

**Private enforcement of competition rules: closer and closer** (From the Volume Editor)

**The academic achievements of Professor Stanisław Sołtysiński in the widely defined competition law field** (laudation by Professor Marek Szydło commemorating the granting of the Great Owl Award for the entirety of Professor Sołtysiński's academic achievements in the competition law field)

**Discretion in competition law: the perspective of Dr Cezary Banasiński** (laudation by Professor Agata Jurkowska-Gomułka commemorating the granting of the CARS Award 2016)

### Articles

Dorothy Hansberry-Bieguńska, Małgorzata Krasnodębska-Tomkiel, Grzegorz Materna, **Leniency programmes in Polish and US antitrust law and the access to *leniency* materials in private damages actions in cases of cartels and other restrictive agreements**

#### Table of contents:

- I. Introduction – public enforcement of the prohibition of restrictive practices and actions for damages in cases of anticompetitive agreements
- II. *Leniency* programmes as instruments of effective public enforcement of the prohibition of restrictive practices
  1. The *leniency* programme under Polish law – an overview
  2. The leniency programme in the US legal system – an overview
  3. *Leniency* programmes in the Polish and US legal systems – basic similarities and differences
  4. The benefits of *leniency* programmes for public enforcement of the prohibition of restrictive practices
- III. Civil damages actions in cases concerning anticompetitive agreements
  1. Private civil damages actions in cases concerning anticompetitive agreements in Polish law – an overview
  2. Private civil damages actions for violations of Section 1 of the Sherman Act – an overview
  3. Similarities and differences in private damages actions under Polish and US laws and practice
  4. Importance of access to *leniency* documents for plaintiffs who file civil damages actions in cases of restrictive practices
  5. Risks to the effectiveness of *leniency* programmes by the disclosure of *leniency* materials in private civil damages actions
- IV. Provisions of Polish law on access to *leniency* documents by litigants in civil damages actions in cases concerning restrictive agreements
  1. Availability of *leniency* documents in the current Act on Competition and Consumer Protection and the Polish Code of Civil Procedure

2. The need to change the rules on access to *leniency* materials in light of Directive 2014/104/EU
  3. Availability of *leniency* materials in light of the Polish draft discussion paper on the future Polish act on actions for damages for infringements of antitrust provisions
- V. The right and restrictions of civil parties to obtain *leniency* materials by court order from the Antitrust Division of the US Department of Justice
1. The Antitrust Division's position on access to leniency materials by private damage action litigants
  2. The terms of the agreements between the Antitrust Division and leniency applicant
  3. What is the scope of *leniency* materials that can be disclosed to civil litigants? What are the circumstances – if any – that would dictate a wider or a more limited disclosure to civil litigants?
- VI. Conclusion – the impact of the rules on access to *leniency* documents for the recovery of claims for, in turn, the effectiveness of *leniency* programmes in matters of restrictive agreements
1. Assessment of both the current and proposed approaches under Polish law
  2. Comparing the Polish and US approaches
  3. Proposals *de lege ferenda*

VII. Summary

**Summary:** The article addresses issues concerning access to *leniency* materials by private damages action litigants in cases of restrictive agreements, and analyzes relevant legal provisions in Polish and US laws. With regard to the former, the article considers both its current rules as well as a draft act which will serve to implement the EU Damages Directive (Directive 2014/104/EU). The issue of disclosure of *leniency* materials to private damages action litigants is analyzed from the perspective of its impact on the effectiveness of *leniency* programmes. This article questions whether the upcoming legislation concerning access to *leniency* materials may lessen the readiness of undertakings to submit *leniency* applications. A consequence of a dampening of the interest in seeking *leniency* would be a decrease in the effectiveness of public enforcement of competition rules. The authors make therefore certain proposals *de lege ferenda*. At the same time, a comparison of relevant Polish and US provisions and practices leads the authors to the conclusion that it is the US and its judicial decisions that design the relationships between public and private competition enforcement so that each of these instruments interacts with each other without lowering the other's effectiveness.

**Keywords:** Polish competition law; US competition law; Section 1 of the Sherman Act; *leniency* programmes; private actions for damages; EU damages directive; access to *leniency* materials; discovery in civil cases; criminal liability.

