.00% of the 666 lawsuits in the 12 months ending 31 March 2010; 97.79% of the 1086 lawsuits in the 12 months ending 31 March 2009; 96.80% of the 1063 lawsuits in the 12 months ending 31 March 2008; 98.71% of the 1165 lawsuits in the 12 months ending 31 March 2007). See *Federal Judicial Caseload Statistics*, available at <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx>. A decline in the number of antitrust lawsuits since 2009 is thus visible. On the face of it, there seems to be a continuing judicial trend of limiting the ability of private plaintiffs to seek relief under antitrust rules. See also *The Handbook of Competition Enforcement Agencies 2008. A Global Competition Review Special Report*, London 2008, p. 304.

⁶ P. Podrecki wrote in 2000 about difficulties in antitrust damages actions; P. Podrecki, *Porozumienia monopolistyczne i ich cywilnoprawne skutki*, Kraków 2000, p. 282.

⁷ In alphabetical order: 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. 299 et seq.; A. Jurkowska, 'Antitrust Private Enforcement – Case of Poland' (2008) 1(1) *YARS*; M. Kolasiński, 'Odpowiedzialność cywilna za szkody powstałe w wyniku naruszenia wspólnotowych zakazów stosowania praktyk ograniczających konkurencję i nadużywania pozycji dominującej' (2007) 11 *Przegląd Prawa Handlowego*; O. Kopiczko, 'Prywatnoprawne stosowanie wspólnotowego prawa konkurencji' (2005) 2 *Prawo i Podatki Unii Europejskiej*; B. Nowak-Chrzęszczyk, 'Roszczenie odszkodowawcze w postępowaniu w sprawie o naruszenie wspólnotowego prawa konkurencji', [in:] E. Piontek (ed.), *Nowe tendencje...*; A. Piszcz, 'Wybrane problemy związane ze stosowaniem prawa antymonopolowego Unii Europejskiej przez sądy krajowe', [in:] N. Szczęch (ed.), *Księga Jubileuszowa z okazji 5-lecia Wydziału Prawa Wyższej Szkoły Menedżerskiej w Legnicy „Ius est ars boni et aequi”*, Legnica 2010, p. 547 et seq.; P. Podrecki, 'Civil Law Actions in the Context of Competition Restricting Practices under Polish Law' (2009) 2(2) *YARS*.

⁸ COM(2008)794, 27/11/08.

Also announced in the 2008 White Paper was the fact that the Commission intended to draw-up non-binding guidelines on quantifying harm caused by antitrust violations. During the drafting process, the Commission commissioned a study on the quantification of harm suffered by victims of competition law infringements (prepared in 2009 by a group of lawyers and economists). Following the publication of the study, the Commission organised also a workshop with external economists on 26 January 2010 regarding this very issue.

Contrary to its initial intentions, the Commission soon engaged in the preparation of a draft directive on the rules governing damages actions for breach of EU antitrust rules⁹. It seemed by 2009 that the 2008 White Paper would end up as the basis for the preparation of an act of EU hard law (directive) rather than the originally envisaged act of soft law (guidelines). EU Member States could expect, therefore, to be put under more pressure in this context than ever before.

The beginning of 2010 brought about another shift when Joaquín Almunia took over the role of the European Commissioner for competition from Neelie Kroes (who seems to have done more than any other Commissioner to bring private antitrust enforcement out of its 'ivory tower' of ineffectiveness and isolation). The draft directive was withdrawn as a result and the new Commissioner got involved in questions of collective redress and the quantification of harm in antitrust damages actions. In his speech entitled 'Common standards for group claims across the EU'¹⁰, delivered on 15 October 2010, the new Commissioner has shown a particularly urgent and practical concern for collective redress.

The issue that seems to have been abandoned by the Commission in that period of time was the requirement of 'fault'. The Commission came to the conclusion in the 2008 White Paper that once the victim had shown a breach of EU antitrust law, the infringer should be liable for damages caused, unless it demonstrated that the infringement was the result of a genuinely excusable error. The Commission proposed at that time that an error would be considered excusable if a reasonable person applying high standards of care could not have been aware of the fact that the conduct in question restricted competition. It is worth noting that the European Parliament eventually opposed this concept in a 2009 Resolution concerning the 2008 White Paper on damages actions for breach of the EC antitrust rules. The European Parliament stressed therein 'that a culpable act must always be a prerequisite for an action for

⁹ See also P. Callol, 'Spain' [in:] A. A. Foer, J. W. Cuneo, *The International Handbook on Private Enforcement of Competition Law*, Cheltenham – Northampton 2010, p. 394.

¹⁰ SPEECH/10/554; University of Valladolid, School of Law Valladolid; available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/554>.

damages, and that a breach of the EC competition rules must, at the least, be negligent unless national law provides that there is an automatic implication or rebuttable presumption of fault in the case of a breach of the EC competition rules, ensuring the consistent and coherent enforcement of competition law¹¹.

It seems that the Commission has chosen since then to pursue further merely two out of the nine factors listed in the 2008 White Paper as affecting private antitrust enforcement. This realisation is supported by the 2011 Commission Work Programme with its scheduled adoption in 2011 of only communications affecting private antitrust enforcement:

- a communication presenting a set of common principles that shall guide any future legislative proposals concerning collective redress, including in the antitrust field,
- a communication on quantification of harm in antitrust damages actions¹².

