POLAND

Agnieszka Lisiecka/ Katarzyna Wójcik
Tomasz Wardyński/ Krzysztof Filiński
Wardyński & Partners
Aleje Ujazdowskie 10
00-478 Warsaw
T: +48 22 437 8200
F: +48 22 437 8201

I. Introduction

Antitrust legislation in Poland dates back to 1987 when the Act Against Monopolistic Practices in the National Economy of 28 January 1987 came into force. The first independent regulatory antitrust body (currently Urząd Ochrony Konkurencji i Konsumentów, the Office for Competition and Consumer Protection, hereafter "UOKiK") was created under the Act for Consumer Protection and Against Monopolistic Practices of 24 February 1990. ("AMP Act") The Protection of Competition and Consumers Act of 15 December 2000 is currently in force.

The process of adapting Polish competition provisions to EU law began when Poland signed the Association Treaty dated 16 December 1991 with the EU. Provisions mirroring Articles 81 and 82 EC were introduced into the AMP Act. After accession by Poland to the EU, the President of UOKiK will perform tasks imposed on the Member States under Articles 84 and 85 EC. The Polish competition authority will join the network of competition authorities of the EU Member States which, together with the European Commission, co-operate in counteracting anti-competitive practices.

To the best of our knowledge, there are currently no cases lodged, pending or resolved in the Polish courts on breaches of competition law. In the Polish system the first step in the process of seeking redress for damage sustained by a breach of competition law often is to obtain a positive decision or a judgment from the UOKiK or the Antimonopoly Court (special division of the Regional Court which deals with appeals against UOKiK's decisions only) respectively (See E(b)(iii) below). A party wishing to appeal UOKiK`s decision has two weeks from the date the decision was received to lodge the appeal. At a party's request UOKiK may suspend the implementation of the decision until the case is completed. Judgments of the Antimonopoly Court may be appealed to the Supreme Court. . It would have once been necessary to discuss whether Polish civil courts have power to consider breaches of competition law, however, EU membership and extended court jurisdiction to directly adopt community competition rules, means that this is no longer necessary.

An individual who, or an undertaking which has sustained damage due to anti-competitive practices has two ways of protecting his/her/its rights. The first is to file an application with the UOKiK and after having obtained a positive decision, to sue the defendant before a civil court. A decision confirming breach of antitrust legislation may help the court to assess compensation and to justify the verdict. The second way is to bring a claim for damages for breach of antitrust legislation directly before the court.

Private enforcement of competition rules should aim not only to compensate losses resulting from anti-competitive behaviour, but influence the market by giving clear signals how to behave to comply with competition rules, as well. Appropriate compensation awarded by the courts may improve the ways in which dominant or monopolistic undertakings do business. The market sometimes needs deterring methods of education.

Real market situations do not often favour injured parties claiming compensation for breach of competition rules. Small entrepreneurs who are victims of abuse of the dominant position or cartel`s agreements are afraid of taking any legal action because of the possibility of losing recipients for their products or services. Besides, court proceedings are lengthy and undertakings are rarely exempt from court fees. Reaching a verdict after 3 or 5 years is not satisfactory

Use of the term "monopolistic practices" in this report refers to infringements of Polish competition legislation the provisions of which mirror Art. 81 and 82 of the Treaty at least to some extent (see above).

II. Actions for damages - status quo

A. What is the legal basis for bringing an action for damages?

(i) Is there an explicit statutory basis, is this different from other actions for damages and is there is a distinction between EC and national law in this regard?

There is no explicit statutory basis for bringing an action for damages breach of competition law in Poland. All damages actions are brought under the provisions of the Civil Code. These define damage, principles of liability for damage and obligation to compensate. The Civil Code also regulates liability for infringement of rights in *personam* and liability resulting from contractual relations and other activities such as illegal acts and unilateral declarations of intent. The lack of an explicit statutory basis does not facilitate private actions for damages but does not necessarily create excessive obstacles to do so. The Civil Code offers universal provisions to construct an effective claim for damages. If all material and formal requirements are met, the injured party is able to prove losses and logical link between those losses and infringement of competition rules. In such situation a court should award compensation. In addition, some regulations refer to Civil Code as the basis for bringing a law suit. Under the Act Against Unfair Competition of 16 April 1993[1] compensation for damage caused by an act of unfair competition and refund of profits gained without any legal basis (=restitution) is to be made by application of general principles, as defined in the Civil Code (articles 415 – 497). Provisions specify two types of liability: contractual and tortious with different obligations to compensate. Therefore, an action for bringing competition-based damages is no different from any other action for damages and the same principles apply to both. **In particular, a party violating competition rules can do so through intentional and unintentional action. There must always be an element of fault in his action. The lack of intention occurs quite rarely. This is further expanded on below under D(iii).**

B. Which courts are competent to hear an action for damages?

(i) Which courts are competent?

The following courts hear actions for damages: District - Rejonowy, Regional - Okrêgowy and Appeal – Apelacyjny courts. The District Court has jurisdiction to hear claims in the first instance where the value of the claim does not exceed 30,000 PLN. If the value of the claim exceeds 30,000 PLN, the case will be heard in the Regional Court. Generally, an action for damages may be brought: in the relevant court for the district in which the defendant resides or has his registered office; or in actions for damages for the non-performance or undue performance of a contract, in the court of the place of performance of the contract. Courts apply national law to consider competition based cases. Only individual entrepreneurs or undertakings can be charged with anticompetitive practices. Public authorities cannot be charged with anticompetitive practices.

First instance judgments may be appealed against. An appeal against a judgment of the District Court is heard by the Regional Court, an appeal from the Regional Court is heard by the Appeal Court.

While proceedings are pending the court may request other courts or authorities for their opinion or decision in previous similar cases The court which deals with claims for damages may order the party to file a motion to the UOKiK to institute antimonopoly proceedings. Similarly it may inform the UOKiK on suspicion of breaching antimonopoly rules. The UOKiK itself will decide whether to handle the case or not.

As far as the department within a court is concerned, competition based cases are to be lodged at courts having jurisdiction in commercial cases i.e. cases in which only undertakings participate and those which concern economic activity carried out by them. B**oth regional and district courts have departments dealing with commercial matters.**

The Antimonopoly Court (current name: Court for Competition and Consumer Protection) is a sub-division of the Regional Court in Warsaw.

Poland has signed many bilateral agreements on legal assistance and mutual enforcement of judgments in civil and criminal matters, as well as international conventions on jurisdiction and enforcement of judgments in civil and commercial matters, for example the Lugano Convention of 16 September 1988 on jurisdiction and enforcement of judgments in civil and commercial matters, the New York Convention of 10 June 1958 on confirmation and enforcement of foreign judgments of Arbitration Courts. Poland has also concluded some bilateral agreements with current EU members (Austria, Belgium, France, the UK) and new members (Czech Republic, Cyprus, Estonia) and non-European countries such as Cuba, Egypt, Iraq, Mongolia, USA. Provisions of the above mentioned agreements and conventions allow one country to request another country to confirm and enforce judgments made in the requesting country. On the basis of those arrangements an individual or undertaking wishing to enforce the judgment in a country other than its home country can file an application directly with the foreign court or file it with the court in its home country, which then initiates proceedings in order to enforce the judgment.

