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Proving the Grounds for Compensation – Reflections on Private Enforcement in the Polish Cement Cartel Case.

Case Comment to the Judgment of the Court of Appeals in Cracow of 10 January 2014 (Ref. No I ACa 1322/13)

by

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Key words: private enforcement of competition law; antitrust damage claims; quantification of harm; passing-on of overcharges; burden of proof; binding decision; final decision of a competition authority.

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I. Introduction and the background of the case

Despite the fact that the right to full compensation of harm caused by the breach of Articles 101 and 102 TFEU was confirmed in European Union jurisprudence many years ago,[1] and that actions for damages for competition law infringements were admissible in Poland also before the transposition of Directive 2014/104/EU (hereinafter, the **Damages Directive**),[2] the number of reported court cases regarding private enforcement of competition law is very low.[3] The commented judgment of the Court of Appeals in Cracow (*Sąd Apelacyjny w Krakowie*) of 10 January 2014[4] is one of the very few judgments of Polish courts regarding actions for damages for an infringement of competition law.[5]

The action for damages in this case is an example of a follow-on action, as it was preceded by a decision of the Polish national competition authority, that is, the President of the Office of Competition and Consumer Protection (*Prezes Urzędu Ochrony Konkurencji i Konsumentów*, hereinafter, the **UOKiK President**), adopted on 8 December 2009.[6] The UOKiK President recognized therein a practice on the domestic market for the production and sale of gray cement as restricting competition, constituting an infringement of both national and EU competition rules. According to the UOKiK President, this anticompetitive agreement was in force no later than since 1998 and lasted until 2006, that is, before the Damages Directive was adopted. Interestingly,

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[1] See judgment of 20.09.2001, *Courage and Crehan*, case C–453/99, ECLI:EU:C:2001:465, para. 26; judgment of 13.06.2006, *Manfredi*, joined cases C–295/04 to C–298/04, ECLI:EU:C:2006:461, para. 60; judgment of 14.06.2011, *Pfleiderer*, case C–360/09, ECLI:EU:C:2011:389, para. 36 and judgment of 06.11.2012, *European Community v. Otis NV and others*, case C–199/11, ECLI:EU:C:2012:684.

[2] Directive 2014/104/EU of the European Parliament and of the Council of 26.11.2014 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, 05.12.2014.

[3] Judgments of Polish courts on private competition law enforcement between 1993 and 2012 were reviewed by A. Jurkowska-Gomułka (see Jurkowska-Gomułka, 2013).

[4] Judgment of the Court of Appeals in Cracow of 10.01.2014, Ref. No I ACa 1322/13. Retrieved from: http://orzeczenia.krakow.sa.gov.pl/content/$N/152000000000503_I_ACa_001322_2013_Uz_2014-01-10_001 (18.09.2017). Not available in English.

[5] It should be noted, however, that due to the fact that private enforcement of competition law cases do not have any special denotation in Polish courts (they are not entered into separate repertory), there are no comprehensive statistics of the number of such cases.

[6] Decision No DOK-7/2009. Retrieved from: https://decyzje.uokik.gov.pl/bp/dec_prez.nsf/43104c28a7a1be23c1257eac006d8dd4/e3ec800578c62cffc1257ec6007b8da2/$FILE/decyzja_dok_7_2009.pdf (18.09.2017). Not available in English.

during the antitrust proceedings before the UOKiK President, the defendant, Lafarge Cement S.A. (seated in Małogoszcz, Poland), did not contest its participation in the agreement, quite the contrary, it was the immunity recipient. It is also worth noting that the total share of the participants of the cartel in the domestic market for the production and sale of gray cement was estimated by the UOKiK President at almost 100%.[7] The administrative decision was appealed to the Court of Competition and Consumers Protection (*Sąd Ochrony Konkurencji i Konsumentów*, hereinafter **SOKiK**) but not by the defendant, who took advantage of the leniency programme and thus had no legal interest in appealing the decision. SOKiK issued a judgment on 13 December 2013[8] which confirmed the findings of the UOKiK President as to the participation of the parties in the anticompetitive agreement.[9] This judgment was later appealed to the Court of Appeals in Warsaw.[10] The latter court, having constitutional doubts, referred a 'preliminary' question to the Polish Constitutional Tribunal (*Trybunał Konstytucyjny*). The Tribunal considered the question unfounded and decided to discontinue its proceedings on 5 April 2017.[11] Accordingly, the UOKiK President's decision of 8 December 2009 has not become final even up to this point.

