

Individuals and the Enforcement of Competition Law – Recent Development of the Private Enforcement Doctrine in Polish and European Antitrust Law

by

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Abstract

The following article focuses on the issue of private enforcement of competition law as one of the key elements of the current European and national debate

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on the efficiency of competition law. By analyzing this concept, the article aims to determine the influence of the European private enforcement model on the national competition law enforcement practice. The goal of the analysis is to answer two main questions:

- 1) Does the current convergence of the national competition law enforcement system towards the European model guarantee the establishment of an effective, public-private system of antitrust enforcement?
- 2) Under which conditions may the development of private methods of antitrust enforcement lead to an increase in the efficiency of Polish and European competition law?

In order to address these questions, the article analyses the development of the private enforcement doctrine in the European Union and Poland. It refers to European and Polish jurisprudence on private enforcement, the competition policy of the European Commission as well as of the Polish competition authority – the UOKiK President. It also covers recent legislative changes introduced in the European and national legal orders. The analysis leads to the conclusion that the current convergence of the national antitrust system towards the European model did not lead to the establishment of an effective mechanism of private enforcement in Poland. Nevertheless, the assessment of recent changes at the European level gives grounds to assume that the adoption of the Directive on Damages Actions, and its transposition into the national legal order, might overcome this problem and allow for better protection of individuals against anti-competitive behaviors.

Resumé

L'article est concentré autour de la question d'application privée du droit de la concurrence comme un des éléments clés du débat européen et national sur l'efficacité du droit de la concurrence. En analysant le concept de «*private enforcement*», l'article vise à déterminer l'influence du modèle européen d'application privée du droit de la concurrence sur la pratique nationale en droit de la concurrence. Le but de l'analyse est de répondre aux deux questions suivantes:

- 1) Est-ce que la convergence actuelle de système national du droit de la concurrence vers le modèle européen garantit l'établissement du système efficace d'application du droit de la concurrence?
- 2) Dans quelles conditions le développement des méthodes privées d'application du droit de la concurrence peut mener à l'augmentation d'efficacité du droit polonais et européen de la concurrence?

Afin de répondre aux questions mentionnées ci-dessus, l'auteur analyse le développement de la doctrine du «*private enforcement*» dans l'Union européenne et en Pologne. L'article se réfère à la jurisprudence des cours européennes et nationales sur l'application privée du droit de la concurrence, à la politique de concurrence de la Commission européenne et l'Autorité nationale de la concurrence, ainsi qu'aux récentes modifications législatives introduites dans l'ordre juridique européen et national. L'analyse effectuée mène à la conclusion que la convergence actuelle de système polonais du droit de la concurrence au modèle européen n'a pas permis

d'établir un mécanisme efficace d'application privée du droit de la concurrence en Pologne. Néanmoins, l'analyse des changements introduits récemment dans le domaine de «*private enforcement*» au niveau européen, donne des raisons à croire que l'adoption d'une directive sur les actions privées et sa mise en œuvre dans l'ordre juridique national, peut résoudre ce problème et permettre une meilleure protection des individus contre les violations du droit de la concurrence.

Classifications and key words: collective redress; damages actions; group litigation; private enforcement; public enforcement.

I. Introduction

The concept of private enforcement of competition law has been discussed in Europe for over a decade already and yet, it can still be regarded as a novelty, rather than the standard in the application of competition law. The realization is often stressed that in order to increase the efficiency of antitrust provisions, private enforcement models must be developed, popularized and more commonly used. Nevertheless, once this general standpoint is put into practice, the continuous underdevelopment in the enforcement of competition law by individuals is very noticeable. The European Commission (hereafter, EC) has recently proposed important changes in the area of private enforcement¹ and all EU Member States (hereafter, MS) are required to adapt their national legal systems to the standards developed at the EU level. In today's legal context, it thus seems crucial to answer two key questions:

- 1) Does the current convergence of a national competition law system towards the European model guarantee the establishment of an effective, public-private system of antitrust enforcement?
- 2) Under which conditions may the development of private methods of competition law enforcement lead to an increase in the efficiency of Polish and European antitrust law?

This article aims to provide answers to these questions. It will not only evaluate current Polish and European experiences in the area of private antitrust enforcement, but will also create grounds for determining the possible direction for its future evolution. The responses given to the above questions will provide the basis for addressing one of the main problems discussed within the ongoing debate on the enforcement of competition law: how to increase its efficiency and ensure an appropriate balance between public and private enforcement methods?

¹ See Section IV of this article.

II. Development of the private enforcement doctrine in the European Union

Private enforcement of competition law, which may be defined as an individually initiated litigation before a court in order to remedy an antitrust infringement², is not a new concept in the European Union (hereafter, EU). Private enforcement has been widely debated for over 10 years now, and has led to the introduction of several legal instruments at both the EU and national level. Nevertheless, as current experiences show, the process of developing private antitrust enforcement in Europe is far from being over. While its usefulness is widely recognized³, the question that remains is how to establish an effective system of private antitrust enforcement at the European and national level.

Importantly, European attempts to address this question have a dual character. On the one hand, they are characterized by the important role played by the Court of Justice of the EU (hereafter, CJEU or Court) in the formulation of the private enforcement doctrine. On the other, they are determined by the activities of the Commission that aim to approximate national antitrust systems and establish a common European private enforcement model. Although both initiatives may be regarded as complementary, recent experiences in this area show also a risk of their mutual incoherence⁴.

1. CJEU and private enforcement

The jurisprudence of the CJEU on private enforcement has developed significantly in the course of the last decade. A path for private actions was already opened with the Court confirming the direct effect of EU competition law provisions⁵ and later strengthened by the modernization of the EU

² K. Huschelrath, S. Peyer, *Public and Private Enforcement of Competition Law – A Differentiated Approach*, ZEW Discussion Paper No. 13-029, April 2013, p. 5, available at: <http://ftp.zew.de/pub/zew-docs/dp/dp13029.pdf>.

³ R. Stefanicki, *Prywatno-prawne środki dochodzenia roszczeń z tytułu naruszenia regul konkurencji*, Warszawa 2014, p. VII–VIII.

⁴ See para. IV.2 and IV.3 in this article.

⁵ A. Jurkowska, *Prywatno-prawne wdrażanie wspólnotowego prawa konkurencji*, Zeszyty CEN, z. 19, Warszawa 2004, p. 20; A. Jurkowska-Gomułka, *Publiczne I prywatne egzekwowanie zakazów praktyk ograniczających konkurencję*, Warszawa 2013, p. 122; see also judgments of the Court in: C-127/73 *BRT v. SABAM* [1974] ECR 00313; C-234/89 *Delimitis v. Henninger Brau AG* [1991] ECR I-00935; C-333/94 P *Tetra Pak International SA v. Commission* [1996] ECR I-05951; C-126/97 *Eco SwissChina Time Ltd. v. Benetton International NV* [1999] ECR I-03055.

antitrust enforcement system⁶. However, it still took a while for the Court to declare that individuals have a right to initiate private lawsuits after sustaining an antitrust injury. In fact, it wasn't until the 2001 *Courage* judgment when the Court first held that: 'The full effectiveness of Article 85 of the Treaty [Article 101 TFEU] [...] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition'⁷. The CJEU thus confirmed that the private enforcement method shall constitute an important part of an effective antitrust enforcement system. The Court stated also that the lack of a private enforcement mechanism could deprive individuals of appropriate protection and lead to a situation where the efficiency of EU competition law would be threatened⁸.