**JEL:** K21; K41; K42

Joanna Lenart, Teresa Kaczyńska, **The binding effect of final decisions by the President of the Office for Competition and Consumer Protection, the Court for Competition and Consumer Protection and the Court of Appeal, and its consequences for public and private competition law enforcement**

**Table of contents:**

- I. Introduction
- II. The scope of the binding effect of the President of the OCCP's final decisions
- III. Joint participation in civil proceedings in competition law cases and the consequences of determining the nature of joint participation for public and private competition law enforcement
  1. Introductory remarks
  2. The possibility to participate in on-going proceedings before the CCCP or the Court of Appeal for undertakings which did not appeal against the President of the OCCP's decision
  3. The impact of forthcoming CCCP or the Court of Appeal judgments on the legal position of undertakings which did not appeal against the President of the OCCP's decision
  4. The deadline for paying antitrust fines
  5. The limitation period to claim compensation for antitrust infringements, joint and several liability and recourse claims
  6. The possibility of pursuing claims against undertakings which did not appeal against the President of the OCCP's decision
- IV. Conclusions and the *de lege ferenda* proposals

**Summary:** This article analyses the issues linked to the binding effect of national competition authorities' and appeal courts' final decisions on civil courts, introduced by 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 (the **Directive**), which requires implementation into the Polish legal system.

Although in principle the adoption of this solution should contribute to an increase in the effectiveness of private competition law enforcement, its shape and scope might be problematic to a certain extent. Therefore, in this article the authors consider the scope of the binding force of the President of the OCCP's final decisions and analyse in detail the impact of the nature of joint participation in civil proceedings in competition law cases on the possibility and effectiveness of private competition law enforcement, in particular in terms of legal certainty. In addition, the authors indicate substantial risks which may arise in this context. These considerations expressly demonstrate the existence of a conflict between several general rules underlying the Directive. The article concludes with the *de lege ferenda* proposals regarding the Polish provisions which would implement the Directive.

**Key words:** private enforcement directive 2014/104/EU; private enforcement; antitrust infringement; effect of national competition authorities' decisions; binding effect of final decisions; joint participation in civil proceedings; statutory limitation period

**JEL:** K21; K41, K42

Katarzyna Wiese, **Reducing antitrust fines and limiting the liability of SME for antitrust violations – proposal of the interpretation of the specific inability to pay criterion**

**Table of contents:**

- I. Introductory remarks
- II. Fines imposed by the European Commission in antitrust cases
- III. Method of calculating the amount of a fine and conditions for its reduction
- IV. Procedural aspects of reducing antitrust fines
- V. Decisional practice of the European Commission
- VI. Interpretation of the conditions for limiting the liability of SMEs
- VII. Conclusions

**Summary:** Directive 2014/104/EU provides for a limitation of the liability of SMEs in cases where the application of its normal rules on joint and several liability would irretrievably jeopardise their economic viability and cause their assets to lose all their value. The meaning of this provision is everything but clear and commentators have voiced unanimous and harsh criticism of the chosen wording. This article presents a proposal for the interpretation of this provision based on its observed parallel with the requirements for a reduction of the fine imposed by the European Commission in antitrust cases.

**Key words:** directive 2014/104/EU; reduction of fines; SME; antitrust fines; insolvency; inability to pay; competition law infringement.

**JEL:** K21

Łukasz Stępkowski, **Reimbursement of State aid under Article 108(3) third sentence TFEU within the context of private enforcement of EU State aid law**

**Table of contents:**

- I. Introduction
- II. Properties of Article 108(3) third sentence TFEU under EU law
- III. Enforcement of Article 108(3) third sentence TFEU under Polish law – preliminary remarks
- IV. Reimbursement of illegal State aid and the jurisdiction of an administrative court
- V. Ordinary courts and the reimbursement of illegal State aid
- VI. Conclusions

**Summary:** This paper constitutes an attempt at suggesting practical means of enforcement of Article 108(3) third sentence TFEU under Polish law. The author undertakes to analyse the norm of EU law and seeks a procedural basis of its enforcement under Polish law (as a law of an EU Member State). The goal is to verify whether there are any means to secure effectiveness for Article 108(3) third sentence TFEU under Polish law. The paper takes account of the jurisprudence of the CJEU as well as that of Polish courts.

**Key words:** state aid; reimbursement; national court; EU law.

**JEL:** K21, K29, K41, K42

Joanna Piechucka, Marta Stryszowska, **Calculating damages caused by bid rigging**

**Table of contents:**

- I. Introduction
- II. Determining a justification for a claim
- III. Comparative methods
  1. Introductory remarks
  2. Cross-cutting methods
  3. Methods based on comparisons in time
  4. Combining methods
- IV. Cost analysis
- V. Simulation methods
- VI. Practical issues

**Summary**

The article discusses the various stages and methods of estimating damages caused by bid-rigging. Emphasized first is the importance and essence of constructing a counterfactual scenario describing what would have happened in the absence of bid-rigging. Discussed next are the technical and practical aspects of the use of the various damage-estimation methods. They include: comparator-based methods, financial-analysis-based methods, and market-structure-based methods. The description of each method is accompanied by examples of their use. Finally, the article analyses the practical considerations related to the choice of a given method (among the range of various methods available) in the context of the availability of the relevant data and credibility of the underlying assumptions.