II. Facts of the case

In 2012 the claimant has filed a lawsuit seeking compensation (PLN 1,440,770.70 plus statutory interest from the date of filing the statement of claims) for purchasing cement at excessive prices. The claimant reasoned that the requested amount was a result of the harm it suffered by buying overpriced cement in the years 2001–2002. The action for damages in this case was brought against the cement producer Lafarge Cement S.A. who – in

[7] Point 405 of the UOKiK President decision No DOK-7/2009.

[8] Judgment of SOKiK of 13.12.2013, Ref. No XVII AmA 173/10. Retrieved from: http://orzeczenia.warszawa.so.gov.pl/content/$N/154505000005127_XVII_AmA_000173_2010_Uz_2014-12-13_001 (18.09.2017). Not available in English.

[9] By this judgment, SOKiK decided to change the decision of the UOKiK President but only to a very limited extent: the date when one of the parties ceased the practice concerned has been changed and the amount of penalties imposed on the parties have been decreased. SOKiK judgment has confirmed that the entrepreneurs concerned were parties to the anticompetitive agreement.

[10] The case is still pending before the Court of Appeals in Warsaw (Ref. No. VI ACa 1117/14).

[11] Decision of the Constitutional Tribunal of 24.03.2017, Ref. No. P 17/16. Retrieved from: http://trybunal.gov.pl/postepowanie-i-orzeczenia/postanowienia/art/9667-ochrona-konkurencji-i-konsumentow-ustalenie-wysokosci-kary-pienieznej/ (18.09.2017). Not available in English.

accordance with the UOKiK President decision of 8 December 2009 – was one of the members of the cartel, though the claimant was buying cement from a different entrepreneur. The claimant argued that as a result of the cement cartel, which was functioning in the years 1998–2006, cement prices were unjustifiably increased and, due to the division of the sales market made by the cartel participants, the claimant was deprived of the possibility to choose from which cement producer it was buying the goods. Therefore, taking into consideration the fact that the defendant was an active member of the cement cartel in 1998–2006, the claimant held that the defendant was liable for the damages suffered by the claimant.

The defendant requested the dismissal of the claim. It asserted a statute of limitation and denied that the claimant summoned him to a settlement trial involving the claim covered by the lawsuit in these proceedings. Moreover, the defendant argued that the claimant had not purchased the cement covered by the invoices attached to the lawsuit from the defendant. Lafarge Cement S.A. denied also that it committed acts that resulted in the infringement of competition law which had an impact on the economic situation of the claimant.

The Regional Court in Kielce (*Sąd Rejonowy w Kielcach*, hereinafter, the **First Instance Court**) dismissed the claim in a judgment of 12 June 2013[12] on the basis of the following arguments. First, in the opinion of the court, only a final infringement decision of the UOKiK President would determine whether a competition restricting agreement actually took place. Second, the claimant has not proved that he was deprived of choice and was not able to buy cheaper cement from a different producer. Third, the claimant should have proved he had bought cement from the seller (different entrepreneur than the defendant), had overpaid it, and that the defendant was liable for the claimant's harm arising from these facts. The First Instance Court noted that the claimant has not shown that there was a causal relationship between the defendant's behaviour and the claimant's harm, as well as that the defendant was at fault and liable for this. According to the First Instance Court, the claimant proved neither his harm nor the amount of it. Though the claimant referred to Article 322 of the Polish Civil Procedure Code (hereinafter, the **Civil Procedure Code**),[13] which may be applied only if it is impossible or too difficult to prove the amount of harm, the court stated that the very fact of harm has to be proved first, and this had not been done in this case. For the same reason, the First Instance Court dismissed the claimant's application for

[12] Judgment of the Regional Court in Kielce of 12.06.2013, Ref. No. VII GC 325/12. Not published.

[13] Act of 17.11.1964–Code of Civil Procedure (Journal of Laws 1964, No. 43, item 296 as amended).

a witness expert opinion on the amount of its harm. Fourth, in the view of the court, the limitation period has already lapsed regarding part of the claim.

The judgment of the First Instance Court was appealed by the claimant to the Court of Appeals in Cracow (hereinafter, the **Court of Appeals**). In the commented judgment, the Court of Appeals ruled in favour of the defendant. First of all, the Court of Appeals stated that the claimant had not proved that the anticompetitive agreement was concluded and that the defendant was a party to such agreement. In the Court of Appeals' opinion, the UOKiK President decision of 8 December 2009 could not have been deemed as sufficient evidence of this fact, because at the time of the Court of Appeals' judgment this decision was not yet final. Second, the Court of Appeals indicated that the claimant had not presented evidence to prove its harm nor the amount of it. The invoices documenting the purchase of cement by the claimant in two periods, before the cartel and for the period of 2001–2002, were insufficient. The Court of Appeals explained that the claimant should have presented also invoices documenting his own re-sale prices for the compared periods. Only then the witness expert could have issued an opinion on the amount of harm suffered by the claimant. Lack of documents showing re-sale prices applied by the claimant in those periods constituted – in the Court of Appeals' opinion – an obstacle for evidence from an expert witness opinion.