Subsequent judgments, rendered in the *Manfredi*⁹, *Pfleiderer*¹⁰, *Donau-Chemie*¹¹ and *Otis*¹² case, led to the formulation of the main principles of the European private enforcement doctrine and addressed several procedural issues of key importance for its efficiency¹³. It may thus be said that the CJEU played not only an active role in creating the grounds for the development of private enforcement, but became one of the main actors in determining its current character. According to some authors, CJEU jurisprudence constituted a response to important limitations of private enforcement and established the grounds for its evolution¹⁴.

⁶ E. Camilleri, 'A decade of EU antitrust private enforcement: chronicle or failure foretold?' (2013) 34(10) *ECLR* 531.

⁷ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-06297, para 26.

⁸ V. Milutinovic, 'Private enforcement – Upcoming issues', [in:] G. Amato (ed.), *EC Competition law: A critical assessment*, Oxford 2007, p. 727.

⁹ Joined cases C-295/04 to C-298/04, *Manfredi v. Lloyd AdriaticaAssicurazioniSpA et al.* [2006] ECR I-06619.

¹⁰ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR 05161.

¹¹ Case C-536/11 *Bundeswettbewerbbehörde v. DonauChemie AG and Others*, ECLI:EU:C:2013:366.

¹² Case C-199/11 *Europese Gemeenschap v. Otis NV and Others*, ECLI:EU:C:2012:684.

¹³ See for example the *Manfredi* judgment where the Court confirmed the broad legitimacy of parties entitled to initiate private proceedings, argued in favour of a wide scope of damages, and stressed that the limitation period for bringing a damages claim provided in national law shall not render the exercise of the right to compensation practically impossible or excessively difficult.

¹⁴ See E. De Smijter, D. O'Sullivan, 'The Manfredi judgment of the ECJ and how it relates to the Commission's initiative on EC antitrust damages actions' (2006) 3 *Competition Policy Newsletter*; M. Carpagno, 'Private Enforcement of Competition Law Arrives in Italy: Analysis of the Judgment of the European Court of Justice in Joined Cases C-295-289/04 Manfredi' (2006) 3(1) *The Competition Law Review*; A. Jurkowska, 'Roszczenia z tytułu naruszenia wspólnotowego prawa ochrony konkurencji przez podmioty prywatne – glosa do wyroku ETS z 13.07.2006 r.

Apart from creating a frame for private enforcement, the Court played also an important role in resolving its current problems. The *Pfleiderer* and *DonauChemie* judgments, of 2011 and 2013 respectively, addressed the issue of access to leniency materials by private parties claiming damages. Although it was widely recognized that limited claimants' access to proofs of violations was one of the main obstacles in the development of private actions, it was still necessary to determine if EU law limits access to leniency documents¹⁵.

Referring to this question in *Pfleiderer*, the CJEU accepted that leniency programmes were a useful tool in the fight against cartels¹⁶. Yet the Court also stressed that they were not the only instrument contributing to the maintenance of effective competition – private damages actions could also play a significant role here¹⁷. Despite accepting that the effectiveness of national leniency programmes could be threatened if leniency documents were to be disclosed¹⁸, the Court concluded therefore that the provisions of EU law do not preclude a person adversely affected by an antitrust infringement from obtaining access to leniency documents when seeking compensation¹⁹.

The *Pfleiderer* ruling was more than just an answer to the dilemma of the national court hearing the original case. Most importantly, it dealt with limitations facing damages actions in Europe²⁰. The main barrier to their effective development (limited access to evidence) could have been eliminated. Moreover, the asymmetry in the position of injured individuals and accused undertakings was decreased. Finally, the importance of private actions in the overall competition law enforcement system was strengthened.

The standpoint expressed in *Pfleiderer* was further developed in *DonauChemie*. The Court was supposed to determine here if a given national rule contradicted EU law. The rule in question granted access to leniency materials subject to the consent of the undertaking that submitted them. According to the CJEU, while deciding on the disclosure of leniency materials, a national court should always have the right to weigh the two opposing interests:

w połączonych sprawach: od C – 295 do 298/04 Manfredi' (2009) 3 *Europejski Przegląd Sądowy*.

¹⁵ G. Goddin, 'The Pfleiderer Judgment on Transparency: The National Sequel of the Access to Document Saga' (2012) 3(1) *Journal of European Competition Law & Practice* 40-42.

¹⁶ Case C-360/09 *Pfleiderer AG*, para. 25.

¹⁷ *Ibidem*, paras. 28–29.

¹⁸ *Ibidem*, paras. 26–27.

¹⁹ *Ibidem*, para. 33.

²⁰ M. Gac, 'Public versus private enforcement of European competition law – the evolution of case-law on access to leniency materials after Pfleiderer judgment' [in:] K. Dobosz, M. Scheibe, K. Nowak (eds.), *In short but to the point – comments on EU law*, Kraków 2013, p. 199–201.

the right to access evidence and the requirement to protect information provided by an undertaking²¹. In the opinion of the CJEU, national court must have such prerogative in order to preserve a proper balance between public and private enforcement and ensure effective application of antitrust provisions²². As a result, the Court held that any rule of national law which limits the competences of a court to assess the possibility of access to leniency documents, should be regarded as hindering rights conferred on individuals under the Treaty and contrary to EU law²³.

Finally, the CJEU played an active role in broadening the scope of the private enforcement doctrine. This may be illustrated by the *Otis* ruling where the Court held that the EU may initiate a private action and bring a claim for damages before a national court if it is a victim of an antitrust infringement²⁴. By granting such right to the EU, the Court confirmed that despite all the risks resulting from such construction, in particular the imbalance in the procedural position of the parties, a wide and effective private enforcement model must be ensured in Europe²⁵.

2. EC and private enforcement

The evolution of the Court's jurisprudence was followed by changes in the policy of the Commission providing a positive response to the doctrinal developments of the CJEU. Neelie Kroes, former EU Commissioner responsible for competition, stated that it was not enough to claim that individuals injured by anti-competitive behaviors shall have a right to claim damages. In her opinion, it was also necessary to provide them with an effective means of enforcing this right in court²⁶.

The Commission took its first steps to achieve this objective at the end of 2003 when it decided to launch comparative studies of the relevant legal systems found in MS. Its goal was to identify what national rules were governing, at that time, damages claims resulting from antitrust violations. The results of this

²¹ Case C-536/11 *Bundeswettbewerbshörde v DonauChemie AG*, para. 30.

²² *Ibidem*, para. 31, 51.

²³ *Ibidem*, para. 31.

²⁴ Case C-199/11 *Europese Gemeenschap v Otis NV*, para. 77.

²⁵ A. Vallery, 'Otis: Can the Commission be a Victim in Addition to Acting as a Police Officer, a Prosecutor and a Judge?' (2013) 4(3) *Journal of Competition Law & Practice* 232–236.

²⁶ N. Kroes, 'Enhancing Actions for Damages for Breach of Competition Rules in Europe' SPEECH/05/533, available at: http://europa.eu/rapid/press-release_SPEECH-05-533_en.htm?locale=en.

so-called Ashurst Report²⁷ were shocking. The Report determined that private enforcement mechanisms were totally underdevelopment in Europe, and that an astonishing diversity of national solutions was being used across the EU²⁸. Such critical assessment confirmed that more decisive steps had to be taken by the EC, national legislators and national competition authorities (hereafter: NCAs) in order to provide individuals with effective safeguards against anti-competitive behaviors. As a result, a Green Paper on damages actions²⁹ was published one year later, and the EC initiated a widespread European debate on private enforcement. Its conclusion was clear: facilitating private actions was a logical next step in the development of antitrust enforcement and an important element in the creation of a competitive economy³⁰.