To some extent, provisions of the Act on private international law secure the flexibility in terms of which legal system the parties to the contract can choose. There must be a link between the law and the rights and duties the parties have. If parties do not choose the law, then provisions of the Act apply. They regulate jurisdiction for contracts listed in the Act, such as commission and task contracts, transport and shipping contracts, or consignment contracts. A party's residence, or registered office determine proper jurisdiction. For non-contractual obligations, the Act provides for application of the law of the country in which the event which is the source of obligation has taken place.

(ii) Are there specialised courts for bringing competition-based damages actions as opposed to other actions for damages?

The Polish legal system does not provide for specialised courts to hear competition-based damages actions. Such matters are determined by the courts mentioned in (i) above.

The antimonopoly Court's judgements are binding on a civil court, as to the declaration of infringement of competition law. Other matters specified in a judgement are subject to proof by evidence. An administrative decision is legally binding on a party, or parties, to an action. Anticompetitive practices can affect a great number of consumers, or businesses, and they all are authorised to seek damages for the losses they have suffered, because of those practices. The injured parties who have not participated in administrative proceedings, but are victims of anticompetitive practices, which were prohibited in a final decision, have the right to rely on that decision as evidence in their own actions.

C. Who can bring an action for damages?

(i) What limitations are there to the standing of natural or legal persons, including those from other jurisdictions? What connecting factor(s) are required with the jurisdiction in order for an action to be admissible?

Any natural or legal person who can prove that he has sustained damage as a result of a defendant's actions which are in breach of competition law, may bring a damages action. A party must have the capacity to be a party in and to act in court proceedings. Under the Civil Procedure Code any natural or legal person has the capacity to be a party in court proceedings. In addition, representative bodies not

having a legal personality permitted to act on the basis of binding provisions, e.g. bodies whose objective is consumer protection, have standing as well.(article 61 (1) Civil Procedure Code. The Regulation of the Ministry of Justice of 10 November 2000 specifies the organisations which have the power to act in the courts for and on behalf of citizens.

An action for damages may be economic in nature, if it is conducted between businesses and concerns same economic activity carried out by them. In such cases all entities with or without legal personality (including entities established according to legal provisions) may also have the capacity to be parties in court proceedings if the subject of their activity is commercial, e.g. registered or limited partnership. Such entities are not natural persons and do not have legal personality, but have the capacity to act in court in commercial matters.

Conditions generally required by courts to bring actions to protect rights in personam need to be fulfilled before an action for damages can be brought. The plaintiff should be able to prove that his/her rights have been violated or threatened and that he/she can act in a court personally or by proxy.

Rules of private international law do not differ between EU Member States and non-Member States. The parties to a contract may choose the law which governs the contract on condition that there is a link between the legal system and a contract e.g. the place of performance of a contract. Torts are generally tried within the country in which they occur.

As majority of infringements of competition rules are non-contractual. Private international law is fundamental in governing both jurisdiction and applicable law. Here, it is irrelevant whether the infringement occurred in an EU Member State, or not. One has to apply the law of the country where the infringement occurred and submit to its jurisdiction

Arbitration is an example of subject which is neither covered by Regulation 44/2001, nor by Private international law. There are international conventions and bilateral agreements which apply. It has a certain value in assisting in possible amicable solution of competition based claims for damages.

Polish courts have exclusive jurisdiction when a defendant resides in Poland, or has a registered office (seat) at the time a claim is served, or when a defendant has property in Poland.

The parties to the business agreement can exclude Polish jurisdiction and choose the jurisdiction of any foreign country, if the law of that country allows that.
To some extent, provisions of the Act on private international law secure flexibility in terms of which legal system the parties to the contract can choose. There must be a link between the law and the rights and duties the parties have. If parties do not choose the law, the provisions of the Act apply. They regulate jurisdiction for contracts listed in the Act such as commission and task contracts, transport and shipping contracts, or consignment contracts. A party's residence, or registered office determine proper jurisdiction. For non-contractual obligations, the Act provides the law of a country where the event which is the source of obligation has taken place.

(ii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

The Civil Procedure Code allows collective claims. Several persons may simultaneously be plaintiffs, if the subject of the litigation gives rise to:

1) shared rights or obligations or if it is based on the same facts and legal basis (substantive joint participation); or

2) claims or obligations of one type based on the same facts and legal basis, if the jurisdiction of the court is justified for each claim or

obligation separately, or for everyone jointly (formal joint participation).

For example, if a cartel operating on the local market brings about an increase in prices for certain services, all consumers who are forced to pay a higher price than they would have paid absent the cartel can bring a collective claim. The customers of the members of the cartel who sustained damage due to breach of competition rules also share the right to make a legal claim and their rights are based on the same facts.

But, allowing for the difference in the definition of "collective claims" to which EU law applies, the award is made to different members of the group, in relation to the losses they suffered individually.

In addition, a prosecutor may institute a competition-based damages action when acting for a specific person or persons. According to article 7 of Civil Procedure Code a prosecutor is authorised to institute proceedings in any matter if he finds that this is necessary to protect the legal system, citizens' rights or the public interest. He may also be joined in proceedings already pending at any stage. We have not been able to discover whether Polish prosecutors have benefited from these provisions in practice.

The Polish ombudsman has the same rights as a prosecutor to authorise the institution of civil proceedings, or to be joined in proceedings already pending. Since his position among other law enforcement institutions is well founded and widely accepted, one can expect that he will deal with a greater number of cases resulting from competition infringement. In comparison to other institutions, he is able to order administrative bodies, civil courts, or prosecutors to initiate proceedings.

Polish procedural laws do not foresee the possibility of bringing class actions.

In consumer protection matters, representative bodies may institute proceedings on behalf of citizens. With the plaintiff's consent, such bodies may also be joined in proceedings already pending at any stage.

These representative bodies are:

1) consumer associations,
2) human rights organisations,
3) scientific and technological bodies,
4) trade unions, and
5) automobile associations, other than bodies representing commercial transport undertakings.

The only "filtering procedure" which could apply to the above mentioned organisations functions when interested parties establish a certain kind of organisation, for example a trade union or association. Requirements usually refer to a minimum number of members (for a trade union this is at least 10 persons and 15 persons for an association) and provisions of the deed of association which should provide for the purposes of organisation and means of executing the organisational goals.

An association may join court proceedings with its member' consent. The provisions concerning prosecutors apply. As in other cases a prosecutor may initiate proceedings or join the court proceedings which are pending. (Articles 55-60 Civil Procedure Code).

An award is made to an individual plaintiff.

D. What are the procedural and substantive conditions to obtain damages?

(i) What forms of compensation are available?

There are two types of compensation which an injured party can choose. If the redress is to be in money, the amount is fixed according to the prices on the date the damages are determined (i.e. on the date of the judgement) - ex post. If the injured party decides to claim *restitutio in integrum,* the court determines the value of damages on the date when the loss was incurred – ex ante.

The Civil Code provides for compensation of both types of losses, i.e. damnum emergens and lucrum cessans and an injured party has the right to sue for both. The amount of compensation actually awarded depends on the ability to prove damages sustained.

The injured party may choose the form of compensation. In practice, pecuniary compensation is the most common.

Where restitution is impossible, or could involve excessive difficulties or costs for the defendant, the injured party's claim is restricted to pecuniary compensation.

(ii) Other forms of civil liability?