III. Reasoning of the Court of Appeals and the discussion

1. Conditions required to establish whether a competition authority's decision is final

The first and most important point is establishing whether courts are bound by a decision of UOKiK President and when that decision becomes final.

Regarding the issue of a court being bound by a UOKiK President decision, there was no consistency in the Polish case-law for years. For example, the Polish Supreme Court (*Sąd Najwyższy*, hereinafter, the **Supreme Court**) stated in 2004 that decisions finding an infringement have binding effect on civil courts.[14] Later, the same issue was tackled differently by the judiciary. Nevertheless, the prevailing approach, which was confirmed by the jurisprudence of the Supreme Court,[15] is that civil courts are independent in

[14] Judgment of the Supreme Court of 28.04.2004, Ref. No. III CK 521/02. Not published. See also judgment of the Supreme Court of 04.03.2008, Ref. No. IV CSK 441/07. Not published.

[15] Judgment of the Supreme Court of 02.03.2006, Ref. No. I CSK 83/05, retrieved from: http://sn.pl/sites/orzecznictwo/Orzeczenia2/I%20CSK%2083-05-1.pdf (18.09.2017), not available

determining the existence and nature of an anticompetitive agreement when there is no final decision of the competition authority. Therefore, courts are not bound by the competition authority decision and act alone in deciding how to apply competition law in a specific case pending before that court, unless there is a final decision of the competition authority decision (Jurkowska-Gomułka, 2010, p. 45). A similar approach was taken by the court in the commented judgment.

The next matter is determining at what point an administrative decision becomes final. A decision issued by the Polish competition authority is final when it is irrevocable, that is, when no ordinary remedies are available under the law, where all those remedies were exhausted or where the time limit for those remedies has expired (Jaśkowska, 2016, p. 1105).[16] The relevant 'ordinary' legal remedy is an appeal to SOKiK or, next, to the Court of Appeals preventing a decision from becoming final. In other words, antitrust decisions are final when the time limit for an appeal lapsed or the Court of Appeals upheld the antitrust decision.

In the reviewed judgment, the Court of Appeals assessing the damages case focused mainly on the lack of a binding antitrust decision, reasoning that only a final ruling of the Court of Appeals in the matter of the UOKiK decision will determine whether: 1) there was an anticompetitive agreement, 2) defendant participated in the agreement, 3) the agreement restricted competition on the domestic market for the production and sale of gray cement in 2001–2002.

First, it has to be noted that SOKiK, which reviewed the contested antitrust decision first, did not undermine the existence of the anticompetitive practice. Moreover, it acknowledged the role of Lafarge Cement S.A. (the defendant in the damages case) in the cartel. It remains unclear why the court responsible for hearing the action for damages questioned the defendant's participation in the cartel, when in its own judgment it emphasizes that during the antitrust proceedings the defendant did not contest his participation in the anticompetitive agreement. Interestingly, the fact that the defendant was the immunity recipient was also not considered as a basis to establish the existence of the agreement.

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in English; judgment of the Supreme Court of 14.03.2006, Ref. No. I CSK 83/05, not published; resolution of the Supreme Court of 23.07.2008, Ref. No. III CZP 52/08, retrieved from: http://www.sn.pl/sites/orzecznictwo/Orzeczenia1/III%20CZP%2052-08.pdf (18.09.2017), not available in English.

[16] See judgment of the Provincial Administrative Court in Warsaw (*Wojewódzki Sąd Administracyjny w Warszawie*) of 24.02.2010, Ref. No. VII SA/Wa 2137/09. Not available in English. From 01.06.2017, the Polish Administrative Procedure Code defines final decisions as decisions which cannot be challenged before the court (Art. 16 § 3).