In the first half of 2011, the Commission released a Staff Working Document – Public Consultation: Towards a Coherent European Approach to Collective Redress¹³. The act was preceded by a Joint Information Note of the Commissioners for Justice, Competition and Consumer Policy on the need for a coherent European approach to Collective Redress. From 17 June 2011 to 30 September 2011, the Commission held a public consultation on its draft Guidance Paper on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU¹⁴. The draft Paper presented the main methods and techniques used to quantify antitrust harm. The consultation was accompanied by a workshop with economists held on 27 September 2011.

The Commission has not advanced the issue further since then. An EU framework for collective redress has been entered into the 2012 Commission Work Programme as one of its initiatives¹⁵ alongside actions for damages for antitrust violations (legislative initiatives). One of the objectives of the latter is to clarify the interrelation of damages actions with public enforcement of EU antitrust law by the Commission and National Competition Authorities (hereafter, NCAs), notably as regards the protection of leniency programmes, in order to preserve the central role of public antitrust enforcement in the

¹¹ Reported in: OJ [2010] C 117E/161.

¹² Annexes to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commission Work Programme 2011, COM(2010)623.

¹³ SEC(2011)173.

¹⁴ The draft Guidance Paper is available at http://ec.europa.eu/competition/consultations/2011_actions_damages/draft_guidance_paper_en.pdf.

¹⁵ Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Commission Work Programme 2012, COM(2011) 777.

EU. Protection of leniency material in the context of civil damages actions is also the subject of a Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012¹⁶.

Attempts to provide quick solutions to the lack of effective private antitrust enforcement in Europe have proven beyond the powers of the Commission. However, it may be better to avoid ‘quick fix’ measures here and aim instead to formulate a long-term strategy for a continuous increase in the level of ‘just’ compensation and ordered progress in ‘sustainable antitrust enforcement’. The next sections of this paper will present in detail the developments in private antitrust enforcement in Poland after 2008¹⁷. Are there reasons to believe that Polish initiatives were inspired by the actions of the European Commission? To avoid misunderstandings, it is not the intention of this paper to compare the range and scale of Polish solutions to that of the EU because even at first glance, Polish initiatives seem so small that a comparison would be difficult.

III. The private antitrust enforcement developments in Poland

1. Prologue

The publication of the 2008 White Paper coincided almost exactly with the first anniversary of the Polish Act of 16 February 2007 on Competition and Consumer Protection (hereafter, Competition Act)¹⁸. Although its authors could not draw an inspiration from the 2008 White Paper, they were surely familiar with the earlier Green Paper of 2005. One of the most important innovations introduced by the current Competition Act was the elimination of the possibility to commence administrative proceedings in antitrust matters (called ‘antimonopoly’ proceedings in the Competition Act) on the basis of a complaint. Since 21 April 2007, all antitrust proceedings in Poland are therefore initiated *ex officio*. In the modernisation process of Polish competition law, the initiation of proceedings by way of a complaint was thus made impossible. This change was, in the opinion of some commentators, unwarranted and thus incurred a great deal of criticism¹⁹. However, the

¹⁶ Available at http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf.

¹⁷ Information contained herein was last updated on 26/07/12.

¹⁸ Journal of Laws 2007 No. 50, item 331, as amended.

¹⁹ E.g. M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, p. 158 et seq. But see M. Krasnodebska-Tomkiel, D. Szafrński, ‘Skuteczność prawa antymonopolowego’, [in:] T. Giaro (ed.), *Skuteczność prawa*, Warszawa 2010, p. 107–108.

explanatory notes to the draft bill²⁰ state that the said amendment was in fact inspired by EU's aim to promote private antitrust enforcement, which the 2005 Green Paper is related to. The explanatory notes stress that public antitrust enforcement is not meant to protect individual interests. In this light, the authors of the Competition Act 2007 stressed the existence of a bipolar system of public and private enforcement of antitrust rules.

The above postulate seems to have little in common with the approach of the Commission. Neither the 2005 Green Paper nor the 2008 White Paper encourage the elimination of antitrust proceedings initiated by way of a complaint. Neither do they postulate any other such 'bipolarisation' of competition law enforcement. In this sense, the European Commission saw information contained in its own documents used for purposes it might have not approved of. Whatever the views might be on commencing antitrust proceedings on a complaint, EU competition law is being enforced by the Commission according to a 'tandem model' whereby it may, pursuant to Article 7(1) of Regulation 1/2003, initiate proceedings either on a complaint or on its own initiative²¹.

2. Binding effect of administrative decisions (jurisprudential developments)

The explanatory notes to the draft Competition Act state also that abolishing administrative proceedings initiated by way of a complaint is beneficial for competition as such ('institutional phenomenon') as well as for those injured by competition restraints. This benefit is associated with the shortening of overly long administrative proceedings. Their excessive length is supposed to imply that the final decisions issued by the UOKiK President may be primarily of 'historical interest' for those injured by competition restraints.

Public antitrust enforcement is not a direct way to compensate victims of competition restraints. It may, however, facilitate access to redress when damages claims are brought forward on the basis of infringement decisions taken by the European Commission or an NCA, provided that the possibility of so called 'follow-on actions' is preserved. Follow-on actions are considerably simpler to pursue than stand-alone actions, where there is a need to prove an antitrust infringement. Therefore, final antitrust decisions are usually of more than just 'historical interest' for those injured by restraints of competition.