The works conducted in the following years led to the publication of a White Paper on damages actions³¹. The document was based on European jurisprudence and the results of extensive public consultations and supposed to constitute a response to the limitations of private enforcement. It argued in favour of more liberal rules on the disclosure of evidence, easier calculation of damages, and more effective enforcement mechanisms. It also spoke for the adoption of a binding European legal instrument on private actions which would guarantee a greater level of transparency, coherence and efficiency³². Despite the wide scope of the proposed changes, the desired goal of increasing the role of private antitrust enforcement was not achieved in Europe. The attempt to propose a directive on private actions failed and so did the discussion on private enforcement. However, some authors say that the White Paper constituted a turning point in the development of the European private enforcement doctrine³³. It codified and restated existing *acquis* on the right of individuals to claim compensation. It also marked a point of no return – as A. Komninos stated: ‘it showed that even if the whole initiative to introduce

²⁷ Comparative report – *Study on the conditions of claims for damages in case of infringement of EC competition rules*, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf.

²⁸ *Ibidem*, p. 1.

²⁹ Green Paper – Damages actions for breach of the EC antitrust rules, COM(2005) 672, 19.12.2005.

³⁰ Commission Staff Working Paper – Annex to the Green Paper – Damages actions for breach of the EC antitrust rules, SEC(2005) 1732, p. 9–11.

³¹ White paper on damages actions for breach of the EC antitrust rules {SEC(2008) 404} {SEC(2008) 405} {SEC(2008) 406} /* COM/2008/0165 final */.

³² Commission Staff Working Paper accompanying the White paper on damages actions for breach of the EC antitrust rules {COM(2008) 165 final} {SEC (2008) 405} {SEC (2008) 406} /* SEC/2008/0404 final */, pt. 332–333.

³³ A. Komninos, ‘The Road to the Commission’s White Paper for Damages Actions: Where We Came From’ (2008) 4(2) *Competition Policy International*.

Community measures for private actions were abandoned, the existing *acquis* itself was a Community minimum from which there can be no departure³⁴.

The last stage of the Commission's activity in the area of private enforcement took place between 2011 and 2014 and covered two key initiatives: the European debate on group litigation³⁵ and the EC's recent works on a private enforcement directive³⁶.

The EC initiated a discussion on group litigation in February 2011. Its goal was to identify what legal principles underpin national collective redress systems, and to determine whether it is possible to introduce such instrument at the European level. However, formulating a common position on this issue proved to be hard to do. The majority of the MS, most of legal experts, and all consumers argued in favour of the introduction of a collective redress mechanism on the EU level. Still, business representatives and certain MS were against European intervention in this area, claiming that the EC's proposal on collective redress would have no legal value and would infringe the rules of subsidiarity and proportionality³⁷. Despite the disagreement between the supporters and the opponents of group litigation, public consultations confirmed that introducing a collective redress mechanism could bring several benefits to individuals enforcing competition law. It would limit the costs of private actions, increase access to proofs of antitrust violation, and reduce information asymmetry between individuals and undertakings. Hence, the European Parliament decided to speak in favour of the development of an EU collective redress mechanism. It stated that: 'action is needed at EU level in order to improve the current EU regulatory framework so as to allow victims of infringements of EU law to be compensated for the damage they sustain and thus contribute to consumer confidence and smoother functioning of the internal market'³⁸.

In the end however, the EC decided to take a rather conformist approach while dealing with the results of the public consultations procedure. Instead

³⁴ Ibidem, p. 98.

³⁵ Commission Staff Working Paper Document Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011)173 Final.

³⁶ 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 [2014] L 349/1.

³⁷ See *Evaluation of contributions to the public consultation and hearing: 'Towards a Coherent European Approach to Collective Redress'*, Study JUST/2010/JCIV/CT/0027/A4, available at: http://ec.europa.eu/competition/consultations/2011_collective_redress/study_heidelberg_overview_en.pdf.

³⁸ European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress', 2011/2089(INI), para. 4.

of proposing an EU instrument on group litigation, it published non-binding recommendations on common principles for collective redress³⁹. Undoubtedly, such solution is easier to adapt to the differences existing between MS. However, the question remains: will such an act actually guarantee greater efficiency of private enforcement? Non-binding recommendations risk preserving the current *status quo* which, according to the EC's and the Parliament, may be described as a complex legal patchwork of national solutions, each of which is unique and none of which is fully effective⁴⁰. Hence, can the Commission's recent activity in the area of on group litigation be considered as a step forward? Or rather, is it a step back in the development of an effective mechanism of private enforcement in Europe⁴¹?

The second of the recent initiatives undertaken by the EC in the private enforcement field concerns a proposal for a directive on antitrust damages actions. This initiative can be regarded as a much more far-reaching solution. Its specific elements will be described in details in the last part of this article. Suffice to say here that due to the proposed legislative method as well as the scope of the pursued objectives, this initiative may be considered as an important step in the development of the private enforcement doctrine in Europe. Its introduction may finally ensure that all individuals injured by an anti-competitive behavior will be entitled to effective protection, and that the principles stipulated by the CJEU as early as 2001 will finally be achieved.

To sum up, the CJEU and the EC were the main actors in the development of the European private enforcement doctrine in the course of the last decade. Through their judicial and legislative activity, they led to the establishment of key elements of the private enforcement mechanism, which if adopted at national level, could lead to better protection of individuals against anti-competitive behaviors. Yet in Europe's decentralized antitrust enforcement system, EU policy depends strongly on the activities of national courts, legislators, NCAs and individuals because they are all involved in the design and practical use of private enforcement mechanisms. As a result, the steps undertaken at the European level may be squandered by the reluctance

³⁹ See 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, OJ [2013] L 20/60.

⁴⁰ Commission Staff Working Paper Document Public Consultation: Towards a Coherent European Approach to Collective Redress..., pt. 9; European Parliament Directorate General for Internal Policies, *Overview of existing collective redress schemes in EU Member States*, July 2011, pt. 3, available at: <http://www.europarl.europa.eu/document/activities/cont/201107/20110715ATT24242/20110715ATT24242EN.pdf>.

⁴¹ See M. Gac, 'The road to collective redress in the European Union: 2011 – a step forward or a step back in the introduction of a collective redress mechanism' [in:] K. Dobosz (ed.), *Current developments of the European Union Law 2011/2012*, Kraków 2013, p. 93–109.

of national legislators and NCAs to create effective private enforcement mechanisms, and by the unwillingness of individuals to use them and courts to support their development. In order to fully evaluate the European private enforcement doctrine, a reference to national practice is thus required. It will help to correctly assess whether the current convergence of national systems towards the European model guarantees the establishment of an effective antitrust enforcement system in the EU.

III. Private enforcement and the Polish competition law system

The Polish competition law system may be regarded as an example of approximation of national solutions towards the model developed at the EU level. Therefore, the second part of the article will be devoted to the analysis of the policy of the Polish competition authority, national jurisprudence, and legislative changes introduced in this area in the course of the last decade. The goal of this analysis will be to ascertain if the approximation of Polish antitrust law and practice towards the European model has led to the establishment of effective methods of private antitrust enforcement, and created grounds for the development of a comprehensive public-private system of antitrust enforcement in Poland.