A different issue that raises concerns is the uncertainty regarding the reasons for ruling on the damages claim while the appeal proceedings concerning the antitrust decision of the UOKiK President were still pending. The Supreme Court notes that it would be troublesome if civil courts and the Polish competition authority would reach different conclusions while deciding whether there has been an infringement of competition law.[17] Jurkowska and Sieradzka share this view stating that civil proceedings should be suspended if antitrust proceedings relating to the same infringement are pending. This would ensure coherence between public and private enforcement (Jurkowska, 2010, p. 44; Sieradzka, 2008). The court in the commented damages judgment should have considered suspending its own proceedings until the challenged antitrust decision becomes final. According to Article 177 § 1(3) of the Civil Procedure Code, optional grounds for suspending the proceedings include dependence on the outcome of separate ongoing proceedings. Although these grounds are not mandatory, they should be at least considered by the court, which did not apply them in this case. Neither a justification nor sound arguments for not suspending the damages proceedings were provided.

Article 9 of the Damages Directive introduced an improvement in this matter stating that final infringement decisions should be deemed to be irrefutably established in actions for damages brought in the Member State of the national competition authority or review court relating to that infringement. The effect of the finding should, however, cover only the nature of the infringement and its material, personal, temporal and territorial scope, as determined by the competition authority or review court in the exercise of its jurisdiction (recital 34 of the Preamble to the Damages Directive). Despite the fact that the Damages Directive applies only to breaches of EU competition law, corresponding provisions of national law were introduced into Polish law also.[18] Other CEE Member States have adopted the same model and gave a broader scope to their implementing provisions – they introduced into their national legislation provisions applying to other situations than only infringements of competition law affecting trade between Member States. By doing so, they avoided introducing double standards regarding two different types of infringements (Piszcz, 2017, p. 298).

Another outstanding question is whether an infringement decision becomes final regarding a leniency applicant who did not appeal it. In the relevant antitrust case, the leniency procedure was initiated by two undertakings,

[17] Resolution of the Supreme Court of 23.07.2008, Ref. No. III CZP 52/08. Retrieved from: http://www.sn.pl/sites/orzecznictwo/Orzeczenia1/III%20CZP%2052-08.pdf (18.09.2017). Not available in English.

[18] Art. 30 of the Act of 21.04.2017 on claims for damages for infringements of competition law (Journal of Laws 2017, item 1132), hereinafter, **ACD**.

which decided to cooperate with the competition authority. The antitrust decision concluded that as many as seven undertakings were in fact involved in the cartel (fixing prices and sales conditions as well as geographic market sharing). The UOKiK President imposed maximum fines on five members of the cartel, excluding only one leniency applicant – Lafarge Cement S.A. and reducing the fine to 5% of the revenue for the other – Górażdże Cement S.A. Lafarge Cement S.A. was also the only undertaking which did not challenge the decision.

Given these facts, an important question arises: how does it affect the leniency applicant? What happens if not all of the parties to the antitrust proceedings challenge the infringement decision? Thought must be given to situations where the decision of the competition authority finding an infringement may become final for the leniency applicant before it becomes final for other infringers, which did not apply for leniency or have not received immunity. This would result in at least two implications. First, a leniency applicant immediately becomes the target of compensation claims. Second, it gives raise to the assumption that an agreement, which by definition is concluded by many entities, is attributed to only one undertaking, which is undoubtedly unreasonable (Piszcz, 2016, p. 108).

Following this reasoning, it is pertinent to introduce provisions for undertakings which were exempt from fines (that is, immunity recipients) imposed by a competition authority, to be protected from being the target of damages claims. In fact, the Damages Directive states that an immunity recipient is jointly and severally liable only to 'its direct or indirect purchasers or providers' and that other infringers may recover a contribution from him 'where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law' (Article 11(4)). However, when the commented damages judgment was given it was months before the Directive was signed into law, let alone before the transposition period ended.

The Court of Appeals in the commented judgment did not consider issues covered by the mentioned article of the Damages Directive, but it found that the decision is not final regarding the immunity recipient who did not appeal it and was only an interested party in the antitrust appeal proceedings before the court reviewing the contested decision of the UOKiK President. This approach appears to be consistent with Polish doctrine, which refers to substantive joint participation described in Article 72 § 1(1) of the Civil Procedure Code, stating that more than one person may act in one case as claimants or defendants, provided that the matters at issue are rights or obligations common to them or which are based on the same factual and legal grounds (substantial joint participation). Manowska explains further that an appeal brought by joint

