

Private antitrust enforcement – has there been any change? (from the Volume Editor)

ARTICLES

Joanna Affre, Mateusz Restel, Impact of the strengthening of private enforcement of competition law on the willingness of a cartel participant to disclose an illegal agreement

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Summary: The article examines how the implementation of Directive 2014/104/EU has affected a cartel participant's willingness to participate in the leniency programme. The article compares the legal position of entities interested in joining the programme before and after the implementation of the Directive. It devotes considerable attention to the calculation of the level of risk a cartel participant takes before disclosing an illegal agreement to a competition authority. The purpose of this article is to explain whether and why an entity exempted from a fine is the preferred target of private actions for damages. The article deals with competition law from a European perspective and it is based on German literature. A better understanding of the discussed issues will allow, also in Poland, for an effective public enforcement of competition law while preserving the right to full compensation.

Key words: cartel; cartel participant; directive 2014/104/EU; private enforcement; compensation claim; immunity recipient; leniency programme.

JEL: K13, K 14, K21, K42

Elżbieta Buczkowska, Marcin Trepka, The lack of grounds for the suspension of proceedings by a civil court, deciding a case for the compensation of damages caused by a competition law infringement, until public antitrust or appeal proceedings against the decision of the Polish Competition Authority on the same infringement is resolved – comments under Article 177 § 1 of the Code of Civil Procedure

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Summary: The aim of the article is to present the issue of the relationship between civil proceedings for the compensation of damages caused by a competition law infringement on the one hand, and, on the other, antitrust or appeal proceedings against a decision of the President of the Office of Competition and Consumer Protection (Polish NCA) on the same infringement, under Article 177 § 1 of the Code of Civil Procedure. The authors present current views on this issue, based on the thesis on the prejudicial nature of the relationship between those proceedings. They formulate the opinion that as the result of the entry into force of the Act on claims for compensation for damage caused by violation of competition law, its structure and its place within the Polish legal system aimed at competition protection, this thesis requires significant verification. The authors indicate that these proceedings are now fully autonomous, and that the exceptions to the above-mentioned autonomy are no longer relevant. The authors present in particular their view on the interpretation of Article 30 of the above Act and its role in the legal system of competition protection built on the assumption of the full autonomy of private and public-law proceedings. Based on the observations made, the authors justify the view that there are currently no grounds to establish a relationship between these proceedings also in the context of Article 177§ 1 of the Code of Civil Procedure, that is, there are no grounds to suspend civil proceedings until the end of the parallel public-law proceedings.

Key words: private enforcement; Directive 2014/104/UE; claiming compensation; abuse of competition law; to be bound by the final judgement; suspending of the court proceedings; prejudiciality.

JEL: K15, K21, K41, K42

Marcin Kolasiński, The impact of the findings contained in final decisions of the Polish Competition Authority regarding competition restricting agreements on proceedings concerning claims to remedy damages caused by a breach of competition law

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Summary: The article discusses the possibility of taking advantage of final decisions of the President of the Office of Competition and Consumer Protection (Polish NCA) in pursuing claims to remedy damages caused by a breach of competition law. Although the antitrust decisions are supposed to be binding on the compensation courts in cases of this type with regard to the establishment of a breach of competition law, this may prove unfeasible because of the vagueness of the findings of antitrust decisions. The defectiveness of a finding, regarding its failure to correctly prove the existence of an agreement between entrepreneurs, has been assessed in particular. The article presents guidelines on what requirements the findings of decisions issued by the President of the Office of Competition and Consumer Protection should meet in order to be legal and usable in compensation proceedings.

Keywords: compensation proceedings; final decision; verdict of an administrative decision; concurrence of wills; agreement.

JEL: K21, K41

Marta Mackiewicz, Statute of limitations for damages claims arising from an infringement of domestic and EU competition law

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Summary: The purpose of the Polish Act of 21 April 2017 on Claims for Damages for Remediating the Damage Caused by Infringements of Competition Law (Act on Claims), was to enable undertakings to effectively use private enforcement of their damages claims from those that breached competition law. The statute of limitations of these types of claims is regulated comprehensively, securing the interests of the injured undertakings in Article 9 of the Act on Claims. However, a limitation period extended to 5 years, alongside favorable for the injured undertakings conditions triggering the start and the suspension of the limitation period, refer only to these damages claims arising from competition law infringement which occurred after the said Act entered into force (27 June 2017). In case of damages claims derived from an infringement of competition law which arose before the Act on Claims entered into force, temporary rules and a 3-year limitation period applies. A thorough reading of the temporary rule, against the backdrop of facts in cases where the damage is derived from an infringement of competition law, reveals crucial problems regarding the interpretation of the conditions triggering the start of the limitation period. An infringement of competition law does not constitute a typical tort. Usually, it is a continuing act with consequences stretched over time. The

complexity level of the commercial relationships between the participants of forbidden behavior, the secrecy of such acts, which results in difficulties with the identification of the offenders and with evidence collection, cause that a narrow interpretation of domestic law provisions referring to the start of the limitation period makes it practically impossible, or at least seriously difficult, to exercise the right to claim. This paper aims to present an interpretation of the uncertainties, alongside with a proposal of such an interpretation of the conditions triggering the start of the limitation period, which will be consistent with efficacy and equivalence rules. Moreover, in case of claims based solely on a domestic competition law infringement, the offered interpretation will constitute an incentive for the real use of the private enforcement institution alongside with upholding the basic function of the statute of limitations – legal certainty (legal order stability).

Key words: private enforcement; statute of limitations; efficacy of the UE law; damages liability; steady act; infringement of competition law.

JEL: K21, K41, K42

Anna Możdżeń-Sypniewska, Overview of Commission Staff Working document on the implementation of Directive 2014/104/EU 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

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Summary: The article discusses the Commission Staff Working document on the implementation of Directive 2014/104/EU 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. This Report presents the key instruments of the Directive to facilitate the pursuit of damages actions for competition law infringements, the solutions adopted by EU Member States in their implementation, the actions taken by the Commission to ensure the effectiveness of the Directive, and the key judgments of the CJEU in the field of private enforcement.

Key words: Commission Staff Working Document; Directive 2014/104/UE; private enforcement; competition law infringement.

JEL: K21

LEGISLATION AND CASE LAW REVIEW

Mateusz Dąbroś, The judgment in the Volkswagen case (C-343/19) – is this already a *forum actoris*?

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Summary: Over the years, an issue very often resolved by the Court of Justice of the European Union is the correct interpretation of Article 7 clause 2 of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12/12/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as well as its earlier equivalents. Especially the notion of “place of damage” raises numerous interpretative doubts. This issue takes on a special dimension in the context of private enforcement of competition law - damages due to infringement of competition law may be caused, by the actions of one perpetrator, to different entities in different places. The judgment of the CJEU in case C-343/19 Volkswagen of 9 July 2020 is yet another edition of the interpretation struggle of the EU jurisprudence with the above-mentioned provision and another attempt to adapt its quite laconic wording to various and complicated factual situations. However, the question arises as to whether the interpretation made in the framework of the above-mentioned judgment does not favor the injured party too much and whether it does not tend to follow the *forum actoris* principle (jurisdiction of the court of the place of residence or the seat of the plaintiff) in actions for infringement of competition law.

Key words: private enforcement; violation of competition law; compensation; jurisdiction; place where the damage was caused; Volkswagen.

JEL: K13, K21, K41

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