The Polish jurisprudence concerning private antitrust enforcement surrounds this very issue. Not later than a few months after the publication of the 2008

²⁰ Available at <http://orka.sejm.gov.pl/proc5.nsf/opisy/1110.htm>.

²¹ Council Regulation No. 1/2003 of 16/12/02 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.

White Paper, the Polish Supreme Court stated in a resolution²² that ordinary courts are competent to decide whether or not an abuse of a dominant position had occurred if such an assessment is necessary to declare an agreement lawful or illegal and thus void (unlike the EU, legal actions constituting an abuse are null and void *ex lege* in Poland). The Supreme Court declared also that courts do not have such competences if the UOKiK President has already issued a final decision concluding that an infringement had indeed taken place. In such cases, a final decision of the UOKiK President was binding on the courts. The Supreme Court stressed furthermore that courts should always assess whether it is necessary to suspend proceedings, pursuant to Article 177(1)(3) of the Civil Procedure Code²³, awaiting the conclusion of administrative proceedings already underway before the UOKiK President. Article 177(1)(3) provides that the court may (but is not obliged to) stay its proceedings, *ex officio*, where resolution of the case is dependent upon a prior decision of an administrative authority (such as the UOKiK President). Although the 2008 Resolution explicitly concerns a specific group of competition-restricting practices only (dominant position abuses) it can be applied to a wider range of restrictive practices including anti-competitive agreements.

The 'prejudicial' (in Polish: *prejudycjalność*) nature of administrative decisions in antitrust cases, in other words, the fact that they are binding on courts assessing related civil law claims, has been highly disputed in Poland for the last two decades. Although a rich body of jurisprudence has developed on this subject, the judiciary has shown divergent views of this key concept. On one hand, the Supreme Court concluded in a series of judgments²⁴ that where the declaration of the invalidity of an agreement is at stake, the concept of the prejudicial character of UOKiK decisions demanded that the competition authority must rule first that an antitrust infringement had indeed occurred. This approach has undoubtedly the general effect of erecting barriers to the development of private antitrust enforcement.

On the other hand, however, examples exist of more effective judicial interpretation which suggests that the weakness of Polish private antitrust enforcement might not only derive from the content of existing legislation but also from its interpretation. Just after Poland's accession to the European Union in 2004²⁵, the Supreme Court stated, in accordance with its earlier

²² Resolution of 23 July 2008, III CZP 52/08, (2009) 2 *Monitor Prawniczy* 90.

²³ Journal of Laws 1964 No. 43, item 296, as amended.

²⁴ Ruling of 27 October 1995, III CZP 135/95, LEX No. 24705, much criticized by S. Gronowski, 'Głos do postanowienia SN z dnia 27 października 1995 r., III CZP 135/95' (1996) 6 *Orzecznictwo Sądów Polskich* 112 et seq.; judgment of 28 April 2004, III CK 521/02, LEX No. 255591.

²⁵ See judgments of: 2 March 2006, I CSK 83/05, LEX No. 369165; 5 January 2007, III SK 17/06, LEX No. 489018; 4 March 2008, IV CSK 441/07, LEX No. 376385.

judgment of 22 February 1994²⁶, that an assessment whether an agreement has infringed the prohibition of anti-competitive agreements may be carried out in civil litigations between private parties.

Since then, the process of increasing homogeneity of Polish jurisprudence has been remarkably smooth. It is possible to say, in light of the 2008 Resolution of the Supreme Court, that Polish jurisprudence on the prejudicial nature of antitrust decisions is well-established. What it did lack was the analysis of the consequences of an antitrust decision accepting binding commitments. The Supreme Court emphasised therefore in its Resolution that a ‘commitments’ decision did not determine the existence of an antitrust infringement. The plausibility of the existence of a competition law violation is a necessary (*sine qua non*) and sufficient requirement for a commitments decision, in other words, it is not necessary to prove and firmly determine therein whether an infringement of antitrust provisions had actually taken place. Commitment decisions refer thus to ‘potential’ violations only. As such, a commitments decision is not in any way prejudicial for ordinary courts.

There was a deeper reason for the discussed development in Polish jurisprudence. The Supreme Court analysed solutions offered by EU legislation and jurisprudence (however, it did not refer to soft law documents such as Papers) and concluded that its own views were additionally supported by the results of this analysis.

Is it possible to see in the 2008 Resolution nothing more than the end of the discussion in Polish jurisprudence on the prejudicial standing of antitrust decisions? The answer is, in fact, no. The Resolution has already been followed by the judgment of the Court of Appeals in Warsaw of 25 November 2009 (VI ACa 422/09)²⁷. The Appeals Court, referring to the 2008 Resolution, determined that an ordinary court in a particular case could determine for itself whether or not it should examine the anti-competitiveness (illegality) of a given conduct, that is, unless administrative proceedings were underway before the UOKiK President in this regard. It is unclear whether this Appeals Court spoke in line with the 2008 Resolution. The Supreme Court allowed courts to independently assess the need to stall their own proceedings awaiting a decision from the UOKiK President. According to the Supreme Court, the discretion of the courts is precluded in this respect only by the existence of a final infringement decision issued by the UOKiK President (seeing as such a decision is binding on the court). The Appeals Court seems to have gone further than the Supreme Court – its ruling suggests, *a contrario*, that the very commencement of antitrust proceedings precludes courts from independently examining the anti-competitiveness of a given market conduct. As a result,

²⁶ I CRN 238/93, LEX No. 4060.