participants is equally effective against non-acting participants (Manowska, 2015, p. 233). This is a key feature of uniform joint participation of claimants in civil law proceedings. It occurs when it arises, from the nature of an arguable legal relationship or from the provision of statute that the judgment is going to affect indivisibly all joint participants. Moreover, in that case Article 378 § 2 of the Civil Procedure Code, which gives the court of second instance the option to consider the appeal also for the benefit of those joint participants who have not challenged the first instance judgment, does not apply because an appeal is automatically effective against all joint participants. The judgment obtains the force of *res iudicata* against all joint participants, even those who were not mentioned in that ruling (Manowska, 2015, p. 234). Accordingly, applying this reasoning to the commented judgment means that appealing against a UOKiK President decision equals substantive joint participation, that is, appeal brought by one cartel member is effective against other members also. Therefore, the immunity recipient is treated as if he challenged the decision also, even though the appeal was brought by other members of the cement cartel. The Court of Appeals in this case most probably followed this argumentation, because it stated that it is beyond doubt that the relevant decision of the Polish competition authority is not final, therefore it is not binding on the court.

On the European level, however, we come across a different approach, which can be seen in the *Galp Energía España*[19] case. The General Court stated therein in paragraph 90 that 'decision adopted in a competition matter with respect to several undertakings, although drafted and published in the form of a single decision, must be seen as a set of individual decisions finding that each of the addressees is guilty of the infringement or infringements of which they are accused and imposing on them, where appropriate, a fine. It can be annulled only with respect to those addressees which have successfully brought an action before the European Union judicature, and remains binding on those addressees which have not applied for its annulment'. Accordingly, this case, as well as same approaches presented by the CJEU in older cases,[20] expresses the opposite view to that of the Polish doctrine regarding parties being bound by a final decision of a competition authority.

[19] Judgment of 16.09.2013, Case T-462/07 *Galp Energía España and Others v. Commission*, ECLI:EU:T:2013:459.

[20] Judgment of 15.10.2002, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v. Commission*, ECLI:EU:C:2002:582, para. 100. Judgment of 14.09.1999, Case C-310/97 P *Commission v. AssiDomän Kraft Products and Others*,ECLI:EU:C:1999:407, para. 49.

2. Conditions of liability for damages and the burden of proof of passing-on of overcharges

As noted above, in the commented case the claimant has not purchased cement from the defendant but rather from another entity that – according to the UOKiK President decision – was together with the defendant a participant of the cement cartel. In effect, the claimant and the defendant were not bound by any contractual relationship. The claim for damages in this case was based on Article 415 of the Polish Civil Code (hereinafter, the **Civil Code**)[21] which states that a person who has inflicted harm to another person by its own fault shall be obliged to redress it. In order to successfully claim damages on this legal basis, the claimant should have proved: (1) the event giving rise to the harm, (2) the harm, including the amount of if, (3) causal link between the event and the harm and (4) the defendant's fault.

The Court of Appeals indicated that the claimant had not proved, amongst other premises, the amount of the harm suffered as a result of the unlawful action of the defendant. The Court of Appeals stated that due to the nature of the claimant's business activity, the claimant should have presented during the trial not only invoices documenting the purchase of cement by the claimant, but also copies of invoices documenting the re-sell of the cement to the claimant's clients – each set of them for both periods, for the time before and during the cartel. In the Court of Appeals' opinion, only then the expert witness could have been able to quantify the harm suffered by the claimant, as well as to examine the unjustified increase of cement prices and the causal link. By such conclusion, the Court of Appeals has touched upon the issue of the **passing-on of overcharges**. The Court of Appeals suggested that it was not ruled out that the claimant compensated the higher prices of cement purchased while the cartel was functioning by increasing its own re-sale prices. As a result of such practice, actual harm might have been suffered by the claimant's clients, rather than by the claimant himself. The reasoning behind the judgment indirectly suggest that the Court of Appeals has recognized that the burden of proof of the fact that the claimant had not, in fact, passed on the overcharges was on the claimant. The Court of Appeals' conclusion in this case was, however, contrary to general rules governing the burden of proof in civil law cases.

In accordance with Article 6 of the Civil Code, the burden of proof of a fact is placed on the person who derives legal effects from this fact. This rule is supported and supplemented by Article 232 of the Civil Procedure Code whereby the parties shall present evidence to prove the facts from which they derive legal effects. In the jurisprudence of Polish courts, it is underlined that

[21] Act of 23.04.1964–Civil Code (Journal of Laws 1964, No. 16, item 93 as amended).

the following rules apply to the distribution of the burden of proof: 1) facts from which the claim is derived shall be demonstrated – as a rule – by the claimant; the claimant shall also prove the facts which constitute its response to the defendant's allegations; 2) facts justifying the defendant's allegations against the claimant's claim shall be demonstrated by the defendant; 3) facts damaging or abrasive shall be demonstrated by the opponent of that party who makes the claim – as a rule – the defendant.[22]

