

GETTING THE DEAL THROUGH

# Private Antitrust Litigation

in 27 jurisdictions worldwide

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# Poland

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## Legislation and jurisdiction

### 1 How would you summarise the development of private antitrust litigation?

To date, private antitrust litigation has not gained practical importance in Poland; in particular no case law has been recorded. This is because competition law is a new field of law in Poland, which is still in a developing stage. Further, there is no specific regulation for private antitrust litigation. Consequently, the general rules concerning actions for damages apply.

However, it is to be expected that, with the rapid development of this area of law, private antitrust actions will become efficient legal means for parties harmed by infringements of competition law.

### 2 Are private antitrust actions mandated by statute? If not, on what basis are they possible?

Under Polish competition law there is no specific basis for bringing private antitrust actions. The competition law exclusively deals with administrative antitrust proceedings conducted by the president of the Antitrust Office (Prezes Urzedu Ochrony Konkurencji i Konsumentów).

However, private antitrust actions may be brought as actions for damages on the basis of liability for torts as specified in section 415 of the Civil Code (Kodeks cywilny). In such case the plaintiff has to prove: damage; an act or omission violating competition law which causes damage; fault of the injuring party; and (iv) that the act or omission caused the damage.

### 3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

For the relevant legislation, see question 2.

The competent courts for actions for damages are: district courts (*sad rejonowy*), if the value of the claim does not exceed 75,000 zlotys (approximately €19,000), and regional courts (*sad okregowy*), if the amount in dispute exceeds 75,000 zlotys.

In commercial cases (ie, only businesses participate and the case concerns an economic activity carried out by them) the action shall be lodged with the commercial department of the competent court. Furthermore, the competence of courts in commercial matters is set up differently meaning that district courts are competent if the value of the claim is 100,000 zlotys or less (approximately €25,991) and regional courts are competent where the amount in dispute exceeds this amount.

### 4 In what types of antitrust matters are private actions available?

Private antitrust actions may be brought in all cases in which there is an act or omission contrary to statutory law. Thus, private actions are available in cases of agreements restricting competition, abuses of a dominant position and mergers that have been executed in breach of competition law.

### 5 What nexus with the jurisdiction is required to found a private action?

As a rule, private antitrust actions shall be brought in the relevant court of jurisdiction in which the defendant resides, has its registered office or where the damage occurred.

Further, Polish courts have jurisdiction in cases with international reference pursuant to Council Regulation No. 44/2001, the Lugano Convention on Jurisdiction and Enforcement on Judgments in Civil and Commercial Matters and bilateral agreements on jurisdiction. Should these rules not apply, Polish courts could have jurisdiction in cases with international scope if the defendant owns property in Poland. Moreover, there is case law, not confirmed by the Supreme Court (*Sad Najwyzszy*), suggesting that the jurisdiction of the Polish courts may be based on the plaintiff's residence or registered seat in actions for damages based on tort, as the monetary obligations shall be performed at the creditor's place of residence or seat.

### 6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Private actions can be brought against any natural or legal person or entity without legal personality if the entity may act pursuant to binding statutory provision (eg, registered partnerships in commercial matters). Private actions may also be brought against corporations and individuals from other jurisdictions if the nexus specified in question 5 exists.

### 7 If the country is divided into multiple jurisdictions, can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable.

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## Private action procedure

### 8 Are contingency fees available?

Statutory provisions do not bar agreements on contingency fees. However, the Rules of Ethics of Legal Advisers (*Zasady Etyki Radcy Prawnego*) and the Rules of Ethics of Attorneys-at-law

(Zasady Etyki Adwokackiej) prohibit contingency fee arrangements. The infringement of the rules of ethics is punished by disciplinary measures to be taken by the respective Bar. However, attorneys-at-law and legal advisers may agree on an additional success fee.

**9** Are jury trials available?

No, by virtue of the Polish law there are no jury trials in civil and commercial matters.

**10** What pre-trial discovery procedures are available?

Polish law does not envisage pre-trial discovery as it is known in common law countries. In the pre-trial stage parties may on a voluntary basis exchange pleadings in which they specify their claims and positions. In commercial matters, the plaintiff is further obliged to attach to his statement of claim: a demand note, the defendant's answer and any information or documents showing an attempt to settle the dispute.

Further, at the pre-trial stage the court may (acting at the motion of a party) secure evidence if there is a concern that such evidence might not be available later or only be obtainable with great difficulty.