1. UOKiK policy

The first area where it is possible to try assessing the influence of the European private enforcement doctrine on the Polish competition law system concerns the activity of the Polish competition authority – the UOKiK President. The analysis of the NCA's policy during the last decade shows strong support of the UOKiK President for the development of private antitrust enforcement in Poland. This is reflected in competition policy documents for 2008, 2011 and 2014. They show that the promotion of private enforcement among consumers and entrepreneurs (as potential victims of antitrust infringements) was one of the NCA's goals in the last decade⁴². Individuals' knowledge on private enforcement was supposed to have been increased thanks to the conduct of informative campaigns leading to their more frequent use. According to the UOKiK's most recent policy document, greater importance of the private

⁴² *Polityka konkurencji na lata 2008–2010*, UOKiK, Warszawa 2008, p. 151–152; *Polityka konkurencji na lata 2011–2013*, UOKiK, Warszawa 2011, p. 44–46; *Polityka konkurencji na lata 2014–2018*, UOKiK, Warszawa 2014, p. 76–80.

method is supposed to establish an effective, bipolar(public-private) system of antitrust enforcement. At the same time, it should motivate individuals to disclose existing cartels, and make it possible to adapt the national policy to changes developed at the EU level⁴³. This view finds confirmation in statements made by recent UOKiK Presidents. Already in 2007, C. Banasiński argued in favour of introducing a clear basis for the enforcement of competition law by individuals injured by antitrust infringements in Poland⁴⁴. Three years later, M. Krasnodębska-Tomkiel said that: ‘Private enforcement is a solution worth propagating. In my opinion, it constitutes an important support to the activities undertaken by the competition authority in the area of public enforcement and serves individuals injured by antitrust infringements to enforce their rights by the mean of civil proceedings’⁴⁵.

Nevertheless, despite recognizing the need to develop the private enforcement mechanism in Poland, the NCA failed to take any decisive steps in order to achieve this objective in the course of the entire last decade. First, it did not present any legislative proposals on private enforcement, which could have potentially formed part of the Polish competition law reforms of 2007 or 2014. Second, it did not publish any guidelines or recommendations concerning private enforcement. Finally, despite evoking information campaigns as one of the key steps in developing the private enforcement doctrine in Poland⁴⁶, the NCA has never conducted any such campaigns. Even with strong support of the idea of private enforcement, the Polish NCA was thus unable to ensure effective means by which the European doctrine could reach its Polish addresses.

2. Polish jurisprudence

National jurisprudence represents the second area where the approximation of the Polish antitrust system towards the EU private enforcement doctrine can be observed. Its significance is especially important in the decentralized system of EU antitrust enforcement where, according to Regulation 1/2003, ‘National courts have an essential part to play in applying the Community

⁴³ *Polityka konkurencji na lata 2014-2018*, UOKiK, Warszawa 2014, p. 75–76.

⁴⁴ M. Bernatt, ‘Relacja ze spotkania okolicznościowo-naukowego Centrum Studiów Antymonopolowych i regulacyjnych’ (Wydział Zarządzania UW, 20 czerwca 2007 r.), pt. 2.2, available at: http://www.cars.wz.uw.edu.pl/tresc/konferencje/01/sprawozdanie_private_enforcement.doc.

⁴⁵ See ‘Aktualne problemy polityki konkurencji’ – wystąpienie Prezes UOKiK dr Małgorzaty Krasnodębskiej-Tomkiel, Konferencja jubileuszowa z okazji XX-lecia UOKiK, 27.05.2010, p. 6, available at: www.uokik.gov.pl/download.php?plik=8422.

⁴⁶ See UOKiK, *Polityka konkurencji na lata 2008-2010*, Warszawa 2008, p. 151–152.

competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States⁴⁷.

Two main particularities come to light when analyzing Polish jurisprudence on private enforcement: the support expressed by national courts to the idea of private enforcement, and the low number of private antitrust cases in Poland. Hence, while the position of the national judiciary seems to create solid grounds for the development of private enforcement in Poland, courts struggle to provide a positive response to the EU doctrine due to the reluctance of individuals to actually initiate private actions⁴⁸.

Referring to specific elements of domestic jurisprudence, it can be stated first that an individual's right to enforce competition law before a court was recognized in Poland long before the CJEU's *Courage* ruling. Already at the end of 1993, the Polish Antimonopoly Court, while referring to the problem of private enforcement, held that: 'The lack of a public interest violation does not mean that an individual injured by the illegal behavior of a certain undertaking, may not protect its fundamental rights. There is no obstacle in enforcing such rights before the court'⁴⁹. This standpoint was confirmed in a Polish Supreme Court judgment of May 2001 where it was held that: 'Individual rights of market participants may be enforced by way of claims brought before common courts of law or administrative courts'⁵⁰. This judicial line was reaffirmed once again in a ruling of the Polish Antimonopoly Court delivered in January 2003. It was stated therein that: 'Due to the public character of the antimonopoly act, its goal is not the direct protection of individual rights of market participants injured by the activities of other undertakings. Such protection constitutes the subject of the activity of the common courts of law'⁵¹.

The above jurisprudence confirms that Polish courts had already established strong grounds for the adoption of the private enforcement doctrine into the national legal order when the doctrine had only just started to develop in the EU. The right to directly enforce antitrust provisions, and claim compensation in case of an antitrust injury, could thus have been based on national

⁴⁷ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1; para 7 of the Preamble.

⁴⁸ See A. Jurkowska-Gomułka, 'Private Enforcement of Competition Law in Polish Courts: The Story of an (Almost) Lost Hope for Development' (2013) 6(8) *YARS* 107–128.

⁴⁹ Judgment of the Polish Antimonopoly Court of 29 December 1993, XVIIAmr 42/93, (1994) 5 *Wokanda*.

⁵⁰ Judgment of the Polish Supreme Court of 29 May 2001, I CKN 1217/98, (2002) 1/13 *OSNC*.

⁵¹ Judgment of the Polish Antimonopoly Court of 15 January 2003, XVII Ama 29/2002.

jurisprudence and, as many authors stressed, on general rules of civil law⁵². Despite having solid legal grounds, the importance of private enforcement in Poland did not increase however. Moreover, courts dealing with private antitrust cases were faced with difficulties, which significantly hampered progress in this area.

The first problem faced by the Polish judiciary was the limited number of cases brought before them by individuals injured by antitrust infringements. According to a report prepared by A. Jurkowska-Gomułka, the number of private enforcement cases initiated before Polish courts between 1999 and 2012 was very low – it did not exceed 10⁵³. Moreover, as the author highlights, none of these cases was initiated by consumers – they were all were brought forward by entrepreneurs. Furthermore, almost all of the proceedings concerned abuse of dominance and aimed to confirm the nullity of a contract resulting from anti-competitive behavior. None of the claims sought compensation for an antitrust infringement and none involved a violation of EU competition law provisions.

The second problem concerned the content of the cases brought before Polish court. Without going into detail, only one issue analyzed so far by the Polish judiciary – the binding force of UOKiK decisions – gave grounds for a private enforcement debate and led to its development. The binding force of an antitrust decision on a civil court deciding in a given case is of crucial importance to follow-on actions, and ended up the focus of the Polish judiciary for over 10 years. While early judgments argued in favour of the independence of civil courts⁵⁴, the most recent views state quite the opposite. In its judgment of July 2008, the Supreme Court held that a final decision of the UOKiK President in a particular case should be binding upon the court dealing with the same practice, unless the NCA issued a commitments decision. According to the Court: ‘It shall not raise any doubts that it would be undesirable if the evaluation of the same practice by the court and the competition authority could be divergent. It appeals to claim that the final decision of the competition authority on the abuse of a dominant position

⁵² See, e.g., M. Bernatt, ‘Prywatny model ochrony konkurencji oraz jego realizacja w postępowaniu przed sądem krajowym’ [in:] E. Piontek (ed.), *Nowe tendencje w prawie konkurencji Unii Europejskiej*, Warszawa 2008, p. 448–449; P. Podrecki, *Porozumienia monopolistyczne i ich cywilnoprawne skutki*, Kraków 2000, Chapter IV, Letter B, all claiming that a right for compensation in the case of competition law violations may be derived from Article 417 of the Civil Code (tort liability) and Article 471 of the Civil Code (unjust enrichment).