The Act Against Unfair Competition of 16 April 1993 provides for specific forms of civil law liability. Apart from redress according to general principles, an undertaking whose interest has been threatened or infringed through an act of unfair competition, may claim:

1) cessation of the prohibited acts,
2) removal of the effects of the prohibited acts,
3) submission of one or more statements of appropriate content and in proper form (public statements recognising fault),
4) refund of money received without any legal basis (=restitution), general principles apply; or
5) an appropriate sum of money be awarded for a specific charitable purpose.

Furthermore, the Court may rule on the products, their packaging, advertising materials and other objects directly connected with the commission of the act of unfair competition, and in particular may rule that they should be destroyed or taken as part of compensation.

Civil claims to disqualify members of undertakings' governing bodies are not permissible. Such a possibility exists in administrative proceedings, i.e. the President of UOKiK may oblige an undertaking participating in a monopolistic concentration (merger, acquisition, establishing a new company) to disqualify specific persons from its governing or controlling body, as a precondition for issuing consent on the concentration or if the concentration took place pursuant to the President of UOKiK's decision consenting to the concentration, where the decision was issued based on unreliable information provided by the undertaking. The Criminal Code also provides that a person may be prohibited from holding a specific position, performing a specific profession or conducting a specific economic activity. However, a breach of competition law is not in itself sufficient to justify criminal liability.

(iii) Does the infringement have to imply fault?

Polish civil law provides two types of liability for damage caused by breach of Competition law: contract and tort.

Both types of liability are based on the principle of fault. Fault is understood in the same way for both types of liability. The difference is that that in case of contractual liability fault is presumed. Fault must be shown in relation to the event causing the damage i.e. violation of competition law causing the damage.

As far as an action for damages for breach of competition law is concerned, the requirement to show fault is automatically fulfilled.

In contract the fault is presumed while in the case of tort the fault has to be proved. The defendant may reject the claim and prove he is not guilty.

Fault is based on objective and subjective criteria.

1) objective – specified as acting inconsistently with the law or principles of social co-existence (among others, infringing the ban on adopting monopolistic practices)
2) subjective – can be understood as direct or indirect intent or negligence.

A party to proceedings does not have to prove intent. It is sufficient to prove negligence i.e. that the party did not act with proper care to the standards which one would expect in any given circumstances. This means that negligence is based on an objective element (people must act to the standard of care of a reasonable man/honest trader) and a subjective element (what a reasonable man would have done in those specific circumstances). In conducting an economic activity, the degree of care required is assessed taking into consideration the professional character of that activity (diligence of an honest trader). In practice, this means that undertakings are subject to stricter requirements than are generally imposed in the context of non-economic activities.

Even the slightest negligence suffices to fulfil the fault condition required for tortious liability.

Alongside fault, the pre-requisites of liability in cases both of contractual and tortious liability are:

1) Damage. There is no statutory definition of "damage", or any other example for assessing possible forms of damage. The prevailing view in legal doctrine is that damage can flow from any and every violation of a legal interest. Damage may be proprietary or non-proprietary in nature.
2) Causality. Polish civil law requires an adequate causal link, i.e. the perpetrator is liable for the natural effects of an act or omission from which the damage results. The prevailing view in legal doctrine and case law is that it does not matter whether this link is direct or indirect.
3) A) In case of tortious liability an event causing the damage, for which legislation provides the obligation to compensate is also required; such obligation is mostly based on general provisions in the civil code providing an obligation to award damages for any loss caused by loss can be caused by an act or an omission fault (Article 415 of the Civil Code).. Such an act must be illegal and culpable (hence fault). An illegal act is not automatically considered to be negligent.. Whether a violation of competition rules by itself is a sufficient event recognising the requisite fault depends on the circumstances of the case(see above).
   B) In case of contractual liability – the existence of a valid obligation and its non-performance or the undue performance.

All types of anticompetitive practices (agreements and concerned practices), and all forms of abuses of dominant position require active participation of an individual entrepreneur, or persons who represent an undertaking and act in its name. The practices which are mentioned must have an element of fault. Practices specified in the Polish AMO Act comply with those specified in articles 81 and 82 of the EC Treaty. Both systems imply fault as an essential element of anticompetitive practice.

E. Rules of evidence

(a) General

(i) Burden of proof and identity of the party on which it rests (covering issues such as rebuttable presumptions and shifting of the burden to other party etc.)

The general rule is that the burden of proof relating to a fact shall rest on the person who STET attributes the legal effects to that fact (Article 6 of the Civil Code).

This means, that the burden of proof rests on the party bringing a claim, i.e. on the plaintiff. There is an exception in the case of contractual liability where fault is presumed. The injured plaintiff does not have to prove the existence of fault. This presumption may be rebutted by proof presented by the defendant.

The burden of proof shifts to the defendant, when he disputes the plaintiff's evidence. The burden of proof shifts back to the plaintiff where the defendant submits arguments or evidence contradicting the plaintiff's evidence.

Under the rules of evidence, factual statements which are not challenged by the other party, facts considered to be public knowledge and facts known to the court officially can be admitted as evidence. Facts considered to be public knowledge and facts known to the court officially can be contested; however, in practice this right is rather limited.

There are no fixed criteria as to what can be regarded as facts within public knowledge. It may mean events, circumstances, activities that are known by a reasonable man living within the location of the court (e.g. historical, political, natural or economic facts).

Facts known to the court officially means only those known to the court because of its official activities i.e. initiation, suspension or completion of other court proceedings and not from private sources.

The decision of competition authorities will not to be regarded as being a fact within public knowledge, but could be regarded as being a fact known to the court officially. This, however, will depend on the circumstances, particularly the court's knowledge, and will be decided by a court.

If a party to proceedings refuses to produce and submit any evidence to the court or causes obstacles in presenting evidence, the court will decide what meaning and significance the refusal for the considered case has (Article 233 § 2 of the Civil Procedure Code). There are no rules in respect of the effects that such refusal may have on the burden of proof.

(ii) Standard of proof

In Polish procedure there are no standards of proof and therefore there are no technical expressions in this regard.

Circumstances justifying the claim must be proven. The exception is injunctive relief, in respect of which the law requires that the probability of the circumstances justifying the motion be shown.

The court decides whether the given circumstances have been proved or, in case of injunctive relief, their probability has been shown.

If the damage consists of (hypothetical) lost profits, the prevailing view in legal doctrine is that such damage must be proved by the injured party to such an extent that in all likelihood (by all standards of reasonableness) it justifies that profits were actually lost.

The court is unfettered in its obligation to make a decision on the basis of the evidence presented to it. The court will reach a decision after comprehensively weighing up the evidence with which it has been presented.

As a rule, the same standards are applicable within criminal law. However, breach of competition law is not in itself sufficient to justify criminal liability.

A preliminary injunction is appropriate, if the applicant demonstrates that a claim has a good chance of success and that the lack of an injunction could result in his claim not being satisfied. An injunction could be useful when a party is not yet able to prove a claim, but is able to substantiate the claim. In competition based suits for damages, a preliminary injunction can secure the plaintiff's interests where the defendant is trying to hide, or dispose of, his assets.

(iii) Limitations concerning form of evidence

There are no limitations on the form or kinds of evidence that can be presented but the court can exclude evidence submitted only for the purposes of delaying proceedings.