²⁷ LEX No. 1120262.

courts should wait for the outcome of the proceedings before the UOKiK President.

It is worth investigating here the accessibility of Polish jurisprudence regarding private antitrust enforcement. Unfortunately, access to information on this subject is greatly lacking. Courts keep cases registers, including civil law cases, and case information is given in the form of code numbers according to a classification system²⁸. Private antitrust actions included in index 'GC' have not been given a specific code; actions in unfair competition cases are classified as 652; tort actions are labelled 667. To make matters worse, also index 'C' lacks a specific code for private antitrust actions. Worse yet, ordinary courts seem frequently unable to distinguish between unfair competition actions and private antitrust actions²⁹. As a result, it is by no means surprising that it is practically impossible to research Polish private antitrust actions in a coherent manner³⁰. Oddly enough for the Polish history of private antitrust enforcement, the authorities seem to support the *status quo* which sees private antitrust enforcement remaining weak and unpopular. Unlike other NCAs³¹, the UOKiK President has not been given any measures to ensure data collection on antitrust actions. How can Poland be ready for a reform of private antitrust enforcement if the scale of the phenomenon is not even known? Why should special departments be created within existing court structures in order to rule on antitrust cases if it might emerge that there is little need for such change because of their rarity on court dockets?

Legislative changes must therefore be advocated. First, a separate code for private antitrust actions should be introduced³². Second, courts should inform the Justice Minister, who should in turn inform the UOKiK President, about

²⁸ Explained in the Appendix to the Decree of the Minister of Justice of 12 December 2003 on the organisation and scope of work of the court secretariats and other departments of the court service; Official Journal of the Minister of Justice No. 5, item 22, as amended.

²⁹ Mistakes in this respect can be found even in the above mentioned resolution of 23 July 2008, III CZP 52/08, and judgment of the Appeals Court in Warsaw of 25 November 2009 (VI ACa 422/09).

³⁰ The Author has been involved since 2011 in project No. 524/BMN intended to prepare a statistical analysis of unfair competition actions. For example, between 2009-2011, only 8 such claims were filed in the Commercial Regional Court in Białystok and it is unknown how many, if any, of them are cases alleging antitrust violations. It would be surely beneficial to consider antitrust actions only.

³¹ E.g. the German NCA (*Bundeskartellamt*) has to be informed about all civil litigations concerning antitrust infringements including Articles 101 & 102 TFEU, and may decide to participate therein. It thus has at its disposal full data on private antitrust enforcement in Germany; see S.E. Keske, *Group Litigation in European Competition Law*, Antwerp – Oxford – Portland 2010, p. 231.

³² Into the Appendix to the Decree; see footnote 28.

all private antitrust actions (alternatively, courts should send such information directly to the UOKiK President).

Regarding actions for the breach of EU antitrust rules, it is worth drawing particular attention to Article 16(1) of Regulation 1/2003. When national courts rule on agreements, decisions or concerted practices under Article 101 and 102 TFEU that are already the subject of a Commission decision, they cannot deliver judgments running counter to an earlier EU decision. National courts must also avoid delivering rulings which would conflict with a decision contemplated by the Commission during existing proceedings. To that effect, national courts may assess whether it is necessary to suspend their proceedings awaiting a decision from the Commission.

All civil courts (courts for civil litigation), including commercial ones, need to be able to address certain problems unique to competition law, be it EU or national provisions. That is true even for inexperienced courts and it is in fact rare for judges involved in private enforcement of competition law to have frequent contact with antitrust issues. It cannot be common practice for courts to depend solely on Article 15(1) of Regulation 1/2003 which makes it possible for them to ask the Commission for information or its opinions on questions concerning the application of the EU competition rules in proceedings based on Article 101 and 102 TFEU. Although the Commission does not seem obliged to respond to such request, it is likely that it will do whatever it can to help a national court (pursuant to the spirit of the TFEU, rather than to the letter of EU law). Asking a rhetorical question, who can national courts ask for help in the application of domestic competition law? That is why the importance of training national judges in both EU and national antitrust provisions cannot be stressed enough.

It is worth noting in the closing lines of this section that jurisprudential developments concerning the prejudicial character of antitrust decisions in Poland should be reflected in legislation in a similar way to that of Regulation 1/2003. Plaintiffs in follow-on actions are not required to prove an antitrust infringement. The absence of such legal provision is somewhat compensated by the 2008 Resolution of the Supreme Court. However, there is no *stare decisis* rule in the Polish legal system whereby lower courts may deviate in a given case from the views of the Supreme Court expressed elsewhere. The outcomes of the 2008 Resolution should, therefore, be codified into positive laws in order to reduce legal uncertainty on the side of the plaintiffs. Such an amendment might increase the number of civil antitrust lawsuits in Poland and, thus, act as an effective deterrent for antitrust violations. However, Polish legislation remains unclear on issues surrounding private antitrust enforcement – a fact that seems to deter potential plaintiffs from taking this road of action.

3. Collective redress

Collective redress has been subject to much debate in Europe, and with reason. Private antitrust enforcement is expensive, time consuming, complex and inefficient. The concept of group proceedings emerged in Europe, modelled after American class actions, as a centrepiece for private enforcement of competition law³³. The Act of 2009 on the Pursuit of Claims in Group Proceedings³⁴ came into force in Poland on 19 July 2010. An opt-in procedure was adopted therein (as opposed to the American-style opt-out system).