⁵³ See A. Jurkowska-Gomułka, *Comparative competition law private enforcement and consumer redress in the EU 1999–2012*, available at: <http://www.clcpecreu.co.uk/pdf/final/Poland%20report.pdf>; see also D. Hansberry-Biegunska, ‘Poland’ [in:] I. K. Gotts (ed.), *The Private Competition Enforcement Review*, 4th ed., London 2011, p. 251–259.

⁵⁴ See e.g. Judgment of the Polish Supreme Court of 22 February 1994, I CRN 238/93.

shall be binding upon the civil court. Such standpoint is consistent with the rule that civil courts are generally bound by final administrative decisions⁵⁵.

The aforementioned ruling could be regarded as a positive step in the development of the private enforcement doctrine in Poland, and an attempt to approximate Polish enforcement practice with the EU model. Despite its significant importance for private follow-on actions, the ruling did not, however, result in a practical increase in the number of proceedings initiated by victims of antitrust infringements. Due to the lack of a reciprocal link between jurisprudence and individuals' will to open private actions, the importance of jurisprudence in the development of the private enforcement method was once again put in question.

The last limitation of Polish jurisprudence in the area of private enforcement results from its character and problems with its accessibility. Judgments are rendered in individual cases and do not have binding effects on other courts deciding on the same subject matter. Moreover, access to jurisprudence, which could potentially foster a public debate on private enforcement and promote a doctrinal analysis of the discussed issue, is largely limited in Poland⁵⁶. The possible influence of Polish jurisprudence on the development of the private enforcement doctrine is thus not only limited by the low number of domestic private enforcement cases and their restricted substantive content, but also by problems in accessing existing rulings.

3. Legislative changes

The final area where changes concerning the issue of private enforcement may be observed, relates to legal reforms introduced in Poland in the course of the last decade. These include: the Polish Act on Competition and Consumer Protection (hereafter: Competition Act) of 2007⁵⁷, the Law on Group Litigation of 2009⁵⁸, and a reform of the Competition Act adopted by the Polish Parliament in 2014⁵⁹. All of these legislative steps contain

⁵⁵ Resolution of the Polish Supreme Court resolution of 23 July 2008, III CZP 52/2008, (2009) 2 *Monitor Prawniczy* 90.

⁵⁶ A. Jurkowska-Gomułka, *Comparative competition law private enforcement and consumer redress in the EU 1999-2012...*, p. 3.

⁵⁷ Act of 16 February 2007 on Competition and Consumer Protection (Journal of Laws 2007 No. 50, item 331, amendments: Journal of Laws 2007 No. 99, item 99; Journal of Laws 2007 No. 171, item 1206 as amended).

⁵⁸ Act of 17 December 2009 on Pursuing Claims in Group Proceedings (Journal of Laws from 2010, No. 7, item 44).

⁵⁹ Act of 10 June 2014 amending the Act on Competition and Consumer Protection and Act – Code of Civil Procedure (Journal of Laws 2014, item 945).

a response, however limited, to particular problems of the private enforcement method.

The first legal instrument requiring attention here is the Competition Act of 2007. Although the act did not establish a separate private enforcement mechanism, its authors believed that it opened a path for the development of private actions in Poland. According to the earlier Competition Act of 2004, antitrust proceedings could be opened in Poland *ex officio* or by means of a complaint. The possibility of initiating administrative proceedings on the basis of an individual complaint was intentionally removed. Public enforcement on the basis of the Competition Act of 2007 was thus to be limited to the NCA's own initiative to take action against a company engaged in anti-competitive conduct. According to A. Piszcz the reform had little in common with the approach expressed by the Commission in the Green and White Paper on damages actions⁶⁰. According to the authors of the Competition Act of 2007 the above change was meant to enhance private enforcement and develop a comprehensive, dual system of competition law enforcement in Poland. It was argued that: 'The proposed change is inspired by EU policy which aims to increase the importance of private enforcement of competition law in EU Member States'⁶¹. It was also said that the reform was needed to increase the efficiency of competition law enforcement, accelerate public proceedings and give strong incentives to individuals to submit damages claims. According to the justification to the draft Competition Act of 2007: 'In the public enforcement system, only the most important violations of competition law, having particularly negative influence on competition, shall be examined. Whereas individuals injured by antitrust infringements shall enforce their rights (claim for the nullity of the agreement, cessation of violation or damages) before civil courts. The bi-polar model, in which two ways of competition law enforcement exist next to each other, shall ensure a complementary character of public and private enforcement'⁶².

Many scholars criticized the proposed changes claiming that the reform did not provide a sufficient justification for such a far-reaching change, and did not have an appropriate basis in the EU competition law enforcement model⁶³. Despite these criticisms, the new solutions were adopted. However,

⁶⁰ See A. Piszcz, 'Still-unpopular Sanctions: Developments in Private Antitrust Enforcement in Poland after 2008 White Paper' (2012) 5(7) *YARS* 62.

⁶¹ See p. 20 of the justification to the Act on Competition and Consumer Protection, available at: [http://orka.sejm.gov.pl/Druki5ka.nsf/0/06AED0325C1F3B3FC125722600445A4A/\\$file/1110.pdf](http://orka.sejm.gov.pl/Druki5ka.nsf/0/06AED0325C1F3B3FC125722600445A4A/$file/1110.pdf).

⁶² *Ibidem*, p. 17.

⁶³ See M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, p. 158 et seq.; M. Krasnodębska-Tomkiel, D. Szafranski,

the Competition Act of 2007 had an inherent weakness from the start: while complaint-based proceedings were abolished, the Act did not contain an effective mechanism for private actions. As a result, private antitrust enforcement had limited chances of success.

The second reform introduced into the Polish legal system in the course of the last decade, which may be regarded as providing a response to the European private enforcement debate, concerns the adoption of an Act on Pursuing Claims in Group Proceedings. This Act established a possibility to use group proceedings *inter alia* in the case of competition law infringements. Many authors regarded this act as an attempt to respond to the limited efficiency of private actions in Poland⁶⁴. The act allowed for the grouping within one proceeding of at least 10 individuals injured by the same infringement. Thanks to this construction, the new legislation was supposed to overcome several difficulties faced by private enforcement, such as limited access to proofs of a violation, information asymmetry, high costs of proceedings, or low incentive to sue. As it was stated in the justification of the Act: 'Group litigation allows for increased access to justice in cases where pursuing a claim is more preferential within such proceedings than in an individual dispute (e.g. in case of small damages claims from the same party which caused the injury), and as a result leads to increase of judicial protection'⁶⁵.

Despite the novelty of the group litigation instrument and its far-reaching goals, its empirical analysis from a 4-year perspective shows the limited practical significance of this mechanism, especially in the area of competition law. According to the data provided by the Polish Ministry of Justice, in the period from 2010 to 2012, 93 group litigations were initiated before Polish courts⁶⁶. Still, while the number of group proceedings was rather satisfactory in the first two years of the functioning of the act, the year 2013 showed a decrease in the number of group claims⁶⁷. Moreover, most of the proceedings proved very long and caused major difficulties for the group plaintiffs due to the formalized character of the conditions for initiating a claim and conducting

'Skuteczność prawa antymonopolowego', [in:] T. Giaro (ed.), *Skuteczność prawa*, Warszawa 2010, p. 107–108; see also A. Piszcz, 'Still-unpopular Sanctions...', p. 62.

⁶⁴ See M. Sieradzka, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz*, Warszawa 2010, p. 15–16, T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz*, Warszawa 2010, p. 4.

⁶⁵ See justification to the Act on Pursuing Claims in Group Proceedings, p. 2–3, available at: [http://orka.sejm.gov.pl/Druki6ka.nsf/0/0E73993108750163C125758A004227CB/\\$file/1829.pdf](http://orka.sejm.gov.pl/Druki6ka.nsf/0/0E73993108750163C125758A004227CB/$file/1829.pdf).

