

Private enforcement of the European Union competition law

*Prawnoprywatne egzekwowanie
reguł konkurencji w Unii Europejskiej*

Amanda Adamska, Piotr Olechowski, Jagiellonian University, Faculty of Law and Administration

ABSTRACT

The aim of this article is to discuss the issue of private enforcement of competition law. It is becoming an increasingly important aspect of this area of law as it gives an opportunity to exercise the right to claim compensation for infringements of the European Union and corresponding national competition laws in order to ensure a proper functioning of the internal market for companies and consumers. The article outlines an evolution of this phenomenon; in particular, it serves as confirmation of the right to damages by the European Court of Justice that was followed by consultations in the European Commission and an issuance of numerous policy statements. The culminating point of this process is an enactment on the Directive's 2014/104/EU on anti-trust damages actions. The article puts an emphasis on Directive's proposals that are aimed to facilitate and increase the significance of private enforcement at the national level.

Keywords: private enforcement of competition law, European Union law, Directive 2014/104/EU.

Celem niniejszego artykułu jest omówienie zagadnienia egzekwowania reguł konkurencji na drodze prywatnoprawnej. Stanowi ono istotny aspekt prawa ochrony konkurencji, gdyż zapewnia możliwość dochodzenia roszczeń odszkodowawczych z tytułu naruszenia unijnych oraz krajowych reguł konkurencji, zapewniając tym samym prawidłowe funkcjonowanie rynku wewnętrznego dla przedsiębiorców oraz konsumentów. Artykuł przedstawia stopniowy rozwój modelu prywatnoprawnego, w szczególności rolę orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej, który potwierdził możliwość dochodzenia roszczeń, a także działalność Komisji Europejskiej, dzięki której zostało wydanych wiele kluczowych dokumentów. Prace nad rozwiązaniem tego zagadnienia zostały zwieńczone przyjęciem tzw. Dyrektywy odszkodowawczej 2014/104/UE. W niniejszym artykule zostają przedstawione rozwiązania przyjęte w Dyrektywie, które mają na celu ułatwienie oraz zwiększenie znaczenia prywatnoprawnego dochodzenia roszczeń na poziomie krajowym.

Słowa kluczowe: prywatnoprawne egzekwowanie reguł konkurencji, prawo Unii Europejskiej, Dyrektywa 2014/104/UE.

STRESZCZENIE

Introduction

Private enforcement is an aspect of competition law that has gained a lot of attention in recent years. It gives an opportunity to exercise the right to claim damages for harm resulting from infringements of European Union and national competition laws. Articles 101 and 102 of the Treaty on the Functioning of the European Union (2008, OJ C 115/47, hereafter referred to as TFEU) impose prohibitions on certain forms of anticompetitive market behaviour, such as restrictive agreements and the abuse of a dominant position. These prohibitions are nowadays mainly enforced through public enforcement carried out by the European Commission and the competition authorities of the Member States in accordance with Council Regulation No. 1/2003 of 16th December 2002 on implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003, OJ L1/1). The Treaty of Lisbon entered into force on 1st December 2009 and from this moment Articles 81 and 82 TFEU became Articles 101 and 102 TFEU, remaining identical in substance. In national competition laws, there are corresponding provisions that are applied in the same cases by national competition authorities or national courts in parallel to EU competition law when anticompetitive market behaviours may affect the trade between the Member States (Article 3 of Regulation 1/2003). Until recently, the enforcement of antitrust provisions by private

