ICC COMPENDIUM OF
ANTITRUST DAMAGES ACTIONS

POLAND

Court proceedings
in key jurisdictions
This chapter is part of the ICC Compendium of Antitrust Damages Actions (the “Compendium”) which can be read in full on the ICC website at www.iccwbo.org.

Designed to provide decision-makers with a comparative overview of the issues most frequently arising in private antitrust litigation in key jurisdictions, the Compendium reflects contributions from leading antitrust law specialists around the world. It does not try to explore the complexity of each legal system but strives to capture a comprehensive picture of the matter, organised around nine topics, and completed in some jurisdictions by an additional chapter highlighting key issues. A collection of decisions issued in the same jurisdictions is also available on the ICC website. This database is the essential complement to the overviews for a comparative approach and will allow a better understanding of the rules presented in the compendium.

With this publication, ICC hopes to help in-house counsels, antitrust practitioners and enforcers, but also judges of the courts and academics, navigate through a new, fast-changing legal environment.
Glossary

**Appeal:** a proceeding undertaken to have a decision reviewed by a higher authority whose jurisdiction may include (i) an entirely new assessment of the case, (ii) a limited review of manifest errors of law and facts, or (iii) a specific review limited to legal issues.

**Article 101 TFEU:** This provision prohibits as anti-competitive all agreements, decisions, and practices between undertakings and concerted practices which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

**Article 102 TFEU:** This provision prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. Those behaviours are incompatible within the internal market in so far as it may affect trade between EU Member States.

**Award:** a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.

**Burden of proof:** The responsibility for a party during legal proceedings to prove the facts it asserts; the burden of proof may be shifted to the opposing party once the standard of proof has been met.

**Cartel:** Any horizontal collusion between competitors whose purpose is to fix prices or quantities, allocate markets, while sharing sensitive commercial information.

**Cease-and-desist order:** a court’s or agency’s order prohibiting a person from continuing a particular course of conduct which is deemed harmful. In competition law proceedings, these orders also include a prohibition from adopting future conducts likely to have the same effects as the one which is prohibited.

**Claimant:** the party who brings a civil suit in a court of law.

**Class action:** a lawsuit where a person or a group seeks damages for a larger group of claimants. Class action proceedings typically include a preliminary stage to define the characteristics of the group, which needs to gather persons with identical cases and who have suffered a prejudice from the same tort.

**Competition authority:** Any public authority, whether independent of forming part of a government administration, whose role is to enforce rules which prohibit unilateral and coordinated behaviours that restrict competition.

**Damages:** money claimed by, or ordered to be paid to, a person as compensation for loss or injury.

**Defendant:** a person sued in a civil proceeding.

**Discovery:** Proceeding whereby a party has to disclose information and documents relating to the litigation upon the request of the opposing party. This procedure is usually implemented during the pre-trial phase of the lawsuit.
**Directive 2014/104/EU:** European Union Directive issued on 5 December 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the EU. The purpose of this text is to set forth common rules among EU Member States in order to enhance private enforcement of Articles 101 and 102 TFEU and full compensation for victims of anti-competitive conducts. The text also provides for specific rules on the interplay between civil lawsuits and enforcement proceedings before competition authorities.

**Follow-on:** A competition law claim for damages where the alleged infringement has previously been found by a final decision of a competition authority.

**Immunity:** Total exemption of fine for a company that is the first to reveal the existence of a competition law infringement to a competition authority.

**Infringer:** Any company that has implemented unilateral or coordinated behaviours infringing competition law, where a competition authority has found such infringement in a decision.

**Joint-and-several liability:** liability that may be apportioned either among two or more parties or to only one or a few select members of a group of Infringers upon the decision of a competition authority or a civil court.

**Leniency:** A competition law procedure that rewards companies that adopt anti-competitive conducts with Immunity or reduction of fine, if they inform a the competition authority of an infringement that it did not previously have knowledge of.

**Limitation period:** a statutory period after which a lawsuit or prosecution cannot be brought in court.

**Passing-on defence:** a competition law defence that relies on the civil law principle of unjust enrichment. During civil proceedings, a defendant may argue that the plaintiff’s claim for compensation should be totally or partially denied as it passed the alleged overcharge resulting from a competition law infringement on its own customers.

**SME (Small—and Medium-sized Enterprise):** categories of micro, small and medium enterprises defined based on their staff headcount, and either their turnover or balance sheet total.

**Stand-alone action:** A competition law claim for damages where the alleged infringement has not previously been found by a final decision of a competition authority.

**Standard of proof:** In any legal procedure, the level of evidence that is required to establish with certainty a fact or a liability.

**Tort:** A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relation to one another.
Private antitrust litigation is a relatively new concept in Poland. While in the past private enforcement was legally possible under general civil law rules, it was not exercised at all. This was due mainly to the difficulty in proving the extent of the damage (quantum) and the causal link between the damage and the breach of competition law, which is a prerequisite for obtaining compensation. On 21 April 2017, following the implementation of the Damages Directive 2014/104/EU (the “Directive”), the act on claims for compensation for damage caused by competition law infringements (hereinafter referred to as the “Act”) was adopted. The Act aims to regulate the legal rules of private antitrust litigation in line with European Union law. After the adoption of the Act, the first private enforcement litigations were launched. However, all of them are still pending to date.