Forms of evidence include documents (official and private), witnesses' testimonies, experts' opinions, inspections and hearings of the parties. The court may admit as evidence films, television broadcastings photocopies, photographs, plans, drawings and sound recordings or tapes and other devices recording or transmitting pictures or sounds (Article 308 of the Civil Procedure Code).

The above list of forms of evidence is non-exhaustive. Other forms are also permissible.

Polish law does not provide any hierarchy of forms of evidence. The Court assesses the credibility and weight of the evidence presented. Polish law allows foreign witnesses to be heard by a foreign court, pursuant to international bi-lateral and multi-lateral conventions to which Poland is a party.

There are no rules as to the relative weight to be accorded to different forms of evidence. However, witness statements or parties' testimonies can only be admitted as evidence if this does not circumvent the provisions on the form a document has to take in order to be valid (Article 247 Civil Procedure Code).

No one has the right to refuse to testify, except for related parties (i.e. party's spouse, ascendant, and descendant, relations of affinity and any adopted person). However, the witness and the party to the proceedings have the right to refuse to answer any questions posed, where the answer could expose him or those close to him to criminal liability, disgrace or severe and direct proprietary damage or if the testimony was linked with the abuse of a fundamental professional secret.

In competition based cases the experts may prove useful. They can accelerate the proceedings by providing judges reliable assessments of case circumstances and accurate legal expert opinions. They may attempt to a keep balance between the parties which have non equal economic potential, as well..

(iv) Rules on discovery of documents within and outside the jurisdiction of the court vis-à-vis defendants, third parties and competition authorities (national, foreign, Commission).

There is no equivalent of discovery in Polish law. At the pre-trial stage parties to proceedings exchange pleadings specifying their claims and positions. This is informal and voluntary. Its objective is, above all, to induce the other side to fulfil claims without the necessity of having to institute court proceedings and to incur related court costs.
There is an exception as regards commercial proceedings. In such proceedings the plaintiff is obliged to attach to his statement a copy of the following documents:

letter before action; defendant's answer; information or documents verifying an attempt to settle the matter.

The court can order (this usually happens upon a party's request) any party to produce a certain document to the Court. It does not matter whether the requested documents is situated abroad. There is no rule as to how detailed the request should be. It may indicate named document as well as a type or category of documents. The requesting party, however, must justify its request by stating the relevance of the document and showing what facts are to be proved by it.
A document produced to a court may then be subject to discovery by the other party.

A refusal to submit the requested documents is permissible only if (i) it contains a state secret (ii) when the party requested could refuse to testify as a witness as to circumstances contained in a document or if someone possesses a document on behalf of a third party who could refuse to present the document for the same reasons. However, the rule does not apply where the person in possession of the document or a third party a duty towards one of the parties to the proceedings or if the document is issued in the interest of the party requesting the evidence to be heard (Article 248 of the Civil Procedure Code).

In other cases, if the requested party refuses to do so, this fact and its significance to the proceedings will be assessed by the court.

Additionally, if a third party unreasonably refuses to submit the requested documents, it may be fined (Article 251 of the Civil Procedure Code).

Submission of documents is regulated by several bilateral agreements on legal assistance to which Poland is a party. Judges have a constitutionally guaranteed right to freely assess all evidence, regardless of origin. The law defines the type of evidence (testimonies, documents, objects, expert opinions etc.).

Polish law provides a procedure to secure evidence, if there is a danger that its presentation will be difficult or when, because of other reasons there is a need to define the existing factual physical state of a thing or a person. This may take place before the court proceedings are initiated upon a party's motion. Evidence may also be secured during proceedings and may also be initiated by the court itself (Article 310 of the Civil Procedure Code).

The coming into force of 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 makes it easier to get access to the relevant documents by establishing the rules of exchanging documents between the Commission, national authorities and courts.

(b) Proving the infringement

(i) Is expert evidence admissible?

Expert evidence is admissible. This often influences the final outcome of the case. In relation to competition-based actions for damages, such evidence may be decisive in proving inter alia the existence and extent of the damage. Experts may be called by the parties and by the court (ex-officio, or, more usually upon the party's request(whereas any expert summoned by the court will have "expert opinion" status). Any expert opinion produced by one of the parties to the proceedings will be regarded as being a private document and not an expert opinion.

If the court calls an expert, such expert is chosen form the closed court expert lists. A party's expert may be a person having professional knowledge/ experience/ reputation within the matter considered by the court.

It is believed that, where in appeal proceedings neither the President of UOKiK nor the court in appeal proceedings has held that a breach of Competition law occurred,

an economic expert's opinion will be needed to prove that a particular activity has a monopolistic character. This is not a legal requirement.

Experts' opinion is restricted to matters of fact. Expert evidence on the law is not admissible.
If there is a need for explanation on foreign law, the court can ask the Ministry of Justice to provide it with a relevant expert opinion. The Ministry of Justice offers such expert opinions on the basis of co-operation with ministries of justice of other countries. If this concerns international law, the court can summon experts who have a good knowledge in the matter, for example university professors.

All expert opinions regardless of whether the expert is appointed by the court or by a party are freely assessed by the judge. The judge can accept an opinion, or reject it in full.

(ii) To what extent, if any is cross-examination permissible?

The principle of cross-examination does not exist in the same way as it often does in common law systems. Witnesses must give evidence objectively only on facts known to them. Every party to the proceedings, as well as the court has the right to question a witness. The court, however, may object to the questions asked by the party if it deems that the matters raised in such questions have already been clarified or that the matters do not relate to the subject of the proceedings. No one has the right to refuse to testify, except for related parties. The witness and the party to the proceedings have the right to refuse to answer the question posed, where the answer could expose him or those close to him to criminal liability, disgrace or severe and direct proprietary damage or if the testimony were linked with the abuse of a fundamental professional secret (this also applies to directors of defendant companies). The above principles also apply in relation to questions asked by the party that did not originally call the witness.

(iii) Under what conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?

Legal opinions differ as to whether a court may examine competition-based damages actions before they have been determined by UOKiK. In our opinion, a civil court is competent to classify specific activities as monopolistic practice for the purposes of a claim for damages, although it is conceded that the hearing of evidence may be more complex in the absence of a prior UOKIK decision, because of the necessity to prove that specific activities have monopolistic character.

All administrative decisions and judgments can be used as documentary evidence in all proceedings. The court has discretion to decide on the evidential value of such decisions and judgments as far as proving the facts of the proceedings before the court are concerned. Final judgments and decisions are legally binding as to the legal principles contained therein on all courts and administrative bodies in all kinds of matters.

In principle a decision banning the adoption of a specific practice can also be relied upon as an official document by an injured party, even if that party did not participate in the administrative proceedings before the President of UOKiK.
The above means that decisions of UOKiK as well as court decisions issued during the course of the appeal proceedings will carry significant evidential value.

UOKiK`s decision is not needed for a claim for damages to be brought. An injured party can sue the individual, or undertaking, for damages on the basis of facts. It is a court which has to consider whether or not the competition rules have been breached and by whom. But in practice the most effective way of seeking damages is to obtain a positive UOKiK decision or court ruling which upholds such decision, and then bring an action in court. A UOKiK decision would be crucial material evidence proving the infringement of competition rules, while a court ruling is binding on a civil court as to the finding that competition law has been breached.