⁶⁶ See statistics of the Polish Ministry of Justice for the period 2010-2012 available at: bip.ms.gov.pl/pl/dzialalnosc/statystyki/statystyki-2013/download,2350,15.html.

⁶⁷ See results of a debate: 'Pozwy zbiorowe – prawo i praktyka' (in English: Collective actions – law and practice) organized by PAP on 16.01.2014, available at: <http://www.bankier.pl/wiadomosc/Pozwy-zbiorowe-w-liczbach-3038473.html>.

the proceedings⁶⁸. It also needs to be noted that only five of such cases concerned violations of unfair competition rules, and they were all initiated by companies, not individuals⁶⁹. Finally, none of these cases concerned a violation of antitrust provisions⁷⁰.

The last legal instrument that needs to be analyzed here is the Act amending the Competition Act and the Code of Civil Procedure (hereafter: Amending Act), adopted by the Polish Parliament in June 2014⁷¹. The Amending Act has two main objectives: to increase the efficiency of competition law enforcement and to simplify competition proceedings⁷². It also tries to respond to current European and international antitrust policy with the goal to ‘increase detection of most significant violations of antitrust law, strengthen the position of weaker participants of the market and informalize and accelerate applied procedures’⁷³. While both goals are worthwhile, the following question arises: does this recent reform allow for better protection of weaker parties against antitrust infringements? In other words, does it provide effective solutions to current limitations of private enforcement in Poland?

The changes proposed by the Amending Act refer mainly to the leniency programme, concentration control, antimonopoly proceedings, and the fining policy. Their analysis makes it possible to conclude that the Polish legislator omitted the current European debate on private enforcement from its reform proposal. While the justification of the draft Amending Act stressed the need to strengthen the position of weaker market participants, very few provisions of the new legislation actually aim to increase the efficiency of private enforcement. They include the introduction (Article 63⁵ of the Code of Civil Procedure) of the right of the UOKiK President to participate in civil damages proceedings as an *amicus curiae*. They also include the prolongation (new wording of Article 93 of the Competition Act) of the limitation period for pursuing anti-competitive practices by the UOKiK from 1 to 5 years. The first change allows for greater participation of the NCA in private proceedings, and may thus lead to an increase in the efficiency of private actions. The second change may have a positive, indirect influence on follow-on actions

⁶⁸ I. Gabrysiak, *Postępowanie grupowe w polskim prawie*, FundacjaInstytutPrawPublicznych, Warszawa 2014, p. 23–24.

⁶⁹ See results of a debate: ‘Pozwy zbiorowe – prawo i pratyka’ organized by PAP on 16.01.2014, available at: <http://www.bankier.pl/wiadomosc/Pozwy-zbiorowe-w-liczbach-3038473.html>.

⁷⁰ A. Jurkowska-Gomułka, *Comparative competition law private enforcement...*, p. 3.

⁷¹ Act of 10 June 2014 amending the Act on Competition and Consumer Protection and Act – Code of Civil Procedure (Journal of Laws 2014, item 945).

⁷² See justification to the project of Act amending the Act on Competition and Consumer Protection and Act – Code of Civil Procedure, p. 1, available at: <http://orka.sejm.gov.pl/Druki7ka.nsf/0/9F27C3A04DCCA6E8C1257BE3003730DF/%24File/1703.pdf>.

⁷³ *Ibidem*, p. 1.

brought by individuals injured by antitrust infringements. A longer period for the NCA to discover and pursue anti-competitive behavior may lead to an increase in the time when individuals are entitled to bring private actions. According to Article 442 of the Polish Civil Code, individuals injured by a law infringement may claim compensation within 3 years from the date when they had found out about the injury and the person responsible for the infringement. Extending the time for the UOKiK President to pursue infringements may thus indirectly result, in the case of follow-on actions, in a potentially longer time for the detection of infringements and pursuing a damages claim by an injured individual.

Apart from these two procedural modifications, the Amending Act does not contain any other changes that might increase the efficiency of private actions in Poland. In fact, some of its amendments may actually be regarded as undermining the efficiency of the private method. This could be the case with the new paragraphs 2a and 2b of Article 479³³ of the Polish Code of Civil Procedure which is meant to limit access to leniency materials by private damages claimants. According to the justification to the Amending Act, this change aims to preserve the attractiveness of leniency and ensure public trust in the activity of the UOKiK President⁷⁴. However, the new rule seems to contradict the *Pfleiderer* and *DonauChemie* rulings. By subordinating access to leniency materials to the approval of the undertaking, it practically eliminates the possibility of access to these documents by injured individual, and significantly decreases their chances to obtain proof of the infringement.

It can be stated therefore that the most recent legislative measure adopted in the area of Polish antitrust provisions fails to respond to the European private enforcement debate. While the EC and CJEU strongly reaffirm the need to increase the protection of individuals against antitrust infringements, the Polish legislator has focused instead on the development or enhancement of the public enforcement method, omitting private actions. Such approach is rather disappointing, and does not correspond with the need to strengthen the position of weaker market participants expressed in the justification to the draft reform.

4. Polish experience with private enforcement – evaluation attempt

The evaluation of the Polish competition law enforcement system shows that the desired goal of increasing the importance of the private mechanisms was not fully realized, despite the legal changes introduced in the last decade,

⁷⁴ Ibidem, p. 26–27.

and the gradual approximation of national solutions with the European model.

First, the policy of the UOKiK President in the area of private enforcement has neither lead to an increase in individuals' knowledge on private enforcement measures, nor to the introduction of effective private enforcement mechanisms. Despite the NCA's declared support of the private enforcement idea, it did not come forward with proposals that could make it possible to adapt European solutions to the Polish reality.

Second, legal reforms introduced in Poland between 2004 and 2014 did not lead to the establishment of effective private enforcement mechanisms; mainly focusing on the enhancement of the public enforcement method, private actions were left to be debated. As a result, the 2004 *status quo* was preserved. Individuals have a possibility to enforce their rights in courts if they suffered an antitrust injury but they are deprived of effective mechanisms to do so. This situation did not improve with the elimination of complaint-based proceedings, or the introduction of a group litigation mechanism. Both solutions were intended to encourage individuals to enforce their rights in courts. Yet they were unable to respond to the numerous limitations facing private actions, such as restricted access to proofs, difficulties with assessing the case and calculating damages, and high costs of private proceedings. As the practice of competition law enforcement in Poland has shown, the number of private actions remained very low in the last decade, and numerous individuals injured by antitrust infringements were left without due compensation.

Finally, one of the NCA's most important goals of the last decade – educating individuals on private enforcement methods – was not achieved. According to the UOKiK competition policy for 2014–2018, consumers' and enterprises' knowledge on private enforcement is limited. Information campaigns are thus necessary in order to inform the public on possible protective measures against anti-competitive behaviors⁷⁵. It is fair to say therefore that despite important changes introduced at the European and national level, the private enforcement doctrine was not able to reach its Polish addresses.

It can also be stated that the current convergence method of the Polish competition law system towards the European model did not lead to satisfactory results in the area of private enforcement. While public enforcement has gradually strengthened its position in the course of the last decade, private enforcement struggles to complement it. This can, of course, be explained by the failure of the UOKiK's competition policy, limited activity of the Polish legislator, and the lack of the so-called 'litigation culture' among Polish citizens. Still, the analysis of private antitrust enforcement in Europe confirms

⁷⁵ *Polityka konkurencji na lata 2014-2018...*, p. 76.

that Poland is not an isolated case. According to current statistics, the number of private actions brought by individuals injured by anti-competitive behaviors before national courts is still far from satisfactory⁷⁶. Between 2006 and 2012, only 28% of the EC's final infringements decisions, including cartels, were followed by damages claims. Moreover, a great majority of private antitrust cases takes place in a few MS only⁷⁷, causing an undesirable imbalance in the protection of EU citizens against competition law infringements among MS. The astonishing diversity and underdevelopment in the area of private antitrust enforcement in Europe persists. As the Polish example illustrates, a lot has to be done in order to improve this situation.