During the civil proceedings, the court (usually acting upon a party's request) may order any person or entity to submit specific documents that are important for the proceedings. A person or entity may only refuse to submit such documents if he, she or it could refuse to testify as a witness as to circumstances contained in the documents or it possesses documents on behalf of other persons that could refuse to submit a document for the same reasons.

**11** What evidence is admissible?

The Civil Procedure Code does not provide for limitations concerning the form or kind of evidence in actions for damages. The following forms of evidence may, for instance, be presented in proceedings:

- official and private documents;
- testimonies of witnesses;
- expert opinions;
- inspections;
- parties' statements;
- devices recording or transmitting pictures or sounds, thereunder films, television broadcasting, photocopies, photographs, plans and sound recordings; and
- other forms of evidence.

**12** Are private actions available where there has been a criminal conviction in respect of the same matter?

A criminal conviction does not affect the permissibility of a private action in respect of the same matter. In addition, it shall be noted that criminal sanctions for the infringement of the competition law are sparse under the Polish law. According to the Criminal Code (Kodeks karny) criminal offences are: the abuse of a dominant position by way of usury and agreements restricting competition by way of 'bid rigging'.

**13** Can the evidence or findings in criminal proceedings be relied upon by plaintiffs in parallel private actions?

Pursuant to the Civil Procedure Code, the factual findings of a conviction in criminal proceedings are binding for the court in any civil proceedings on the same subject matter. In cases of parallel private actions, the above described rules apply. The binding effect is not applicable in the case of acquittals. However, these factual findings have to relate to the circumstances of committing a criminal offence. It should be noted that the courts interpret the extent of the findings in criminal proceedings which are binding for the civil court restrictively, eg, the amount of damage determined by the criminal court is not necessarily binding for the civil proceedings.

**14** What is the applicable standard of proof and who bears the burden?

**Standard of proof**

Under Polish law there is no abstract definition of the standard of proof owing to the principle of the free evaluation of evidence by judges. According to case law, facts must be proven with the adequate probability. Should the accurate amount of the damage suffered not be proven (assuming that all prerequisites for a liability are proven), the judge may award damages at his or her own discretion taking into account all circumstances of a given case.

**Burden of proof**

It is generally the plaintiff who bears the burden of proof. The general rule of law says that the party who draws legal consequences from a fact is under obligation to prove that fact (article 6 of the Civil Code).

**15** What is the typical timetable for class and non-class proceedings? Is it possible to accelerate proceedings?

Polish law does not provide for class proceedings (see question 18).

Acceleration of proceedings does not seem to be feasible, as the private antitrust actions are in principle of complex nature and valuable. Further, it should be noted that, pursuant to the contradictory character of civil proceedings, the proceedings are closed after all evidence has been presented.

**16** What are the relevant limitation periods?

Claims for damages become time-barred on the expiration of three years from the day on which the injured party learned of the damage and of the author to redress it. The limitation period starts to run even though the injured party does not learn of the exact amount or the extent of the damage.

In any case, claims become time-barred 10 years after the day on which the event causing damage occurred, irrespective of the knowledge of the plaintiff. This rule however is not binding in relation to the personal damages where the limitation period runs always from the moment of getting the knowledge on the damage and person liable for.

**17** What appeals are available?

A party to court proceedings may appeal against the first instance judgment to superior courts. An appeal against the judgment of the district court shall be lodged with the regional court through the first instance court. An appeal against the judgment of the regional court shall be lodged to the appeal court (*sad apelacyjny*) through the first instance court.

Furthermore, there are extraordinary means of appeal against second instance judgments: eg, cassation, provided that additional requirements are fulfilled (questions of law, infringement of procedural provisions that materially influenced the outcome of the proceedings).

### Class proceedings

**18** Are class proceedings available in respect of antitrust claims?

The Civil Procedure Code does not envisage class proceedings similar to the proceedings known in common law countries. However, under Polish law, several plaintiffs may take a joint action against one and the same defendant (also in relation to private antitrust actions) if the matter in dispute concerns:

- rights or obligations that are shared or based on the same facts and legal basis, or
- claims or obligations of one type based on the identical facts or legal basis provided that jurisdiction of a court is justified for each claim or obligation separately or for all claims jointly.

**19** Are class proceedings mandated by legislation?

See question 18.

**20** If class proceedings are allowed, is there a certification process? What is the test?

Not applicable.