Decisions and judgments issued in competition cases by bodies of other EU countries may formally constitute evidence before a Polish court. However, their evidential value is limited. Such decisions and judgments are not binding on a Polish court but can rather assist in interpreting notions of competition law.

Articles 81 and 82 of the EC Treaty apply to trade between member states and it is still possible that in domestic actions a court will order a party to file a motion in UOKiK to obtain a decision, before commencing court proceedings. We hope that the practical application of EC competition regulations by Polish courts will encourage them to examine cases based on Polish competition law as well.

(c) Proving damage

(i) Are there any specific rules for evidence of damage?

There are no specific principles for proving the existence or amount of damage. General principles concerning evidence, including hearing of evidence apply.

Where it is impossible or at least difficult to determine the amount of damages, the Civil Procedure Code entitles the court to award an appropriate sum at its discretion based on all the circumstances of the case (Article 322 of the Civil Procedure Code).

The court may render a partial judgement, if only part of a claim or some of the claims are properly established (Article 317 of the Civil Procedural Code).

If the court recognises a claim as being justified in principle, it may issue a preliminary judgment in this respect. In respect of quantum, it may adjourn or order further proceedings in the matter (Article 318 of the Civil Procedural Code).

(d) Proving causation

(i) What level of causation must be proven: direct or indirect?

A party claiming damages must prove the existence of an adequate causal link. It means that the cause must be a necessary condition for the existence of the damage i.e. a cause must be considered as a sine qua non of the damage. It is for the court to determine whether the alleged damage is a normal consequence of the cause.

The prevailing view in doctrine and case law is that proving an indirect causal link is sufficient. (see: point D (iii) 2). However, these judgements and views refer mostly to injury to an individual.

As a rule, multiple causes are treated the same – the adequate causal link is required to be proved in respect of each cause.

F. Grounds of justification

(i) Are there grounds of justification?

The term justification in the narrow sense, i.e. anything that wholly exculpates the defendant, despite the plaintiff having fulfilled all the conditions necessary for an action for damages, is not shown by any practical examples in competition-based actions for damages. Any examples of such justification (for example force majeure) are based on general principles of civil law. In general, the liability of the defendant is based on its fault, either in respect of tort or contract. The examples of much stricter liability based on the rule of risk are of limited use (for example Article 435 Civil Code – liability of a person managing a factory/enterprise which uses any kind of energy for the damages caused by the activity of such factory/enterprise). However, the defendant is not liable for damages caused by force majeure or activities of third parties for which the defendant is not responsible.

The Polish legal system provides for the principle of full compensation, the aim of which is to fully compensate for the loss, without unjustifiably enriching the injured party. Thus, other than the defence that not all the conditions of liability have been fulfilled, the following justifications (in the general sense) may be presented to reduce the amount of compensation payable:

1) limitations provided in specific provisions e.g. limiting the liability of redressing damage actually sustained; there are no examples of this that could be relevant to competition based damages claims;
2) imposing an obligation on, or entitling, the decision making body to mitigate damages in the following cases:
   (a) where it is impossible or difficult to determine the amount of damages, Article 322 of the Civil Procedure Code entitles the court to award an appropriate sum at its discretion based on all the circumstances of the case;
   (b) where the principle of compensatio lucri cum damno applies (see point F (ii) below);
   (c) where the injured party contributed to the occurrence or increased the extent of the damage (Article 362 of the Civil Code) (see point F (iii) below);

(ii) Are the "passing on" defence and "indirect purchaser" issues taken into account?

The "passing on" defence and notion of "indirect purchaser" do not exist in the Polish legal system, neither as a complete defence to an action for damages, nor as a way of reducing the amount of damages payable. The principle of compensatio lucri cum damno, however, has a similar effect of defining the amount of damages payable. This states that damages awarded to an injured party cannot exceed the amount of loss incurred, and compensation cannot enrich the injured party. The sole purpose of the damages is to compensate for any loss suffered, and not to punish the perpetrator. Punitive damages do not exist in the Polish system.

If the injured party benefited from the damage sustained, the court takes into account those benefits after considering all the circumstances of the case. This approach can be applied in a case where loss and benefits are the natural consequences of the same event, such as overcharging resulting from a cartel or abuse of a dominant position, providing that such overcharging is passed with profit by the injured party onto the other entity on the market. **Put differently, an entity suffering from an overcharge imposed by a cartel or dominating company may reduce its own losses by "passing on" the higher prices to its clients. Thus, an entity suffers losses due to high prices that it must pay for some goods or services, but at the same time it has enough power to pass on a part of its losses to its clients.**

The finding by the court that e.g. a cartel member (meaning a defendant) has been unjustly enriched does not influence the level of damages payable to the plaintiff.

As mentioned above, the "passing on" defence and notion of "indirect purchaser" do not exist in the Polish legal system. However, if the "passing on" defence is contemplated the following can be stated by application of general rules: (i) there is no presumption that higher prices have been passed on, (ii) the burden of proof that the loss has been passed on lies on the defendant i.e. the cartel members or the entity holding a dominant position. This means that first the injured party (plaintiff) proves its loss and next the defendant addressing the plaintiff's claim proves that the plaintiff has passed the loss on. If the notion of "indirect purchaser" is contemplated the following can be stated by application of general rules: (i) there is no presumption that higher prices have been passed on, (ii) an indirect purchaser can claim damages for loss sustained by using an indirect causal link.

(iii) Is it relevant that the plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has he benefited from the infringement? Mitigation?

Pursuant to Article 362 of the Civil Code, where the injured party contributed to the occurrence or increased the extent of the damage, the court has the right, but not the duty to reduce the amount of damages. The court may award full damages even in the event of contributory negligence.

Where the injured party contributed to the occurrence or increased the extent of the damage, the damage must be a natural consequence of the injured party's conduct. The court examines the legitimacy of reducing the amount of damages only after the contributory aspect has been determined. In such situation the court contemplates all the issues of the case in the following order: (i) whether the loss was sustained, (ii) extent of loss, (iii) to what extent the injured party has contributed to the damage, (iv) by how much the damage should be reduced. The court may waive the right to compensate the injured party only where that party has been guilty of intentional fault. Thus, in any event compensation cannot be totally reduced in the absence of an intentional fault on the part of the plaintiff.

When reducing damages, the court should consider all the facts of the case connected with the damage caused and the contributory aspect of the injured party, including fault of both parties. Comparing the extent of fault of both parties is only one of the criteria considered by the court.

The court may also consider the level of proper care which may be required from the injured party in a given situation, which is stricter in relations between professionals (Article 365 of the Civil Code).

Damages are reduced by an appropriate fraction or specific percentage. A certain sum can also be deducted or specific elements omitted. If the court finds the defendant liable for damage which may result in future losses then in the event that the plaintiff contributed to the occurrence of the damage the court can also reduce the amount of future damages.