parties (entrepreneurs or customers) before the national courts of the Member States was not the case in Europe as opposed to the United States where private enforcement has long been the central plank in the antitrust enforcement matrix. In Europe, antitrust prohibitions have been regularly invoked in private litigation as a defence (or 'shield'), mainly in contractual disputes, but they are rarely used proactively (as a 'sword') to claim damages and an injunctive relief (Wils 2003). TFEU does not regulate the use of Articles 101 and 102 as a 'sword'. However, it should be pointed out that private complainants play an important role in the public enforcement of the abovementioned provisions. Under Article 7 of Regulation 1/2003, any natural or legal person, who can show a legitimate interest, can lodge a complaint requesting the Commission to take action against an infringement of Articles 101 or 102 TFEU. If the complaint is rejected by the Commission, such a decision can be subjected to a judicial review. Nevertheless, this phenomenon is increasing in viability in the European Union as a consequence of judgments of the European Court of Justice, that underline the centrality of the right to private action as well as a result of the legislation (such as Regulation 1/2003) and numerous policy statements issued by the European Parliament and the European Commission so as to increase the number of damages actions at the national level (Jones 2004). These efforts have gathered momentum more recently with an enactment of Directive 2014/104/EU of The

European Parliament and of the Council of 26th November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5.12.2014, hereafter referred to as the Directive). The aim of the Directive is to strengthen and harmonise national procedures for private competition litigation in order to facilitate and increase private enforcement in the Member States. The main objective is to provide full effectiveness of prohibitions under Articles 101 and 102 TFEU and national law systems, and also to ensure proper functioning of the internal market for both – undertakings and consumers.

Evolution of Private Enforcement in the EU competition law and the role of the European Court of Justice

Only relatively recently, in *Courage v. Crehan* case (Judgment of 20th September 2001 in Case C-453/99, *Courage Ltd v Bernard Crehan*, 2001 ECR I-06297), the Court confirmed the existence of the right to claim compensation for losses incurred as a result of infringements of Articles 101 or 102 TFEU. The Court stated that *actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community* (section 27). The right to damages for competition infringements was confirmed in the subsequent *Manfredi* judgement, stating that the right extends not only to the actual loss (*damnum emergens*), but also to any loss of profit (*lucrum cessans*), plus the payment of the interest (Judgment of 13th July 2006 in joined Cases C-295-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, 2006 ECR I-6619, section 61). In the absence of harmonised EU law governing application of the right to damages, the rules and procedures for enforcing of such claims are determined by the Member States at the national level, bearing in mind that these domestic rules must comply with the principles of effectiveness and equivalence (Judgment of 20th September 2001 in Case C-453/99, *Courage Ltd v Bernard Crehan*, 2001 ECR I-06297, section 29).

The role of the European Commission

In 2005, the European Commission issued a Green Paper on damages for breach of the EC antitrust rules (COM 2005, 672 final, 19th December 2005) in order to identify the existing obstacles and outline proposals for potential actions. The Commission emphasised the diversity between the Member States and a total underdevelopment with regard to actions for damages before the national courts. The reactions to this work were generally positive, however, some far-reaching proposals were criticised. As a consequence, in 2008 the Commission issued a White Paper European Commission on damages actions for breach of the EC antitrust rules (COM 2008, 165 final, 02.04.2008), which sets out precise proposals to enable compensation for competition infringements. The Commission stated that *in line with the requirement set out by the Court of Justice that any victim of antitrust infringements must be able to exercise his right to compensation effectively, the issues addressed in the White Paper concern, in principle, all categories of victim, all types of breach of Articles [101 and 102 TFEU] and all sectors of the economy* (section 3). The Green Paper and the White Paper

received the qualified approval of the European Parliament and, on the basis of consultation on proposals included in the White Paper, the Commission prepared a draft Directive. In June 2013, the Commission issued a package of measures to facilitate and encourage private actions at the national level. It included a proposal for a Directive on damages actions (COM 2013, 404, 11.6.2013) as well as a communication from the Commission (C 2013, 3440, 11.6.2013) and a practical guide on the quantification of damages (SWD 2013, 205, 11.6.2013.), and also a recommendation on collective redress 2013/396/EU (OJ L 201/60, 26.7.2013), although all of them were non-binding and non-exhaustive.