Addressing one of the questions posed in the introduction to this paper, it has to be said that the recent convergence of the national competition law system towards the European model did not guarantee the establishment of an effective, public-private system of antitrust enforcement. First, the proposed method of such convergence, based on CJEU jurisprudence and soft laws issued by the Commission, did not lead to the introduction of effective mechanisms of private enforcement at the national level. Second, it created a risk of incoherent solutions being used in different jurisdictions, and an unequal level of protection given to EU citizens against anti-competitive behaviors across MS. Finally, the solutions proposed by the EC, even if introduced at the national level, did not ensure an increase in the efficiency of the private method. As the Polish example of group litigation shows, the adoption of an innovative legal mechanism did not result in the increase in the number of private antitrust actions. It may thus be claimed that the adoption of a Directive on Damages Action may be regarded as a step forward in the development of the private enforcement doctrine. Clearly, it is too early yet to evaluate its final outcome because of the need to transpose the directive into the national legal orders of all MS. However, the initial analysis of its provisions, as well as the character of the proposed legislative method, make it possible to say that the current shortcomings of the private enforcement doctrine in the area of Polish and European competition law may be finally resolved.

⁷⁶ See Commission Staff Working Document Impact Assessment Report Damages action for breach of EU antitrust rules accompanying the 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, SWD(2013) 203 final, paras. 52-53.

⁷⁷ According to the aforementioned report, the vast majority of antitrust damages actions were initiated in 3 European jurisdictions: the UK, Germany and the Netherlands.

IV. 'Private enforcement package' – towards more effective protection of individuals against anti-competitive behaviors

The EC's latest proposal in the area of private enforcement consists of several legal instruments meant to provide an effective response to the limited efficiency of private actions. Most of the proposed solutions were well known in Europe already, since they were widely debated in the course of the last decade. However, the EC proposing to use a directive as the main legal instrument in this area constituted an important *novum* here. As such, the earlier soft law approach was replaced by a directive, aiming to harmonize national rules on damages claims and establish a common European private actions mechanism. While such attempt is to be welcomed, the question remains whether it ensures the establishment of an effective instrument of private enforcement in Europe?

1. General description

The EC's proposal, published in June 2013, comprised several documents including, most importantly:

- Proposal for a directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the MS and of the EU (hereafter, Directive);
- Communication and Practical Guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the TFUE⁷⁸ (hereafter, Communication and Practical Guide);
- Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the MS concerning violations of rights granted under Union Law⁷⁹ (hereafter, Recommendation).

Despite the fact that the character of the proposed documents differs (binding and non-binding solutions), some authors argue that together they form a sort of 'private enforcement package', providing a comprehensive and complementary

⁷⁸ 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; Commission Staff Working Document – Practical Guide 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, SWD(2013) 205, 11.6.2013.

⁷⁹ 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, OJ [2013] L 201/60.

approach to the issue of private enforcement⁸⁰. What should also be emphasized is that the Communication, Practical Guide and Recommendation seem to continue earlier Commission practice of proposing soft law mechanisms in the area of private enforcement. By contrast, the Directive constitutes an important *novum* in this context. Thanks to its binding power, it aims to ensure greater coherence and to overcome the diversity of national solutions⁸¹. Apart from this goal, the Directive aims also to achieve two other objectives: ensure optimal interaction between public and private enforcement, and guarantee that victims of antitrust infringements will be able to obtain full compensation for the harm that they had suffered. Due to these far-reaching goals and the proposed legislative method, the ‘private enforcement package’ is regarded by many as an important step in bringing a new quality to the European debate on damages actions in the area of antitrust law⁸². Undoubtedly, it would be premature to attempt to evaluate it at this stage. The Directive was actually only adopted by the Council on 10 November 2014, and entered into force on 26 November 2014. Before the Directive can be fully evaluated, it must first be transposed into the national legal orders of the MS and then actually applied by individuals. However, it is fair to say already that an important step in the area of private antitrust enforcement has been taken in Europe and doors have been opened for better protection of individuals against antitrust infringements.

2. Specific elements

It can be noted referring to the specific elements of the ‘private enforcement package’ that they are construed with a view of achieving two main objectives: increasing efficiency of the private method and guaranteeing an appropriate balance between public and private enforcement. Although these goals may be often difficult to reconcile⁸³, the EC proposes several solutions that might ensure their mutual attainment.

⁸⁰ A. Piszcz, ‘Pakiet’ Komisji Europejskiej dotyczący powództw o odszkodowanie z tytułu naruszenia unijnych reguł konkurencji oraz zbiorowego dochodzenia roszczeń’ (2013) 5(2) *iKAR* 54.

⁸¹ R. Gamble, ‘Whether neap or spring, the tide turns for private enforcement: the EU proposal for a Directive on damages examined’ (2013) 34(12) *ECLR* 612.

⁸² S. Wisking, K. Dietzel, ‘European Commission finally publishes measures to facilitate competition law private actions in the European Union’ (2014) 35(4) *ECLR* 193; R.H. Lande, ‘The Proposed Damages Legislation – Don’t Believe the Critics’ (2014) 5(3) *Journal of Competition Law & Practice*; R. Gamble, ‘Whether neap or spring...’, p. 619.

⁸³ A. Schwab, ‘Finding the Right Balance – the Deliberations of the European Parliament on the Draft Legislation Regarding Damage Claims’ (2014) 5(2) *Journal of European Competition Law & Practice* 65–67.

First, the EC argues in favour of increased access to evidence concerning antitrust infringements. In order to overcome ‘information asymmetry’ between injured individuals and accused undertakings, the Commission proposes a set of provisions that allow wider access to proofs of violations. According to Article 5 of the Directive, an individual injured by a competition law infringement and claiming the resulting damages may, upon a reasonably justified demand, be granted by the court hearing the case access to evidence being in the possession of a defendant or a third party. In order to avoid excess, such disclosure shall be limited by the principle of proportionality requiring, *inter alia*, that disclosure of evidence is limited to specific types of documents and does not lead to the discovery of confidential information.

The aforementioned change constitutes an important *novum* in the current construction of private enforcement in Europe. By broadening access to proofs of antitrust violations, it significantly increases the chances for a positive outcome of private claims. It also responds to the need, already recognized in the White Paper, stating that: ‘it is essential to overcome this structural information asymmetry and to improve victims’ access to relevant evidence’⁸⁴. Although the above change aims to increase the efficiency of private actions, it is also clear that the EC tries to preserve an appropriate balance between the public and the private method. In the following provisions (Article 6 & 7), the Directive argues in favour of absolute or temporary protection of certain categories of documents. Accordingly, leniency statements and settlement submissions shall be completely excluded from the possibility of disclosure. Documents prepared by the parties for the purpose of competition proceedings or those drawn up by competition authorities may be disclosed only after the termination of the proceedings.

The second group of solutions proposed in the Directive refers to the relationship between private actions and public proceedings. They concern the binding force of decisions issued by competition authorities. Article 9 of the Directive stipulates that a final decision of a NCA declaring the existence of an anti-competitive behavior shall be binding upon a court deciding on damages, and shall constitute proof of an antitrust violation. In the opinion of the EC: ‘the possibility for the infringing undertaking to re-litigate the same issues in subsequent damages actions would be inefficient, cause legal uncertainty and lead to unnecessary costs for all parties involved and for the judiciary’⁸⁵. A similar approach to the relationship between private and public proceedings seems also to result from the text of the Recommendation. They

⁸⁴ White paper on damages actions for breach of the EC antitrust rules {SEC(2008) 404} {SEC(2008) 405} {SEC(2008) 406} /* COM/2008/0165 final */.