Pursuant to Article 58 of the Civil Code, illegal contracts are void, do not bring about any legal effects and may not constitute a legal basis for any action. Under article 5 item 2 of the AMO Act, illegal contracts are void in their entirety or in part. As such, they do not bind the parties any longer. The Civil Code defines the way in which parties can settle the costs they have paid and profits they have gained under it. The Polish legal system, therefore, allows parties to a contract which has become void to secure their interests. If damage was suffered as a result of an illegal contract between parties to a dispute, then such situation would be decided pursuant to Article 405 of the Civil Code providing that anyone who without legal basis gained any material benefit from the other party, is obliged to return all benefits gained or their value **The ruling in *Courage v. Crehan* should strengthen the tendency to justify the award of compensation on the basis of infringements of competition rules rather than contractual relations. Of course, the court will not ignore the fact that the parties concluded a contract, but will place emphasis more on competition elements of the case.**

Thus, the court would not award damage in such case but order a return of the unjustifiably gained benefits.
The following forms the basis of court practice:

(i) the amount of damages to be paid by the defendant is reduced where the plaintiff has contributed to the infringement; the damage is reduced in proportion to the contributory act of the plaintiff; the court has the right, but not the duty to reduce the amount of damages;
(ii) the amount of damages to be paid by the defendant is reduced where the plaintiff has benefited from the infringement; and
(iii) on the basis of Article 362 of the Civil Code (i.e. where the injured party contributed to the occurrence or increased the extent of the damage, the court has the right, but not the duty to reduce the amount of damages), it may stated by analogy that the plaintiff has an obligation to mitigate the loss; thus, if the obligation to mitigate

the loss is broken, the amount of damage is to be reduced by the court.

G. Damages

(a) Calculation of damages

(i) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?

The principle of full damages exists in Polish law. The notion of damage covers damage actually incurred and lost profits. The amount of damages is defined as the extent of damage sustained by the injured party resulting from the perpetrator's act.

Profit made by the entity adopting the monopolistic practice will not determine the amount of damages. In practice, such profit may be treated, directly or indirectly, as the measure of the amount of damages.

The level of damage may be influenced by the benefit of the injured party, and decrease the amount of compensation due to him (see point F(ii)).

This results from the fact that there are no provisions on the way in which damages should be calculated by the court and it is often difficult or impossible to accurately prove damage. This also concerns competition-based damages actions, since in such cases damage is most often loss of profits, and it is therefore hypothetical damage.

As future loss of earnings is also recoverable. However, this is not the same as compensation for loss of chance. The prevailing view in legal doctrine, is that if the damage identified as lost profits is hypothetical, such damage must be proved by the injured party to such an extent that in all likelihood (by all standards of reasonableness) profits will actually be lost. The theoretical possibility of obtaining profits will not justify the award of damages.

Since civil law does not provide strict rules as to how damages are to be calculated, there is a practical need to determine factors which enable damages to be assessed on a case by case basis. Profits generated by the infringing entity often serve as a yardstick

Are damages awarded for injury suffered on the national territory or more widely?

There are no provisions limiting the territorial scope of the injury that can be compensated other than the fulfilment of the general conditions to obtain damages.

(iii) What economic models are used to calculate damages?

There are no legal rules on calculating damages. Legal doctrine generally proposes two methods for calculating damages: (1) the objective method and (2) the differential method.

The choice of method depends on the type of damage. In case of damage actually incurred the first method will be applied which consists of determining the actual value of the damage suffered in relation to a specific interest. The method is based on the assumption that the calculation of compensation should reflect the market value of the damage suffered. Therefore, it is more likely to be used in competition-based actions for damages where the damage will mostly be regarded as being lost profits.

The second method consists of comparing the actual financial state of the injured party with the hypothetical state, which would have existed if such damage had not occurred. This method will be decisive in determining the amount of damages payable in competition-based actions for damages, because it allows the amount of damages to be defined as lost profits.

There is no practice on how to calculate the damage in case of competition-based actions. It should be assumed that the injured party should prove how much profit he would have made if he were running a business under conditions of perfect competition and specify the amount of damage which he sustained as a result of anti-competitive practice. In effect, the amount of damages is assessed as the difference between the profits which the injured party earned (if at all) and which he could have earned.

Such a calculation must take into account all the circumstances of the case, which had an impact on the profit that could have been achieved. Only those facts which are linked to the anti-competitive practice can be taken into account in calculating the damages. All objective factors over which the parties did not have any control, must be eliminated (inflation, interest rate changes, and so on). Both parties have the right to indicate factors that should or should not be taken into account. In practice, this will probably be verified by an expert. It is very difficult to predict what the outcome may be. Reduced, or lack of, profitability should be documented in credible financial and accounting information and be based on relevant analyses of the economic situation in a given market.

In practice, since such calculations are complicated, and experts' knowledge is necessary, a court expert will calculate the amount of damages payable.

Judgments (Supreme Court's decision dated 14 July 1972, no. I CR 188/72, Supreme Court's decision dated 3 October 1979, no. II CR 304/79, Supreme Court's decision dated 18 October 2000, no. V CKN 111/00, Supreme Court's decision dated 21 June 2001, no. IV CKN 119/01, Supreme Court's decision dated 21 June 2001, no. IV CKN 382/00) reveal that even if the damage determined as lost profits is hypothetical, such damage must be proved by the injured party to such an extent that in all likelihood (by all standards of reasonableness) profits STET were actually lost. The theoretical possibility of obtaining profits will not justify the award of damages.

If in an action for damages the court holds that there were conditions to obtain damages but it is impossible or very difficult to strictly prove the loss, the court can award an appropriate sum at its discretion, based on all the facts of the case.

(iv) Are ex-ante (time of injury) or ex-post (time of trial) estimates used?

If the redress is to be in money, the amount is fixed according to the prices on the date the damages are determined (i.e. on the date of the judgement) unless specific circumstances require prices existing at a different time to be taken as the basis (Article 363 § 2 of the Civil Code).

(v) Are there maximum limits to damages?

No

(vi) Are punitive or exemplary damages available?

No

(vii) Are fines imposed taken into account when settling damages?

Fines imposed in administrative proceedings by the President of the UOKiK are not taken into account when settling damages.

(b) Interest

(i) When is interest awarded?

In actions for damages whose value is determined on the date of judgement, court judgments are not consistent as to when interest may be awarded from. The prevailing view is that interest is awarded from the date of judgment.

Under contract law, interest may be claimed from the date the claim arose. In such cases, one can also claim interest on arrears of interest from the date the suit was filed.

In tort interest may be claimed from the moment the damage was discovered which resulted in loss of profit.

Low interest rate which may result in a lower sum of compensation being awarded by a court could discourage potential claimants to commence action for damages.

(ii) What are the criteria for determining the levels of interest?

If the amount of interest is not specified in the contract, interest is calculated according to the statutory rate. This is currently 12.25% per annum.

H. Timing

(i) What is the time-limit to institute proceedings?

Under the Civil Code, competition-based damages actions become statue-barred after three years from the date on which the injured party discovered the damage and the identity of the person obliged to redress it. In any event, a claim becomes statute-barred on the expiry of ten years from the date, when the event causing the damage occurred.

Administrative proceedings before the UOKiK do not suspend the limitation period.

The Protection of Competition and Consumers Act provides specific periods of limitation for instituting administrative proceedings before the UOKiK aimed at declaring a finding of anti-competitive practices. These proceedings cannot be instituted if five years have elapsed from the end of the year in which (1) provisions of the Act were infringed; (2) the decision imposing a fine has become final (this applies for where fines have been imposed in administrative proceedings before UOKiK e.g. for adopting anti-competitive practices, but where the undertaking continues to adopt such practices). Furthermore, one cannot institute proceedings claiming for infringement of consumer group interests if one year has elapsed from the end of the year in which any such practice ceased.