As to the **burden of proof of the passing-on of overcharges**, in the light of the above, it should be concluded that the initiative to invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law, as well as to prove the scope of the passing-on, is placed on the entity from whom the victim claims the damages arising from the cartel in accordance with the burden of proof rule (Article 6 of the Civil Code) and the evidence initiative rule (Article 232 of the Civil Procedure Code) (Wolski, 2016, p. 58). Undoubtedly, the entity who derives legal effects from the fact that the person who claims to be injured as a result of a cartel has in actuality reduced or eliminated the negative effects of the price increase by passing on the overcharges onto its clients is the alleged perpetrator of the harm. Moreover, also the scope of the passing-on constitutes a fact from which the alleged perpetrator of the harm derives legal effects as the scope of the overcharges that were passed on by the victim directly determines the actual harm suffered by it. Therefore, the conclusion made by the Court of Appeals according to which the burden of proof of the passing-on of overcharges was on the claimant cannot be considered correct.

It should be added that the documents that could have proved the claimant had (or had not) passed overcharges on were in fact in the possession of the claimant. Nevertheless, the defendant was not deprived of the procedural tools necessary to induce the claimant to deliver them. In accordance with Article 248 § 1 of the Civil Procedure Code, everyone is obliged to submit to a court disclosure order within a specific time, and hand over the document in his possession and evidence of a fact relevant to the resolution of the case, unless the document contains state secrets. In order to prove that the claimant had passed overcharges on, the defendant could have requested that the court issues an order on the basis of Article 248 § 1 of the Civil Procedure Code obliging the claimant to deliver, within a specific time, the requested documents (for example, copies of invoices documenting the resell of cement to the claimant's clients before and during the cartel). Admittedly, Articles 248

[22] See: judgment of the Supreme Court of 16.04.2003, II CKN 1409/00, Orzecznictwo Sądu Najwyższego, Izba Cywilna 2004, item 113; judgment of the Supreme Court of 13.10.2004, III CK 41/04, LEX No 182092. Not available in English.

§ 1 and 2 of the Civil Procedure Code provide for situations when failing to present evidence upon a court order may be justified, but the exposure to the risk of dismissing the claim is not one of them (Article 248 § 2 of the Civil Procedure Code). Failure to present by a party to the proceedings of the requested documents would result in the consequences described in Article 233 § 2 of the Civil Procedure Code. Namely the court would have to assess at its discretion the reliability and validity of a party's refusal to present evidence or a party's interference with the taking of evidence despite a court order, following extensive deliberations on the available material.[23] It means that not obeying a court order regarding the presentation of certain documents could have resulted in an assumption that the facts covered by those documents were in favour of the defendant, and so this was why the claimant had not presented them despite a court disclosure order. In the given case, however, no such order has been submitted nor did the claimant present the evidence of its own initiative. The lack of initiative of the claimant was indeed understandable because – as it was stipulated above – in accordance with the general burden of proof rules, the burden of proof regarding the passing-on of overcharges was on the defendant. In the end, despite the fact that the evidence collected in the proceeding was not sufficient to state whether the overcharges were passed on or not, the Court of Appeals has – with a violation of Article 6 of the Civil Code and Article 232 of the Civil Procedure Code – concluded that the passing-on of overcharges might have taken place.

Incidentally, the commented judgment was decided before the Damages Directive was adopted and transposed into Polish law. Nevertheless, the above interpretation of Article 6 of the Civil Code and Article 232 of the Civil Procedure Code (as to the burden of proof of the passing-on of overcharges) is in line with the obligation imposed on Member States by Article 13 of the Damages Directive. It is also worth noting that the ACD, which transposed the Damages Directive into Polish law, has not introduced any special rules as to the burden of proof of the passing-on of overcharges, except for the introduction of the presumption that the overcharges were passed on to an indirect purchaser, if a competition law infringement has resulted in an overcharge for the direct purchaser and the indirect purchaser has acquired the products or services to which the infringement relates, or products or services derived from such products or services, or containing such products or services (Article 4(1) of the ACD). This presumption may only be relied upon by an indirect purchaser who claims the redress of his own damages

[23] See e.g.: judgment of the Supreme Court of 26.01.1967, II CR 269/66, LEX No. 6108, judgment of the Supreme Court of 14.02.1996, II CRN 197/95, LEX No. 24748, judgment of the Supreme Court of 21.12.2004, I CK 473/04, LEX No. 194138, judgment of the Supreme Court of 20.01.2010, III CSK 119/09, LEX No. 852564.

arising from the passing-on of the overcharge upon this indirect purchaser (Article 4(2) of ACD). Therefore, the remarks as to the burden of proof of the passing-on of overcharges made in this case comment are still applicable.