Directive 2014/104/EU on antitrust damages actions

The above-mentioned efforts reached a climax more recently with an enactment of the Directive 2014/104/EU on antitrust damages actions. The Directive was formally signed into law on 26th November 2014 and published in the Official Journal of the EU on 5th December 2014. The main objective underpinning the Directive is to optimise the relationship between the public and the private enforcement regimes and to ensure that victims of anti-competitive behaviours can obtain compensation for the suffered harm.

Nevertheless, the Directive is not aimed to achieve the comprehensive harmonisation of national rules and procedures for private enforcement among the Member States. As a result of its non-exhaustive nature, several problematic areas remain untouched by its provisions and the Member States are free to regulate some aspects of private enforcement that are not stipulated by the Directive and adapt them to their national law systems. It is emphasised that differences between national procedures for damages actions that are not subject to the process of harmonisation should be approved to the extent that enable them to be compliant with the EU law, case-law of the Court of Justice and the principles of effectiveness and equivalence (Niamh Dunne 2014). It means that the right to compensation under the TFEU should not be excessively difficult or practically impossible to exercise or less favourable in comparison to similar actions in the national laws.

Proposals of the Directive

The Directive contains several proposals that are aimed at facilitating and increasing the significance of private enforcement of the EU and national competition law. First of all, it should provide the full effectiveness of Articles 101, 102 TFEU and national competition laws. It will reduce the differences between the Member States in terms of the rules governing actions for damages for infringements of competition law thus providing the legal certainty in this area. In Article 3, the Directive confirms the right to full compensation for the harm suffered that was established in *Courage v. Crehan* and *Manfredi* cases. This compensation covers the actual loss (*damnum emergens*) and the loss of profit (*lucrum cessans*), plus the payment of the interest from the time the harm occurred, until the moment when the compensation is paid. In the preamble, it is pointed out that this right is recognised for any natural or legal person, i.e. consumers, companies and also public authorities. The directive does not regulate collective redress mechanisms for enforcement of

competition rules. Chapter II addresses an issue of disclosure of evidence between the parties (Articles 5-8). Its aim is to provide the parties with an easier access to evidence that is held exclusively by the opposing party or by third parties and consequently eliminate the asymmetry in access to evidence necessary to prove a claim or a defence. Upon a request of a party, the judge will order the disclosure, taking into account the requirements of necessity and proportionality. The Directive establishes an exemption that leniency statements and settlement submissions to competition authorities are excluded from the disclosure. These procedures are important in public enforcement as they enable the competition authorities to detect the most serious infringements of competition law. The disclosure of this information deter companies from cooperation and pose a risk of their civil or criminal liability. What is more, the information prepared by competition authorities during the proceedings is also exempt from the disclosure of evidence until the termination of the proceedings. The use of evidence obtained by the access to the file of a competition authority will be also limited. The national courts will impose penalties in order to avoid destruction of important evidence, an abusive use of information or a non-compliance with obligations of disclosure. Article 9 declares the binding effect of final infringement decisions reached by the national competition authorities or the review of national courts in other Member States, similarly to the current status of Commission infringement decisions. It will constitute a fool proof before the national courts where the infringement occurred, while before the courts of other Member States, it will be treated as at least prima facie evidence of the infringement. Article 10 establishes clearly the limitation period rules of minimum five years for damages actions, so that victims have sufficient time to claim damages. The limitation periods should not run until the moment that the victim becomes aware of the infringement, the harm caused thereby and the identity of the infringer. This limitation period will be suspended or interrupted if the competition authority commences proceedings. It gives the possibility for victims to wait with a decision until the moment when the public proceedings are finished. In addition, the victims will have at least one year to bring actions after the competition authority's decision becomes final and binding. The Directive also provides for joint and several liability for the harm that was caused by joint behaviour of companies (Article 11). It means that any participant of the infringement will be liable towards the victims for the whole harm caused by the competition infringement with a reservation that there is a possibility to obtain a contribution from other infringers for their share of responsibility. However, this provision will not apply to infringers that obtained immunity from fines as a result of their voluntary cooperation with the competition authority during an investigation in order to ensure the effectiveness of leniency programmes. The leniency applicants will be obliged to compensate only their direct and indirect costumers unless full compensation cannot be obtained from the remaining infringers. There is also an additional exception for small and medium-sized enterprises that can avoid joint and several liability if it this jeopardises their economic viability or their market share on the relevant market is below 5%. This exception does not apply if the company played a leadership role in the infringement or is a recidivist. Chapter IV addresses a controversial issue of the passing-on defence, where