Expiry of administrative deadlines does not frustrate the right to pursue actions for damages in civil proceedings.

(ii) On average, how long do proceedings take?

Court actions for damages are generally lengthy due to the complexity of such matters. Evidential issues concerning proof of damage and its amount are particularly difficult. Obtaining experts' opinions generally prolongs the process.

To the best of our knowledge there have been no competition-based damages actions and therefore it is difficult to specify how long they may last compared with other actions for damages.

From our practice it depends on the place the court is located. Complex damages actions in Warsaw may take about 3 or even 5 years and in other places about 3 years.

(iii) Is it possible to accelerate proceedings?

In actions for damages it is not possible to accelerate proceedings.

(iv) How many judges sit in actions for damages cases?

At first instance only one judge hears such matters. The court may order the case to be heard by three judges where cases are particularly complicated or set a

precedent. At second and third instance such matters are heard as to the merits by a court comprising three judges.

(v) How transparent is the procedure?

Polish procedural rules are very detailed and complicated. Therefore, a lay person will have difficulties in benefiting from all the available legal means of redress without professional assistance.

No document involved in court procedure is made public. Only the court, the party to the proceedings and their attorneys as well as a court expert may review the court files. **However, both UOKiK decisions and Anti-Monopoly Court judgments are published in the Official Journal of the UOKiK, which is issued several times annually, after the proceedings are over. In case of individuals, only initials or name and first letter of surname are published. As far as companies are concerned, judgements reveal the full name of a company and a first letter of place where a company has its registered office.**

I. Costs

(i) Are court fees paid up front?

The court fee is payable by the plaintiff before the statement of claim is served on the defendant, at the court's request within 7 days. If the court fee is not paid, the statement of claim is returned.

(ii) Who bears the legal costs?

Until the final outcome of the case each party bears its own costs of the proceedings.

The court in its final judgment will decide who has to bear the costs of the proceedings. In principle, these costs are borne by the losing party but there are some exceptions to this rule.

If the court partially recognises a claim, the costs are mutually set off or proportionately split between parties. In certain situations, however, the court may oblige one party to bear all the costs.

The defendant is entitled to recover all his costs, if he did not cause the proceedings and acknowledged the plaintiff's claim at the first stage in the proceedings.

In certain justified cases, the court may only charge parts of the costs to the losing party or even not charge the losing party at all. There are no legal provisions which would substantiate this. The court rules on the circumstances of each case.

Irrespective of who wins the case, the court may oblige the party to bear the costs resulting from its unconscientious or patently inappropriate behaviour (in particular, costs arising from a party's refusal to give explanations or submit untrue explanations, withholding or delaying evidence).

If a settlement is reached, the rule is that the costs are set off.

Polish legal regulations do not provide for reimbursement of legal fees, incurred by a party under a contract concluded with an advocate or legal adviser. Such costs are reimbursed according to the payment rates specified in separate provisions and cannot exceed the amount therein mentioned.

There is no limit to what costs are considered to be reasonable and therefore recoverable.

(iii) Are contingency fees permissible?

Contingency fee arrangements in which the lawyer is paid out of any damages that are awarded are not provided for in Polish legal provisions. However, since a lawyer's remuneration is generally based on a contract with a client it is possible to include such a possibility in the retainer. This could also apply in competition based cases. There is however a strong need to underline that deontological rules are against such fee arrangements.

(iv) Can the plaintiff/defendant recover costs? Are there any excluded terms?

Costs may be recovered by the plaintiff/defendant. Costs are reimbursed at the request of a party. Such a request must be submitted before the end of the proceedings before a particular instance. The items which may be recovered are specified in point (vi) below.

Retainer costs can be reimbursed according to payment rates specified in separate provisions. They cannot exceed these rates and they cannot be modified by contract.

(v) What are the different types of litigation costs?

1) Court fees which are payable on the statement of claim. The fee is proportional i.e. depends on the value of the claim. Fees are capped at 100,000 PLN;
2) Costs of legal representation in proceedings, i.e. remuneration of one advocate not exceeding the rate of charges specified in separate provisions and his expenses; and
3) Operational costs of the party, e.g. travel costs to court and equivalent of loss of earnings for appearance at court.

Costs of legal representation in proceedings before the court of first instance are calculated by adopting minimum rates, whose amount depends on the value of the claim and cannot exceed 6 times these rates. Currently the maximum sum for remuneration does not exceed 45,000 PLN (approx. 9,500 EUR). Costs for higher instance proceedings are specified as between 50% - 75% of the remuneration of first instance.

Legal representation costs awarded by a court do not reflect and are not dependent on the amount of remuneration specified in the contract concluded with the advocate or legal adviser. This amount may have an impact on the amount of costs awarded but within the limits specified by the appropriate legal provisions.

Contractual costs associated with pre-trial legal services (preparing legal opinions on the legitimacy of the litigation and risks connected with this) may be claimed as part of the damages.

(vi) Are there national rules for taxation of costs?

If a party is dissatisfied as to costs awarded he may file a complaint to the second instance court. No court fee is payable on such a complaint.

(vii) Is any form of legal aid insurance available?

It is possible to be exempted from court costs. The court may appoint an advocate or legal adviser ex officio. The court allows the application if it deems it necessary. The court will refuse such application if it deems the statement or claim or defence unfounded.

The following may claim exemption from costs: (1) a natural person, who states that it cannot afford the costs without it affecting him and his family's financial state, and (2) undertakings which prove that they do not have sufficient means to meet these costs. Courts are not usually willing to exempt undertakings from court costs.

Even if a party is exempt from court costs and was represented by an advocate or legal adviser ex officio it still has to reimburse the opposing party.

Insurance companies offer legal aid insurance. Such a policy covers a party for legal costs incurred in an action brought for injury suffered, e.g., a car accident while on holiday.

(viii) What are the likely average costs in an action brought by a third party in respect of hard-core violation of competition law?

Given the complexity of competition-based damages actions and frequent necessity to obtain court experts' opinions average costs are difficult to assess.

In a claim for EURO 1 million damages, the court fee is 100,000 PLN, i.e., approx. EURO 20,000, and the lawyer's fees would be between approx. 5,000 and 8,000 EURO.

(a) General

(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules? If so, in what way do they differ from the general private enforcement rules?

Competition-based damages actions in civil proceedings are subject to general principles of civil law and do not differ from the way in which other types of civil damages actions are pursued.

EC competition rules are regarded as being of public policy. This has had no impact on any of the answers given.

(ii) Are there any differences according to whether defendant is public authority or natural or legal person?

No

Polish antimonopoly law does not allow a public authority to be charged with infringements of competition rules. So, it is not possible to sue them for damages. Because Community statutory and case law acknowledge that public authorities could be responsible for the loss that individuals, or undertakings have incurred, it is possible that such entities could be charged with infringement the rules.

(iii) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?

After 1st May, the leniency programme becomes part of the AMO Act, and will serve as a tool to combat illegal agreements, especially price fixing cartels. Reduction, or non-imposition of a fine is intended to encourage a cartel's participants to commence co-operation with the Antitrust Authority.