**Key words:** damage estimation, bid rigging, comparator-based methods, financial-analysis-based methods, market-structure-based methods

**JEL:** C13, D22, L41

**Legislation and Case Law Review**

**Discussion of the implementation process of Directive 2014/104/UE/EU in Poland, Spain and the UK** (Jacek Sadurski)

**Table of contents:**

- I. Introduction
- II. Current level of efficiency of private-law enforcement with regards to breaches of competition law in EU countries
- III. Problem of forum shopping in damages claims
- IV. Polish approach to the implementation process
- V. Spanish approach to the implementation process
- VI. British approach to private enforcement of competition law VII. *De lege lata* proposals concerning the Polish draft Act

**Summary**

This article deals with a number of chosen topics concerning the implementation process of Directive 2014/104/UE 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. The Author endeavors to compare legislative solutions and steps with regards to the implementation process of the Directive which are being currently undertaken in Poland, Spain and Great Britain. He notes certain legislative initiatives which may be taken into consideration during the preparation process on the final text of the Polish Draft Act implementing the Directive.

**Key words:** damages directive 2014/104/UE; claims for damages; breach of competition rules; implementation; legislative proposals

**JEL:** K21; K42

**The termination of a license agreement on the use of a repertoire by a collective rights management organization that abuses its dominant position with respect to neighbouring rights. A case comment to a judgement of the Court of Appeals in Cracow of 25 June 2015, I ACa 466/15 (Marcin Mioduszewski)**

**Table of contents:**

- I. Overview of the key elements of the judgement
- II. The merit of the issue adjudicated by the Court of Appeal in terms of the market for collective copyright management
- III. Cumulative use of the set of prerequisites of Article 106(2) of the Act on Copyright and Related Rights and in Article 9(3) of the Act on Competition and Consumer Protection for the evaluation of the effectiveness of the termination of a license agreement
- IV. Assessment of royalty rates offered by the organization
- V. Important reasons of the collective rights management organization for the refusal to contract
- VI. Dominant position of the collective rights management organization in light of the refusal to contract
- VII. Summary

**Summary:** Collective rights management organizations (which manage copyright as well as related/neighboring rights) operating without an approved tables of copyright royalties, are entitled to license, or to terminate an existing license agreement, only for an important reasons. The dispute over a mere royalty rate, without the presence of any other disputable issue, cannot be considered as an important reason under Article 106(2) of the Act on Copyright and Related Rights, justifying the termination of a license agreement for the repertoire of such organization, or a refusal to enter into such contract at all.

The shape of the collective management system in Poland makes each organization a monopolist within the scope of its activity (within its own repertoire). Even if a particular repertoire is represented by more than one organization, the nature of the user's business activity, and the specifics of using the protected content, makes it necessary for the legal user to sign a license contract with all relevant organizations at the same time, which in turn makes product substitutability virtually nonexistent.

Refusal to license made under Article 106(2) of the Act on Copyright and Related Rights may constitute the sole and independent ground for establishing an abuse by a collective rights management organization. Provided that conditions of the above Act are fulfilled i.e. the refusal

is made for an important reasons, a separate economic scrutiny of the adequacy of royalty fees in terms of article 9(1(1)) of the Act on the Protection of Competition and Consumers may be redundant.

**Key words:** collective management of copyright and related rights; abuse of dominant position; copyright; related rights; producer's rights; refusal to contract; relevant market

**JEL:** K21; K42

### Books Reviews

**Anna Piszcz, Dominik Wolski (eds.), *Pursuing damages claims based on competition law breaches before Polish courts*** [in Polish: *Dochodzenie przed sądem polskim roszczeń odszkodowawczych z tytułu naruszenia reguł konkurencji*], Wydawnictwo Naukowe Wydziału Zarządzania UW, Warszawa 2016 (review by Piotr Machnikowski)

**Frank Wijkmans, Maaïke Visser, Sarah Jaques, Evi Noël, *The EU Private Damages Directive. Practical Insights (Minutes of the Closed Workshop 2015)***, Intersentia, Cambridge-Antwerp-Portland 2015 (review by Agata Jurkowska-Gomułka).

**Piotr Semeniuk, *The concept of a "single economic unit" in competition law*** [in Polish: *Koncepcja jednego organizmu gospodarczego w prawie ochrony konkurencji*], Wydawnictwo Naukowe Wydziału Zarządzania UW, Warszawa 2015 (review by Zbigniew Jurczyk)

### Reports

**CARS Activity Report 2014–2015** (Nina Łazarczyk)

**Polish-Portugese PhD Seminar, Białystok, 10 June 2016** (Magdalena Knapp, Radosław Niwiński)