Accordingly, an action may be pursued in group proceedings in Poland if a group comprised of at least 10 persons (consumers, undertakings, natural persons, legal entities etc.) files claims of the same type and based on the same or identical factual basis. The Act can be applied only to such issues as consumer protection, product and tort liability (except personal rights' protection) as well as competition protection albeit antitrust claims are included in 'roundabout' terms [Article 1(2)]. While it is regrettable that Article 1(2) of the Act is not detailed enough, when taken in the general context, it is clear that it must be understood as referring to private antitrust claims also. Competition law infringements can be thought of as a form of torts. This paper is not meant to provide a detailed answer to the question on what are the legal bases for private antitrust enforcement in Poland or, what are the categories of sanctions (claims) provided for them. Influential commentators³⁵ stress nevertheless that competition restricting market practices are torts within the meaning of civil law provided that the requirements (prerequisites) for the tort are met. This realisation stands be it under the tort law provisions of the Civil Code³⁶ (Article 415 et seq.) taken in isolation or in conjunction with other provisions such as Article 18(1)(4) of the Act of 1993 on Combating Unfair Competition³⁷ or Article 12(1)(4) of the Act on Counteracting Unfair Market Practices³⁸.

In other words, private damages actions for torts, consisting of a breach of competition law (including EU antitrust rules), can be pursued in group

³³ The term 'group action' is used in Europe, while the term 'class action' is used in the U.S. See M. Deguchi, 'The Recent Legislation on the Consumer Group Action in Japan', [in:] *The Recent Tendencies of Development in Civil Procedure Law – between East and West. International Conference*, Vilnius 2007, p. 126.

³⁴ Journal of Laws 2010 No. 7, item 44.

³⁵ See i.a. A. Jurkowska, 'Antitrust Private Enforcement...', p. 65–67; P. Podrecki, 'Civil Law Actions...', p. 87–88.

³⁶ Journal of Laws 1964 No. 16, item 93, as amended.

³⁷ Consolidated text: Journal of Laws 2003 No. 153, item 1503, as amended.

³⁸ Journal of Laws 2007 No. 171, item 1206.

proceedings in Poland. Importantly also, the Act does not reserve the benefit of group proceedings exclusively to consumers and thus the said 'group' can include undertakings³⁹.

Does the Polish Act on the Pursuit of Claims in Group Proceedings facilitate private antitrust enforcement? Can it be considered a real development thereof? It does not adopt any specific rules for measuring damages. It does not introduce any presumptions nor does it introduce the concept of a 'reverse burden of proof' or even introduce a less stringent standard of proof for plaintiffs in such cases. Have group plaintiffs less responsibilities, less 'burdens' than individual ones? Existing legal provisions may suggest the opposite.

In group proceedings, legal representation by a barrister or legal advisor is compulsory for the plaintiff unless the plaintiff is a barrister or legal advisor himself/herself. Perhaps this provision originates from the positive intention of the legislator – it might have been designed so as to reduce of anticipated problems associated with proofs and evidence⁴⁰. Article 2(1) of the Act puts another type of 'pressure' on group plaintiffs. It stipulates that in cases concerning pecuniary claims the amount of individual claims, which make up the overall group litigation, have to be standardised. If standardisation is not approved by all members, group proceedings will not be allowed by the court. These difficulties are eased under Article 2(2) which states that standardisation can be made in subgroups of at least 2 participants.

Nevertheless, group proceedings do have some clear advantages over other types of civil proceedings. First of all, court fees are lower. As a rule, court registration fee for group proceedings in Poland amounts to 2% of the claim, not less than PLN 30 (approx. EUR 7) and not more than PLN 100,000.00 (approx. EUR 24,100). By contrast, 5% of the claim is generally applicable for individual proceedings. Second, Article 5 of the Act is advantageous for barristers and legal advisors of group plaintiffs. If their fees are based on a contingency fee agreement, the court shall award them not more than 20% of the amount awarded to the plaintiffs, with no further conditions. In individual proceedings, the contribution of the losing party toward the fees for the winning lawyers have, as a rule, the highest minimum value of PLN 7,200.00 (approx. EUR 1,735) where the claim is over PLN 200,000.00 (approx. EUR 48,200). The court can increase it by up to six fold (here, to PLN 43,200.00, approx. EUR 10,410) but that is dependent on such factors as: the nature of the case, lawyers' effort, his or her contribution to clarifying and/or bringing

³⁹ By contrast, the use of group proceedings is reserved exclusively to consumers, for example, in Finland. See L. Ervo, *Characteristics of Procedure* [in:] L. Ervo (ed.), *Civil Justice in Finland*, Tokyo 2009, p. 92.

⁴⁰ See M. Sieradzka, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz*, Warszawa 2010, p. 107.

the case to a resolution. The same fee could be obtained from the losing party in group proceedings where the claim is PLN 216,000.00 (approx. EUR 52,057) irrespective of any of the above factors. The third benefit of group actions lies in the fact that they fall within the competence of district courts (in Polish: *sądy okręgowe*). As a result, they are judged by a panel of three professional judges. Their superior experience and expertise is likely to allow them to handle such complex cases better than a single professional judge at a regional court. Another advantage of group proceedings used to lie in the fact that legislation on commercial proceedings was not applicable to group proceedings. However, it is worth remembering that Poland no longer has separate commercial proceedings (see section below).