⁸⁵ 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

states (point 33) that in these areas of law where a public authority may render a decision on a legal violation, collective proceedings shall not conflict with public proceedings concerning the same infringement. In order to achieve this objective, the Recommendation foresees a general prohibition to initiate a collective action if a public authority is already dealing with the case. If the collective action was initiated prior to the initiation of public proceedings, the EC argues in favour of giving the court the possibility to stay the civil proceedings until the case is finally resolved by the public authority. The approach of the EC should be supported. On the one hand, it ensures greater coherence between public and private proceedings. On the other, it increases the chances for a positive outcome of follow-on actions. Moreover, as some authors claim, it brings greater clarity to the discussed matter which, especially in Poland, was for a long time the subject of inconsistent jurisprudence and uncertainty on the side of individuals imitating private actions⁸⁶.

Finally, the Directive refers to such issues as limitation periods, the passing-on of overcharges, and the quantification of harm. While they do not directly refer to the relationship between public and private enforcement, they are crucial for the efficiency of private actions. The EC's proposals should be supported also for aiming to extend the time in which private claims can be submitted (Article 10); giving indirect purchasers the right to sue for damages (Article 12-15); and facilitating rules on proving and quantifying antitrust harm (Article 17). These provisions broaden the scope of possible damages claims, provide greater flexibility to courts determining the existence of an antitrust injury, and finally facilitate the process of assessing harm. They may therefore positively influence the private enforcement process and lead to an increase in the importance of antitrust damages claims in Europe.

3. Evaluation attempt

When evaluating the Directive, as well as other elements of the 'private enforcement package', it seems at first sight that they constitute an important step in the development of the European private enforcement doctrine. The expectation is justified that a coherent approach to the issue of private antitrust enforcement may be finally established in Europe because of the scope of the proposed changes, the goals pursued by the Commission, and the applied legislative method (directive). Many authors stress however that

provisions of the Member States and of the European Union, COM(2013) 404, 11.6.2013, para. 4.3.1.

⁸⁶ A. Piszcz, 'Pakiet' Komisji Europejskiej...', s. 60.

the European discussion on private enforcement is far from being over⁸⁷. The adoption of the Directive will greatly foster the debate, but it is unlikely to bring it to an end.

First, according to many, the implementation process of the Directive may be a really difficult and complex task, requiring the reconciliation of the EC's proposal with different national legal traditions⁸⁸. Problems in Poland might surround the Directive's rules on the disclosure of evidence. These will oblige the national legislator to introduce several exemptions (e.g. proportionality test) to current general disclosure rules stipulated in the Polish Code of Civil Procedure. Furthermore, solutions such as the rebuttable presumption of harm caused by an antitrust infringement, or possibility to estimate the size of the harm by a court, will require significant changes in Poland's traditional approach to the issue of damage and its assessment. For those reasons, some authors highlight that the transposition process may lead to the limitation of the efficiency of the proposed private enforcement mechanism. This may happen if the solutions included in the Directive prove too difficult to reconcile with the legal traditions of different MS. In the opinion of A. Piszcz, such situation often occurs when the EU tries to harmonize these areas of law, which involve procedural rules formulated differently in national legal systems⁸⁹.

The second problem concerns the scope of the Directive, which is said to leave several questions unanswered⁹⁰. Commentators list here issues such as: causation, remoteness and quantification of consequential loss, which were not codified in the damages package. By leaving these matters to be determined by national laws, the Directive risks the creation of varying approaches to these issues. This may in turn lead to legal uncertainty in cases of cross-border litigation and, as a result, limited efficiency of the private enforcement method.

The last problem refers to the Commission's attempt to reconcile two objectives within one Directive: increased efficiency of private enforcement and an appropriate balance between the public and the private method. As previously mentioned, while both aims seem crucial from the perspective of the entirety of the competition law enforcement system, their parallel attainment may be sometimes hard to achieve. This is especially so with respect to access to leniency materials. While specific solutions are proposed in order to preserve the public enforcement mechanism, their practical application may jeopardize the efficiency of the private method. Comments are made

⁸⁷ R.H. Lande, 'The Proposed Damages Legislation...', p. 123–124; A. Howard, 'Too little, too late? The European Commission's Legislative Proposals on Anti-Trust Damages Actions' (2013) 4(6) *Journal of European Competition Law & Practice* 463–464.

⁸⁸ A. Piszcz, 'Pakiet' Komisji Europejskiej...', p. 67.

⁸⁹ *Ibidem*, p. 67.

⁹⁰ A. Howard, 'Too little, too late...', p. 464.

therefore that a more flexible approach should have been adopted in order to reconcile public enforcement policy with the CJEU's jurisprudence on access to leniency materials. This could comprise of a possibility to disclose leniency documents after the termination of public proceedings, combined with a residual liability of leniency recipients⁹¹. Undoubtedly, this is merely one of the possible solutions, but it already shows that a risk of tension between public and private enforcement may still appear, and may require the EC to reconsider its current standpoint.

Finally, it shall be stressed that the Commission's decision to use a soft-law instrument in the area of group litigation is rather disappointing. The proposed legislative method seems to provide an only partial response to the current problems of private enforcement. Due to its non-binding nature and strong dependence on MSs' will, this approach has limited chances of success. Moreover, the character of the solutions proposed by the Commission (e.g. opt-in mechanism, limitation of standing to sue to representative bodies, exclusion of contingency fees) seems to be more preservative than the instruments already developed in many national legal orders. It may thus be stated that the EC's proposal on group litigation constitutes more of a step back than a step forward towards the introduction of effective European mechanism of collective redress. It also fails to provide an appropriate answer to the current discussion on collective actions in antitrust cases.

IV. Conclusion

It can be said in summary that current Polish and European experiences on private antitrust enforcement illustrate that the European debate of the last decade did not lead to the actual increase in the protection of individuals against competition law infringements. Solutions developed by the CJEU and the Commission were not able to reach its addresses at the national level. As a result, an effective system of private enforcement has not been established in Europe for two main reasons. On the one hand, the failure resulted from the proposed method of convergence (soft laws). On the other, it was a consequence of the limited activity of the Polish legislator and the NCA in developing more effective mechanisms of private enforcement. As such, despite the fact that 13 years have gone by since the *Courage* judgment, the principle of full compensation in the case of antitrust infringements still

⁹¹ C. Cauffman, 'The European Commission Proposal for a Directive on Antitrust Damages: A first Assessment' (2013) 13 *Maastricht European Private Law Institute Working Paper*, p. 15–16, available at: <http://ssrn.com/abstract=2339938>.

struggles to find its practical significance in Poland. Looking at this issue from the European perspective, it is necessary to state that the underdevelopment and diversity of national solutions on private enforcement, already identified by the Ashurst Report, is still present. Moreover, this state of affairs causes important limitations to equal and effective protection of European citizens against anti-competitive behaviors across MS.

Nevertheless, this negative assessment of the European private enforcement doctrine may finally change, provided the Directive on Damages Actions is finally implemented and applied in practice. Despite its several limitations, it creates a chance for the introduction of a universal private enforcement mechanism, something that has long since been overlooked in the European debate on private antitrust enforcement. Its introduction may also greatly increase the chances for victims of antitrust infringements not only to obtain a protective measure, but also a strong incentive to participate in antitrust enforcement. Thanks to the Directive, the missing link between the European doctrine and national practice of antitrust enforcement may thus finally be established and lead to an increase in the protection of individuals against anti-competitive behaviors.

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