3. Premises of the estimation of harm

In the commented judgment, the Court of Appeals has refused to apply Article 322 of the Civil Procedure Code which empowers the court – under certain circumstances – to estimate the amount of a damages claim. In accordance with this rule, if, in a case for the redress of *inter alia* damages, the court decides that it is impossible or excessively difficult to substantiate the amount of a claim, the court may award an estimated amount established by taking into consideration all the circumstances of a case.

It was indicated in the reasoning behind the judgment, that the court was empowered to estimate the amount of the claim only when the scope of the harm was proved but the available evidence did make it possible to establish the actual amount of the damages. Such conclusion has been explained by the statement that Article 322 of the Civil Procedure Code does not constitute an exemption from the adversary proceedings rule. The Court of Appeals also stated that the estimation of the amount of a claim, on the basis of Article 322 of the Civil Procedure Code, may be made, provided that the following conditions are fulfilled: 1) the principle of liability is established, 2) the harm and the scope of it are proved and 3) despite the fact that all available evidence was offered in the proceedings, the precise substantiation of the amount of the claim is impossible or excessively difficult.

This interpretation is in line with Polish jurisprudence. It was underlined in the judgment of the Supreme Court dated 26 January 1976[24] that the court is empowered to apply Article 322 of the Civil Procedure Code only when it was proved with all available evidence that the precise substantiation of the amount of a claim is impossible or excessively difficult. It is not sufficient for the claimant to only indicate this fact. The claimant should be active during the proceedings and show by using all available evidence that the premises of the court estimating the amount of the harm have been fulfilled. The burden of proof as to the fact that it is impossible or excessively difficult to prove the precise amount of a claim is on the claimant.[25] Therefore, the application of

[24] Judgment of the Supreme Court of 26.01.1976, I CR 954/75, LEX No. 7795. Not available in English.

[25] Judgment of the Supreme Court of 02.10.2015, II CSK 662/14, LEX No. 1943212, judgment of the Court of Appeals in Szczecin (*Sąd Apelacyjny w Szczecinie*) of 15.07.2015, I ACa 277/15, Lex No. 1938388. Not available in English.

Article 322 of the Civil Procedure Code cannot be triggered by the inaction of a party who does not make use of its own right to adduce evidence; otherwise, the estimation of the amount of a claim by the court would result in realising a party from the obligation to present evidence, which should be offered in accordance with the burden of proof rule.[26] It is not appropriate to use this institution where the claimant simply failed to prove its claim by appropriate means of evidence.[27] The lack of initiative of a party, regarding the facts that should be proved by it, cannot be replaced by the court acting on the basis of Article 322 of the Civil Procedure Code.[28] It has also been underlined in jurisprudence that the application of Article 322 of the Civil Procedure Code is justified only when all remaining premises of liability have been dully established.[29] Such interpretation is supported by the wording of Article 322 of the Civil Procedure Code, which regards only the actual amount of a claim, and does not mention the other premises of liability. Due to the exceptional character of this rule, it is not allowed to make an expansive interpretation of this rule.[30]

In the light of above, the interpretation of Article 322 of the Civil Procedure Code presented by the Court of Appeals in the commented damages judgment is in line with the wording of this legal provision as well as consistent with the jurisprudence of Polish courts. Therefore, the premises of a court using its power to estimate the amount of a claim were indicated correctly (Kohutek, 2016). Nevertheless, the decision of the Court of Appeals to refuse the application of this rule in this particular case may raise doubts.

First, as it was demonstrated in the commented judgment, during the proceedings, in order to prove the claim and its amount, the claimant presented *inter alia* invoices documenting the purchase of cement in the period before and during the cartel, as well as applied for evidence from an expert witness opinion as to the amount of the harm. It also indicated Article 322 of the Civil Procedure Code, which empowers the court to estimate the amount of a claim. The First Instance Court decided to reject the claimant's motion for evidence from an expert witness opinion, due to the fact that in the court's

[26] Judgment of the Court of Appeals in Cracow (*Sąd Apelacyjny w Krakowie*) of 10.02.2017, I ACa 1330/16, LEX No. 2289445. Not available in English.

[27] Judgment of the Court of Appeals in Gdańsk (*Sąd Apelacyjny w Gdańsku*) of 21.06.2016, V Aca 917/15, LEX No. 2308694. Not available in English.