The statement of claim is submitted in group proceedings by a representative of the entire group, a position that can be held either by a member of the group or a regional (in Polish: *powiat*) consumer ombudsman. What can be said against the involvement of consumer ombudsmen in the pursuit of group actions is that they did not used to represent consumers in court proceedings. Figures published by the UOKiK President show only three cases where consumer ombudsmen took action in 2010 under the Act on the Pursuit of Claims in Group Proceedings⁴¹.

It might seem that group proceedings would occupy a growing place in Polish antitrust enforcement and policy. This ‘achievement’ should, therefore, not be over-emphasized because it says more about where the country was in 2010 than where it stands today. In Poland, a tendency to think that legal amendments should result in the removal of barriers to private enforcement (or at least lowering them) has been apparent⁴².

The empirical analysis of group actions of 2010–2011 has been conducted in all Polish district courts⁴³ taking note, in particular, if unfair competition or private antitrust actions were among them. The feedback is positive from most of the examined courts, but certainly not from all. It can only be hoped that future research will present complete statistical data in this field. So far only one ‘class action’ is known to have been filed in Poland regarding competition protection since the Act on Pursuit of Claims in Group Proceedings came

⁴¹ *Funkcjonowanie powiatowych (miejskich) rzeczników konsumentów w roku 2010*, UOKiK, Warszawa 2011, p. 21.

⁴² See M. Sieradzka, *Pozew grupowy jako instrument prywatnoprawnej ochrony interesów konsumentów z tytułu naruszenia reguł konkurencji*, Warszawa 2012, p. 506 et seq.; P. Podrecki, ‘Civil Law Actions...’, p. 95.

⁴³ Statistical data has been gathered in projects No. 524/BMN (closed) and 538/BMN (in progress). Less than twenty courts (civil or commercial departments), excluding courts in Warsaw, have not yet responded.

into force. However, it is not an antitrust but an unfair competition action (concerning misleading advertising).

Data suggests that victims are unwilling to take legal actions and to make use of the available solutions. The Polish legislator provided victims with a legal tool in the forms of private antitrust enforcement, but they do not take advantage thereof. These inefficiencies are surprising when compared to the legislative and organisational effort that has been put into creating them. However, this is a problem that elicits a question of what challenges are faced by policy makers who attempt to facilitate private antitrust enforcement? What sort of resistance do they encounter? Potential plaintiffs are influenced by various motives that cannot be quantitatively measured. Most of all, however, opting-in requires efforts on the side of the individual who initiates the group action⁴⁴. He/she has to gather information and provide evidence. What hampers private antitrust enforcement in Poland is thus not only substantive law but the lack of incentives for such enforcement also.

Without speaking for or against the Polish Act on the Pursuit of Claims in Group Proceedings, this paper merely acknowledges the existence of a number of future problems associated with its provisions. Its adoption was motivated by clearly significant reasons such as: improving access to courts; increasing legal protection; improving the administration of justice and judicial economy; relieving courts of the obligation to hear multiple factually similar cases with different plaintiffs; reducing court costs; ensuring consistency of judgments in similar cases. The achievement of the aforementioned goals requires sophisticated tools, which the Act deals with. However, the explanatory notes to the draft bill⁴⁵ mention neither related EU documents nor the need for a reform of private antitrust enforcement in Poland as the underlying reasons for this legislative initiative.

4. Evidence

The 2008 White Paper concerns, among other things, the problem of asserting claims by entities positioned on different levels in the supply chain, including end-consumers (so called indirect purchasers). End-users may assert claims directly against the antitrust infringer in Poland. In practice, most indirect purchasers are individual consumers; no legal obstacle prevents them from initiating antitrust litigation to recover their damages. There are, however, factual obstacles in this respect namely significant difficulties in obtaining evidence necessary for proving the passing-on of supra-competitive

⁴⁴ See S.E. Keske, *Group Litigation in...*, p. 156.

⁴⁵ Available at <http://orka.sejm.gov.pl/proc6.nsf/opisy/1829.htm>.

prices and their extent. These problems result from the considerable distance that frequently exists between final consumers and the place in the supply chain where the antitrust violation occurs. Polish legislation lacks the American-style, wide-ranging form of discovery of admissible evidence. The principle of ‘non-self-incrimination’ protects the alleged infringer against helping the opponent⁴⁶.

Regarding EU antitrust law, Article 2 of Regulation 1/2003 stipulates that in any national or EU proceedings for the application of Articles 101 and 102 TFEU, the burden of proving an infringement of Article 101(1) or Article 102 TFEU shall rest on the party or the authority alleging the violation. An undertaking or association of undertakings claiming the benefit of Article 101(3) TFEU shall bear the burden of proving that the conditions of that paragraph are fulfilled. It is worth noting that according to recital (5) of its preamble, Regulation 1/2003 affects neither national rules on the standard of proof nor obligations of NCAs and national courts to ascertain the facts of a case, provided that such rules and obligations are compatible with general principles of EU law.