**21** Have courts actually certified class proceedings in antitrust matters?

Not applicable.

**22** Are 'indirect claims' permissible in class and non-class proceedings?

For class proceedings see question 18.

Indirect claims are permissible in case of joint actions and single actions. The claimant has to prove that all criteria to award damages pursuant to the general rule of the liability for torts (especially damage and causal link) are fulfilled.

**23** Can plaintiffs opt out?

Not applicable.

**24** Do class settlements require judicial authorisation?

Not applicable.

**25** If the country is divided into multiple jurisdictions, is a national class proceeding possible?

Not applicable.

**26** Has a plaintiffs' class-proceeding bar developed?

Not applicable.

### Remedies

**27** What forms of compensation are available and on what basis are they allowed?

Under the Civil Code, the plaintiff may claim at his own choice for the restitution (restoration of the former state) or for monetary compensation. If, however, restitution is impossible or entails excessive difficulties or costs to the defendant, the plaintiff's claim will be limited to monetary compensation.

Compensation is assessed on the basis of the injury suffered by the plaintiff. The Civil Code provides for the compensation for all injuries suffered. Hence, the plaintiff may claim for actual loss (*damnum emergens*) and lost profits (*lucrum cessans*).

**28** What other forms of remedy are available?

As a rule, there are no other forms of remedy in case of actions for damages. However, the plaintiff may file a request for injunctions during the court proceedings or prior to its institution.

**29** Are punitive or exemplary damages available?

The Polish Civil Code follows the principle of compensation of damages and does not envisage punitive or exemplary damages.

**30** Is there provision for interest on damages awards?

The plaintiff may claim for interest on damages awarded in the amount of the statutory interest rate in case the defendant is in delay in fulfilling the monetary compensation. By virtue of the Government Decree on the Statutory Interest Rate, the rate amounts to 11.5 per cent.

**31** Are fines imposed by competition authorities taken into account when settling damages?

The court settling damages takes into account the injury suffered by the plaintiff. Taking into account the fines imposed by the competition authorities would be at odds with the restitutionary-compensatory nature of damages.

**32** Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

Pursuant to the Civil Procedure Code, the losing party pays the winning's party costs. If the claim is only partially successful the legal costs are shared on a pro-rata basis. In exceptional cases, the court may order the losing party to pay only a part of the legal costs of the winning party or not charge the losing party at all.

**33** Is liability imposed on a joint and several basis?

Under the Civil Code, if several persons or entities are liable for damage caused by a tort, their liability is joint and several.

**34** Is there a possibility for contribution and indemnity among defendants?

In the case of joint and several liability of several persons or entities, the defendant that paid damages may demand a refund of an appropriate share from other (potential) defendants depending on the circumstances and especially on the fault of the given defendant and the degree in which he, she or it contributed to the dam-

age. The potential settlement between or among defendants does not influence the joint and several liability towards the plaintiff.

**35** Is the 'passing on' defence taken into account?

Polish law does not recognise a 'passing on' defence in court proceedings. Since there have been no private actions reported in Poland it is not possible to assess if such defence could be successful.

However, it should be stressed that the defendant may present all means which would prove that the plaintiff has not suffered losses. This may also be the case if the defendant demonstrates that the plaintiff has fully or partially passed on damage in the form of higher prices to its customers.

**36** Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

Owing to the lack of case law there seem to be no specific defences to be used in private antitrust actions. However, it may be assumed that defendants could apply defences that exist with respect to general actions for damages, such as the claims of contribution of the plaintiff in the occurrence of damage or failure to mitigate the damage. Further, defendants may query the causal link between the event causing losses and the damage actually suffered by the plaintiff.

**37** Are there alternative means of dispute resolution available?

Alternative means of dispute resolution concerning competition law are arbitration and mediation.

Private antitrust actions may be decided in arbitration proceedings if the parties conclude a written arbitration agreement in this respect. Arbitration generally reduces the length of the proceedings but costs (arbitration fee) compared to a judicial proceedings could be higher.

Mediation has been introduced in the Civil Procedure Code in 2005. There is therefore no practical knowledge on the efficiency of this means of dispute resolution. So far the defendants are reluctant to give their consents for participation in mediation. Mediation may be instituted on the basis of an agreement between the parties or the referral of the parties to mediation by the court with the approval of the parties. Mediation might be conducted before the institution of the court proceedings or in the course of such proceedings.



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