The relevant provisions provide that:

1) The President of the UOKiK will not impose a penalty on an undertaking participating in an agreement, whose aim or consequence is to eliminate, limit or infringe competition in the relevant market, if the undertaking cumulatively fulfils the following conditions:
   (a) as the first participant of the agreement he submits information on the existence of the prohibited agreement, sufficient for instituting proceedings, or presents proof on his own initiative, enabling a decision to be issued ordering the cessation of adoption of prohibited practice, if the President of UOKiK did not previously have information and proof in a given matter;

(b) fully co-operates with the President of UOKiK during proceedings, providing him with all the required information and presenting evidence in the matter;
(c) ceased to participate in the agreement;
(d) did not initiate the agreement and did not induce other undertakings to participate in the agreement.

2) if the undertaking does not fulfil the conditions specified in point 1) above, the President of UOKiK reduces the penalty imposed on that undertaking if it jointly fulfils the following conditions:
(a) at its own initiative presents evidence which contributes to a decision ordering the cessation of adoption of prohibited practice;
(b) ceased to participate in the agreement.

(iv) Are there differences from region to region <u>within</u> the Member State as regards damages actions for breach of national or EC competition rules?

Poland has a uniform system of law. Any disparity between judgments simply means that the law has been interpreted differently.

(v) Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction

One of the main problems concerning competition-based damages claims in civil proceedings is that there are not enough judges professionally prepared to hear these kinds of cases, which require inter-disciplinary specialist knowledge.

Furthermore, entities which may be interested in pursuing such claims are not aware of their rights in this area of law.

In addition, in Polish law damages awarded to an injured party cannot exceed the amount of loss incurred, and compensation cannot enrich the injured party, i.e. the amount of damages awarded is limited to the amount of the loss incurred, but is not limited in any other formal way. Moreover, proceedings before courts are time-consuming. Both these elements discourage an injured party from pursuing his rights. The entire procedural system needs reforming. Punitive damages would be a good solution to the problem of limited damages, i.e. the injured parties would have an economic incentive to pursue their competition based damages claims. Court fees are excessively high and should be reduced, because such high fees constitute an economic barrier to instituting proceedings. In the course of court proceedings, the defendant may benefit from a wide range of legal instruments through which he may unreasonably and unjustifiably prolong proceedings. Moreover, the procedure to secure the plaintiff's claim at the beginning of court proceedings through preliminary injunction is time-consuming and onerous for the plaintiff. In the meantime, a defendant acting in bad faith is able to dispose of his entire assets and thus the plaintiff's claim is not secured. Considering all those issues, if the plaintiff incurs a substantial loss materially affecting its business, he may be declared bankrupt before the final decision is obtained in the matter. Even if the plaintiff is successful, often he may not be able to enforce his claim from an "insolvent" defendant.

(vi) Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon

Not applicable.

III. <u>Facilitating private enforcement of Articles 81 and 82 EC</u>

(i) Which of the above elements of claims for damages (under sections II) provide scope for facilitating the private enforcement of Articles 81 and 82 EC? How could that be achieved?

In competition proceedings an injured party should have the right to have his claim for damages determined within such proceedings. Legally, there are no obstacles

for an administrative decision on the breach of competition law to determine the amount of damages. Other administrative proceedings, such as that contained in the Tax Regulations ("Ordynacja podatkowa") provide for a situation when a taxpayer obtains compensation where a tax authority's decision is cancelled. To this end, administrative provisions which determine proceedings before the UOKiK should allow UOKiK to decide on compensation as well. Obtaining compensation for breach of competition law in administrative proceedings does not preclude the case from being examined further in court. We feel that the suggestion to determine compensation in the context of administrative proceeding goes beyond the scope of this study, but if ever put into effect, this could really facilitate private enforcement of competition rules.

Law courts should have easier access to documents at the UOKiK. The provisions of the Civil Procedure Code (article 187 item 2 (iv)) enable the plaintiff who files a statement of claim to request the court to make any document held by public institutions or individuals available in court proceedings. The court may order UOKiK to provide it with any document required but this is only possible while the proceedings are pending or when an interested party files the statement of claim.

The public should have easy access to administrative decisions and judgments which will enable the protection of rights. Administrative decisions are not public. They are sent to parties of administrative proceedings only.

Since any decision of the President of the UOKiK on monopolistic practices is of interest to the public interest; everyone who is affected by the consequences of such practice should be able to effectively rely on it before a court. Anyone who sustains damage due to anti-competitive practices can rely on UOKiK`s decision which acknowledges the breach of competition rules. Only those parties lodging a motion and being successful in the proceedings can use the decision as proof in an action for damages. Other injured parties who do not participate in antimonopoly proceedings should know about the decision. Unfortunately, since September 2003 UOKiK has not published the full name of applicants or perpetrators of anti-competitive practices. This will make it more difficult for other injured parties to find out about decisions which have been taken in the matter which could be essential for somebody not involved in antimonopoly proceedings.

Polish courts, like any other court within the EU directly apply articles 81 and 82 of the EC Treaty. On the basis of those provisions, a court will consider both the infringement of competition rules as well as any damages resulting from infringement. We hope that the practical application of EC competition regulations by Polish courts will encourage the latter to examine cases based on Polish competition law as well.

Article 318 of the Civil Procedure Code allows a court which has found that a claim is justified to issue an initial judgement as to principle only, and the hearing to determine a final judgment can be continued, or adjourned. When seeking damages for infringement of competition rules, those provisions can accelerate proceedings. At this stage, the court considers the claimant's right to obtain damages, but not the amount of compensation to be awarded. At the second stage, the court considers circumstances which decide on how much the defendant has to pay, or what to do to satisfy a plaintiff's claims.

One of the obvious benefits of Poland's accession to the European Union is the strengthening of the powers of the Polish competition authority, because it joins the network of national competition authorities ("NCA"). The European internal market creates an effective environment for doing business, but at the same time provides an opportunity for anticompetitive behaviour which is not easy to detect. The network of NCAs enables those who do not play fairly to be detected. Rules of co-operation between national courts and members of NCA network set in the 1/2003 Regulation will additionally increase the ability to combat anticompetitive practices, and to facilitate compensation for those who suffer loss from anticompetitive practices.

Making publicly available information on consumers and undertakings rights to protect their interests has the same value as all legal institutions which are supposed to facilitate private actions for damages. Competition authorities, business associations and law offices have a particular role to play in that matter. Publications, presentations, seminars, road shows, etc. should be used for that purpose.

(ii) Are alternative means of dispute resolution available and if so, to what extent are they successful?

The most common alternative method for resolving disputes in Poland is arbitration. The Arbitration Court has jurisdiction to resolve proprietary disputes. It does not deal with labour law disputes or disputes concerning maintenance. Therefore, there are no legal obstacles for disputes involving breaches of competition law from being heard by arbitration courts, provided that these cases arise from contractual relations and that the parties agreed to submit the case to arbitration.

In the last few years only two cases concerning breaches of competition law in conjunction with intellectual property law have been heard at the largest and most active arbitration court, the Arbitration Court at the Domestic Chamber of Commerce in Warsaw. Awards were issued in both cases. Due to the private and confidential nature of arbitration proceedings no detailed information concerning the above proceedings can be made available to us.

There are no legal obstacles to submitting disputes involving breaches of competition to be settled in the course of mediation. However, there are no examples of mediation proceedings concerning competition-based disputes. `

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None