Burden of proof principles are rigid for plaintiffs in Poland. Critics of commercial proceedings used to complain, in particular, about the rules on the burden of proof applicable to undertakings – the so-called ‘non-admission of evidence’ principle (in Polish: *prekluzja dowodowa*). Pursuant to this rule, evidence could be filed by the parties to commercial proceedings only within the dates specified by the provisions of Article 479¹² § 1 and Article 479¹⁴ § 1–2 of the Civil Procedure Code (the so-called statutory non-admission of evidence). The plaintiff had to include all allegations in the statement of claim as well as indicate all evidence to support these allegations. The court would ignore late allegations and/or evidence not filed within the deadlines laid out by the Civil Procedure Code. They could be admitted only exceptionally if the plaintiff proved that it had been impossible to include them in the statement of claim or the need thereof had not occurred before (in such cases a two week deadline was given). On the other hand, defendants would be precluded from making allegations/presenting corresponding evidence if they failed to include them in the response to the statement of claim and failed to prove the applicability of one of aforementioned exceptions. The reason for the use of the statutory non-admission of evidence principle was to facilitate and shorten commercial proceedings. Incidentally, non-admission of evidence was the subject of almost every discussion concerning commercial proceedings – it was, so to speak, an issue ‘floating’ above the entire debate. Widely criticised

⁴⁶ See G. Wagner, ‘Should Private Enforcement of Competition Law Be Strengthened?’, [in:] D. Schmidchen, M. Albert, S. Voigt (eds), *The More Economic Approach to European Competition Law*, Tübingen 2007, p. 123.

was particularly the fact that the prime task of a commercial trial was to speed up proceedings rather than find the material truth of the case (and achieve justice)⁴⁷.

The Polish legislature adopted on 16 September 2011 the Act amending the Civil Procedure Code and Some Other Acts⁴⁸ abolishing, as of 3 May 2012, all specific provisions governing commercial proceedings, including the statutory non-admission of evidence principle. The amended Articles 207 and 217 of the Civil Procedure Code are now applicable instead with respect to evidence making no difference between submissions by undertakings and other parties to the proceedings. According to Article 207(2), the presiding judge may order the defendant to make a statement in response to the statement of claim within the period of at least two weeks. The presiding judge may also, before the first sitting of the court, require the parties to file further submissions, giving them directions on the order of submissions, deadlines and stress points that must be explained and clarified. Parties are not allowed to file any submissions other than a statement of claim, response to the statement of claim and those required by the court unless such submissions contain additional evidentiary motions only. The court shall ignore any late allegations and/or evidence unless the submitting parties presents plausible reasons in support of the conjecture that: 1) the delay is not caused by their fault or 2) investigating late allegations and evidence will not lead to a delay in the resolution of the case or 3) there are other exceptional circumstances. On the other hand, Article 217(1) seems to conflict Articles 207 seeing as it stipulates that any allegations and submissions of evidence to substantiate each fact and matter alleged and/or to refute and rebut any evidence and arguments of the opponent must be made before the closing of the hearing. However, existing literature on the amendment suggests that Article 207 of the Civil Procedure Code takes precedence over Article 217⁴⁹. It seems that statutory non-admission of evidence, which used to apply to commercial proceedings, has now been replaced by judicial non-admission of evidence. In fact, not only has the old principle been retained merely in a different form (statutory vs. judicial), the scope of its applicability has increased. While it used to apply to undertakings only (parties to commercial proceedings only), it now covers parties to all types of civil law proceedings, including consumers. The previous

⁴⁷ More T. Szanciło, 'Pozycja procesowa przedsiębiorcy po zmianach Kodeksu postępowania cywilnego' (2012) 125 *Radca Prawny* 10D.

⁴⁸ Journal of Laws 2011 No. 233, item 1381.

⁴⁹ J. Mucha, 'Ciężar wspierania postępowania i granice dyskrecjonalnej władzy sędziego w świetle znowelizowanych przepisów Kodeksu postępowania cywilnego' (2012) 126 *Radca Prawny* 3D.

solution was considered inflexible, but at the same time transparent⁵⁰ – the new approach seems to considerably reduce legal certainty for all parties. Under the new approach it is possible that the presiding judge will not permit the parties to file any submissions other than the statement of claim and a response by the defendant⁵¹.

There is no reason to think that the aforementioned developments have been inspired by EU initiatives concerning private antitrust enforcement primarily because the amendment is not limited to antitrust actions. Even final consumers not represented by a lawyer are now bound not only by ordinary rules on the burden of proof but also by the principle of judicial non-admission of evidence. And these principles are strict for plaintiffs. Is there any chance that the said amendment will contribute to the facilitation of private antitrust enforcement in Poland?

The non-admission of evidence principle remains part of the Civil Procedure Code albeit it has taken on a different form. If Article 207, as speculated, is today's version of the statutory non-admission of evidence principle that used to apply to commercial proceedings, then in truth not much has changed for undertakings as antitrust plaintiffs. As in the past, they must still find their way in a restrictive model of court proceedings, perhaps slightly more irregular than before because its schedule is now dictated not only by statutory means (the Civil Procedure Code) but also by the judiciary. For consumers, however, the situation has notably worsened since the risks connected with litigation have multiplied. If a consumer-plaintiff is not sufficiently familiar with procedures and there is a higher risk that evidence requirements are not met, his/her claim is more likely to fail. Thus, the new rules may act as a very significant disincentive for individual consumers to file antitrust lawsuits.

If only victims made use of existing possibilities, there could be a demand for a jurisprudential development in the area of access to evidence – an issue recently considered by the Court of Justice of the EU. On 14 June 2011, the Court reached its long-awaited verdict in *Pfleiderer AG v Bundeskartellamt*⁵². The judgment focuses on access of antitrust victims to documents and information provided under a national leniency programme. The Court declared therein that the 'provisions of European Union law on cartels, (...), must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement'. According to the Court, it is for the courts and tribunals of the Member States, on the basis

⁵⁰ J. Mucha, 'Ciężar wspierania...', p. 6D.