the claimant (the direct customer of the infringer) has passed on to its own customers (indirect customers) the entirety or part of an overcharge that result from the competition infringement. In such an event, the infringer has the possibility to reduce compensation to direct customers by the amount they passed on to their indirect customers. Passing-on defence will be available, although the burden of proving the existence and scope of the overcharge will be on the defendant. Notwithstanding all that, it may be difficult for a consumer or a company, that suffered harm as indirect purchasers, to prove the extent of this harm. In order to ensure full compensation, the Directive establishes a rebuttable presumption that indirect customers suffered some level of overcharge harm when they are able to show prima facie that such passing-on has occurred. The Commission will issue guidelines for the courts in the Member States concerning estimation of the extent of passing on indirect purchaser cases. Apart from proving the harm suffered, it is necessary to quantify the extent of the harm in order to obtain the damages. It may require costly application of complex economic models. Therefore, in Article 17, the Directive establishes a rebuttable presumption that harm has occurred as result of the cartel infringement. This presumption will undoubtedly facilitate the process of receiving compensation. Member States will determine their own rules regarding quantification of the harm that have to be compliant with principles of effectiveness and equivalence. National courts are empowered to estimate the amount of harm if it is almost impossible or excessively difficult to quantify this precisely.

Finally, chapter VI promotes consensual dispute resolution by suspension of the limitation periods during settlement discussion and establishing that non-settling co-infringers cannot recover contribution from the settling infringer (Articles 18 and 19).

Implementation of the Directive

The Member States are obliged to implement the Directive into their national law systems by 27th December 2016. Several countries have already started or completed public consultations on implementation measures (http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html 2014). The process of implementation to the Polish competition law is also ongoing. The Government Legislation Centre published a draft preliminary paper of 7th March 2016 on its website (<http://legislacja.rcl.gov.pl/projekt/12283303> 2016). According to this document, it is recommendable to introduce a separate Act on actions for damages for infringements of the competition law provisions. There are provisions that do not need to be implemented due to the existence of similar solutions in Polish Law. It will be necessary to introduce changes in the Polish Civil Code Act of 23rd April 1964 (Journal of Laws of 1964 no. 16 item 93 as amended), concerning limitation period rules. In addition, the Act of 16th February 2007 on Competition and Consumer Protection (Journal of Laws of 2007 no. 50 item 331 as amended) should be adopted in terms of the disclosure of documents possessed by competition authorities and consensual settlement's impact on competition authority's decision imposing a fine. Implementation of this Directive is supposed to achieve a desired goal of increased importance of private mechanism in the enforcement of EU and corresponding national competition laws. In the

Polish Law, corresponding prohibitions of anticompetitive practices are established by Article 6 (prohibition of restrictive agreements) and Article 9 (prohibition of the abuse of a dominant position) of the Act of 16th February 2007 on Competition and Consumer Protection.