[28] Judgment of the Supreme Court of 05.07.2013, IV CSK 17/13, LEX No. 1396449, judgment of the Court of Appeals in Łódź (*Sąd Apelacyjny w Łodzi*) of 17.12.2015, I ACa 839/15, LEX No. 1979475. Not available in English.

[29] Judgment of the Court of Appeals in Gdańsk (*Sąd Apelacyjny w Gdańsku*) of 28.10.2015, I Aca 259/16, LEX No. 2287499, judgment of the Court of Appeals in Warsaw (*Sąd Apelacyjny w Warszawie*) of 19.10.2016, VI Aca 931/15, LEX No. 2174849. Not available in English.

[30] Judgment of the Court of Appeals in Poznań (*Sąd Apelacyjny w Poznaniu*) of 27.09.2011, I ACa 680/11, LEX No. 1133345. Not available in English.

opinion the claimant had not presented any evidence to prove the harm, and the calculations in the lawsuit were not supported by any documents that would make it possible to verify those calculations. Such decision of the First Instance Court can be questioned, especially since the evidence collected in the proceedings indicated a high probability that as a result of the cartel (which the defendant participated in), the claimant could have suffered harm. Moreover, taking especially into consideration the nature of the claim, the expert witness opinion could have been crucial in proving the amount of the harm.

Second, the rejection of the claimant's motion for evidence from an expert witness opinion has led to a situation where not all of the available pieces of evidence, that were covered by the motions for evidence, offered in the proceedings in order to prove the precise amount of the claim, were carried out. The court's decision as to evidence from an expert witness opinion constituted, therefore, an obstacle in the application of Article 322 of the Civil Procedure Code.

IV. Conclusion

The commented judgment concerned several complex legal issues relating to private enforcement of competition law, which are particularly difficult to prove for an entity injured by the competition law infringer. While the Court of Appeals addressed a number of issues regarding private enforcement, the reasoning behind the judgment provide small degree of guidance for potential claimants seeking redress relating to competition law infringements. The approach taken by the Court of Appeals raises serious doubts in many areas.

While the Court of Appeals was right to state that the UOKiK President decision of 8 December 2009 has not yet become final, since its judicial appeal proceedings have not ended so far, a following question surfaces: has this fact constituted sufficient grounds for stating that the claimant did not prove that the defendant was a party to the anticompetitive agreement? Taking into consideration all the facts of the case, especially the defendant's attitude in the antitrust proceedings, the positive answer given to this question by the Court of Appeals in the damages case seems to be controversial. In light of the defendant's role in the proceedings conducted by the UOKiK President, a more appropriate decision would have been to suspend the damages proceedings until the UOKiK President decision actually becomes final. Unfortunately, the reasoning behind the judgment give neither clear indication as to whether the court has considered suspending the damages proceedings nor an explanation why the proceedings have not been suspended.

The approach of the Court of Appeals to the issue of the burden of proof of the passing-on of overcharges cannot be shared. Due to the fact that the entity who derives legal effects from the fact that the person who claims to be injured as a result of a cartel has, in fact, reduced or eliminated the negative effects of the price increase by the passing-on of the overcharges is the perpetrator of the harm. The burden of proof as to the passing-on of the overcharges and its scope is placed on the perpetrator, not on the injured party.

Finally, the Court of Appeals' interpretation of Article 322 of the Civil Procedure Code, which stipulates the conditions under which a court may estimate the amount of a claim, generally deserves approval as it is in line with both the wording of this rule and jurisprudence. However, the application of this rule in the commented case may raise serious doubts. It should not be forgotten what the sources of the obstacles in the application of Article 322 of the Civil Procedure Code were: the main obstacle was created by the First Instance Court by its decision to reject the claimant's motion for evidence from an expert witness opinion.

As it was indicated at the beginning, private enforcement of competition law in Poland has not developed yet. Guidance regarding actions for damages arising from competition law infringements, on the basis of legislation in force before the Damages Directive was transposed into Polish law, would be very important. This would be desirable not only because there is little jurisprudence in this kind of cases overall, but also due to the fact that in accordance with the transitional provisions of the ACD, the application of the rules of the ACD (which are more favourable for the potential claimants) to actions for damages for infringements that took place before the ACD came into force is very limited. Unfortunately, the reported judgment gives very little indication as to the interpretation and application of rules applicable in actions for damages arising from competition law infringements. Furthermore, the approach taken by the Court of Appeals in the commented case may discourage injured parties from claiming damages arising from competition law infringements in court proceedings.

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