⁵¹ See P. Kosiński, 'Prekluzja dla wszystkich' (2012) 124 *Radca Prawny* 29.

⁵² Case C-360/09.

of their national laws, to determine the conditions under which such access must be permitted or denied by weighing the different interests protected by EU law. Polish jurisprudence presents the opinion that national law enforcers should use purposive interpretation in order to achieve an outcome consistent with the objectives pursued by EU law. The Polish Supreme Court emphasised that such consistency could be obtained by referring not only to the letter of the law (legislation) but also to EU case law⁵³. In the aforementioned 2008 Resolution, the Supreme Court spoke in favour of interpreting national laws so as to eliminate basic procedural discrepancies between the application of EU legislation and national law. Therefore, the Pfleiderer judgment is likely to help believe in the possibility of an improvement in the way injured parties regard seeking compensation for national antitrust infringements.

5. Remaining factors influencing private antitrust enforcement (instead of an epilogue)

There have been no developments likely to impact private antitrust enforcement in Poland with respect to other contagious issues such as: disclosure *inter partes*; calculation of damages; passing-on of overcharges; limitation periods; or costs of damages actions (apart from special rules for group litigation). The ‘fault requirement’, acting as a prerequisite for compensation, has not been eliminated either. Indeed, it should be expected that changes in this field are likely to occur only if EU Member States are made to do so.

The UOKiK President published for public consultation in May 2012 (amended in July 2012) a proposal for assumptions underlying an Amendment Act of the Competition Act of 2007⁵⁴. Despite the fact that the draft covers the topic of leniency and ‘fashionable’ leniency plus, it does not take into consideration the wide spectrum of issues surrounding the interaction between leniency and actions for damages. The proposal does not even refer to the aforementioned Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012 on protection of leniency material in the context of civil damages actions.

It is, nevertheless, possible to identify a step forward in addressing the issue of private antitrust enforcement in the draft’s newest version of July 2012. The UOKiK President agreed to include a proposal by the Polish Competition Law Association submitted during the public consultation. The Association recommended for the Competition Act to cover provisions which would allow

⁵³ Judgment of the Supreme Court of 29 May 2001, I CKN 1217/98, LEX No. 47587.

⁵⁴ Available at <http://legislacja.rcl.gov.pl/lista/1/projekt/43452/katalog/43464>. See p. 16–20.

the UOKiK President to submit an opinion relevant to a case subject to court proceedings (other than those referred to in Part I Book I Title VII Section IVa of the Code of Civil Procedure), such as proceedings relating to private claims arising from an antitrust violation⁵⁵. The future challenge lies now in an effective incorporation of this proposal into the Competition Act and, then, its practical implementation.

IV. Summary

Public antitrust enforcement is considerably stronger in Poland than its private counterpart. In fact, they are hardly partners at all since private enforcement remains poorly developed and its popularization is being disfavoured by national legislation regarding the procedural situation of plaintiffs.

The aim of this paper was to assess if there is a chance that recent jurisprudential and legislative developments will help facilitate private antitrust enforcement in Poland. If a quantitative comparison is made between Polish initiatives and those in the European Union, Polish advancements might seem to stand up to the comparison quite well. The paper identified two pieces of national legislation (hard law), adopted in the last two years that may have an effect on private antitrust enforcement. Asking, however, how much were they inspired by the needs of victims of competition restraints, the conclusion might emerge that their authors did not even think of private antitrust enforcement during the legislative process. Moreover, neither the 2008 White Paper nor subsequent actions of the European Commission have managed to provide a key stimulus in the development of private antitrust enforcement in Poland.

National authorities proved to be neither constructive reformers nor revolutionaries. Unfortunately, with two steps forward (jurisprudence on the prejudicial effect of antitrust decisions, legislation on group proceedings), two steps back were taken (non-admission of evidence in proceedings with consumers as parties). Potential plaintiffs will react accordingly.

It has been more than four years since the 2008 White Paper and yet Polish legislature continues to lack an overall idea on how to re-design

⁵⁵ It is worth noting that Article 479^{29a} (1)(1) of the Code of Civil Procedure stipulates that if the provisions of a separate act grant an entity that does not participate in the case the right to submit an opinion relevant to the case, Article 63 shall be applied respectively thereto. Article 479^{29a} was added as of 03/05/12 and replaced the now-repealed Article 479^{6a} using identical wording. The latter was introduced in 2004 by the Polish legislature inspired by Article 15 of Regulation 1/2003.

the still vastly unpopular private antitrust sanctions and their enforcement. The impression emerges at present that the authorities are waiting for the European Commission to take definite actions. The pace of the evolutionary processes of Member States' competition laws has historically seldom been quickened by anything other than EU initiative. One can thus expect such an initiative in the field of private antitrust enforcement to follow.

It does not seem appropriate to take such a long path to 'sustainable antitrust enforcement' and achieving a balance between public (administrative) and private (civil law) antitrust enforcement. However, increasing the scale of private actions should not be an aim in and of itself since increasing the workload of courts cannot be advocated. The aim of the reform of the antitrust enforcement system should be, first of all, to decrease the percentage of victims who have not been compensated. Therefore, infringers should be first and foremost persuaded to compensate their victims voluntarily. Encouraging victims to file damages claims in courts should be a secondary aim. But this is a vast subject beyond the scope of this paper.

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