Conclusion

This article considers the evolving role of private enforcement within the framework of the overall system of competition law, in particular in light of the enactment of the long-anticipated Directive on antitrust damages actions. It also outlines the most important proposals for the enforcement of antitrust prohibitions that have to be implemented and adapted to the national law systems by the end of this year. The enforcement of Articles 101 and 102 TFEU has undergone significant changes in the past few decades in both substantive and procedural terms. The role of private enforcement of the EU competition rules has been growing continually in importance as a consequence of judgments of the European Court of Justice and numerous policy statements issued by the European Commission and recently by the enactment of Directive on antitrust damages actions. This Directive's general aim is to strengthen and harmonise different rules and procedures for private damages actions across the various Member States. Summing up, it is also worth pointing out the negative aspects of the Directive that are presented in literature (Dunne). It is argued that the Directive will facilitate significantly the private enforcement only with respect to victims of cartel infringements. It is believed that an emphasis on the issue of cartel action was placed not only in public, but also in private enforcement in the EU law. Other infringements of Articles 101 and 102 TFEU are subject to more regulatory consensual forms of enforcement, particularly the commitment procedure under article 9 of the Regulation 1/2003. Moreover, it is argued that the scope of the Directive is rather disappointing taking into account the effort and time that has so far been put into this reform. In many Member States, the private litigation is rapidly evolving and the implementation may require a reassessment of questions that have already been settled. What is more, it is pointed out that the litigation seems to be facilitated only for the companies that are already eager to seek remedies imposed by the court. The Directive does not provide small and medium-sized companies or consumers with incentives to bring damages actions. Finally, this Directive scarcely addresses issues that are crucial for claimant in the litigation, i.e. costs, funding and class actions. On the other hand, the positive aspects of private enforcement should also be taken into consideration. The Directive would finally optimise the interplay between private damages actions and public enforcement by the Commission and national competition authorities. Furthermore, it removes practical obstacles that were crucial in the process of receiving compensation by all victims of competition infringements. It is applicable to all damages actions, either individual or collective, that are available in the Member States. The enactment of the Directive is a significant step toward improving effective private enforcement, but the implementation process is ongoing. Real changes will be visible only once the Directive is implemented across the EU and

then the proper assessment of its results will be beneficial for the further improvement of the competition culture in Europe.

The sources of research and article funding are the author's own resources.

Bibliography

1. Commission's Green Paper, Damages actions for breach of the EC antitrust rules, COM(2005) 672 final, 19th December 2005.
2. Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, C(2013) 3440, 11.6.2013.
3. Council Regulation (EC) No. 1/2003 of 16 December 2002 on implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1.
4. Council Regulation No. 17 of 6 February 1962 – First Regulation Implementing Articles 85 and 86 (at present Articles 81 and 82) of the Treaty, [1962] JO L13/204.
5. Directive 2014/104/Eu Of The European Parliament And Of The Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union), OJ L 349, 5.12.2014.
6. Dunne Niamh, (2014) *The Role of Private Enforcement within EU Competition*, "Cambridge Yearbook of European Legal Studies" no. 16.
7. European Commission, *Actions for Damages. Directive on Antitrust Damages Actions*, http://ec.europa.eu/competition/antitrust/action-damages/directive_en.html [30.04.2016].
8. European Commission, Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU) (OJ L 201/60, 26.7.2013).
9. European Commission, Staff Working Document. Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 TFEU of the Treaty on the Functioning of the European Union, SWD (2013) 205, 11.6.2013.
10. European Commission, White Paper on Damages actions for breach of the EC antitrust rules, COM (2008) 165 final, 02.04.2008.
11. Jones A., (2004) *Private antitrust enforcement in Europe: a policy analysis and reality check*, "World Competition" 27(1).
12. Judgment of 13 July 2006 in joined Cases C-295-298/04, Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, (2006) ECR I-6619.
13. Judgment of 20 September 2001 in Case C-453/99, Courage Ltd v Bernard Crehan, (2001) ECR I-06297.
14. Minister Sprawiedliwości, (2016) *Projekt założeń projektu ustawy o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konstytucyjnego*, <http://legislacja.rcl.gov.pl/projekt/12283303> [30.04.2016].
15. Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, 11.6.2013.
16. The Act of 16 February 2007 on competition and consumer protection (Journal of Laws of 2007 no. 50 item 331 as amended).
17. The Civil Code Act of 23 April 1964 (Journal of Laws of 1964 no. 16 item 93 as amended).
18. The Treaty on the Functioning of the European Union (consolidated version), [2008] OJ C 115/47, 09.05.2008.
19. Wils W.P.J., (2003) *Should Private Antitrust Enforcement Be Encouraged in Europe?*, "World Competition" 26(3).