1. Jurisdiction

The main Polish authority in charge of enforcing competition law is the Office of Competition and Consumer Protection (“OCCP”). Polish law also provides for specialised competition district judiciary. However, the OCCP and the specialised judiciary are only competent for public enforcement and not for private damages actions.

Private antitrust damages actions can be brought before the Polish district civil courts under the general provisions of Polish civil law and the Act. Thus, private enforcement competition cases are decided by the same civil courts which have jurisdiction over standard civil cases. Local courts depend on the seat of the defendant or the location of the damage. There are no dedicated divisions or sections which specialise in hearing such cases.

Antitrust damages actions can be brought before the competent national court both as a stand-alone action, regardless of a preliminary procedure before the OCCP, or as a follow-on action, based on a decision retaining an infringement and issued by the OCCP. The civil courts may halt a stand-alone action for damages until the competition authority has issued a decision.

2. Relevant legislation and legal grounds

Under the Act, anyone (whether they are direct or indirect customers, competitors, suppliers, and so forth) who has suffered harm caused by an infringement of competition law committed by a company or an association of companies, has the right to receive full compensation for the harm, the loss of profit, and the applicable interests.

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1 Ustawa z dnia 21 kwietnia 2017 r. o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji.
As mentioned above, it is not necessary for the OCCP or the European Commission to have issued a prior decision establishing that an infringement has occurred in order for the action to be admitted. This applies to either individual or class actions.

In Poland, an action for breach of competition law can be brought on the basis of competition law infringements defined in Articles 6 and 9 of the Act of 16 February 2007 on the Protection of Competition and Consumers as well as Articles 101 or 102 of the Treaty on the Functioning of the European Union (hereinafter defined as “TFEU”).

The claim may rely on Article 3 of the Act (under the previous regime the claim could rely on the general provisions of civil law, i.e. Article 405 of Polish Civil Law, regulating claims related to unjust enrichment, or Article 415 of Polish Civil Law, regulating liability for torts). The provision of Article 3 of the Act not only establishes a new type of tort but sets its own principles of liability. The provision requires the claimant to prove: (i) the infringement of competition law, therefore proving the unlawfulness of the infringer’s behaviour, (ii) damage and (iii) causation between the two.

The Act has made it much easier for claimants to establish these three elements:

- Article 3 of the Act introduced a presumption of fault of the infringer of competition law. This means that in order to be released from liability, the defendant would have to prove that its conduct did not amount to a breach of competition law.

- Article 7 of the Act applied a presumption that any infringement of competition law causes damage. In this respect the Polish regulation goes beyond the Directive, which requires such presumption only for cartels.

- Article 30 of the Act provides that findings regarding an infringement of competition law contained in a final decision delivered by the OCCP or a final ruling of a specialised judiciary (i.e. a decision or ruling which can no longer be appealed against/challenged under national law) are binding for the civil court in the relevant proceeding. The same goes for the European Commission’s final decisions enforcing Articles 101 and 102 TFEU. As regards decisions taken in another Member State, they have the same probative value as Polish official documents (Article 1138 of Code of Civil Procedure) and can be recognised by the Polish court as evidence of an infringement on the basis of a presumption of the facts (Article 231 of Code of Civil Procedure) (i.e. they are taken into account as a piece of evidence but the court is not bound by the findings made in such decisions as to whether competition law has been infringed).

- Article 30 of the Act does not apply to decisions of inadmissibility, dismissal, or commitment decisions of the OCCP, since such decisions do not contain findings of an infringement. However, such decisions can still have some evidential value.

- Parties which have been granted immunity from fines under a leniency programme are not exempted from civil liability. However, they benefit from a privileged position as they will only be found jointly and severally liable outside their supply chain if it is not possible to obtain full compensation from the other infringers. Parties are also granted protection as regards access to the file. As to the application of the Act, leniency concerns cartels only (generally in Polish law, leniency is also possible for vertical agreements).
**Rationae temporis** application of the Act

In accordance with the general principle of non-retroactivity of the law, the new substantial provisions of the Act, and in particular the above-mentioned presumptions, are only applicable to actions for damages as a result of infringements of competition rules (i.e. the facts causing liability) which took place after its entry into force i.e. from 27 June 2017 onwards.

However, Chapter 3 of the Act regarding the procedure and rules of the production of evidence apply to all proceedings initiated since 27 June 2017, regardless of when the breach of competition law occurred (Article 36 of the Act).

Provisions extending the limitation period apply when the limitation period had not expired at the date of entry into force of the Act. In such a case, the period that has already elapsed is not taken into consideration, and the general three-year limitation period (Article 4421 § 1 of the Civil Code) started on 27 June 2017.

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3. **What types of anti-competitive conduct are damages actions available for?**

Violations of EU or national competition law are a requirement and include those relating to anti-competitive agreements and concerted practices or abuse of a market dominant position, pursuant to Articles 101 or 102 of the TFEU or Articles 6 and 9 of the Act on the Protection of Competition and Consumers.

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4. **What forms of relief may a private claimant seek?**

The primary objective of damages actions under civil law provisions and the Act is to obtain full compensation for the harm caused by an infringement of competition law.

A private claimant can seek compensation for the damage suffered (*damnum emergens*), as well as for the benefits that it lost as a consequence of the unlawful conduct (*lucrum cessans*).

Causation between the fault and the damage must be direct, which means that the claimant must prove that the damage suffered and/or loss of profits results entirely from the anti-competitive behaviour.

In addition, private claimants are also entitled to claim interest from the day of the decision awarding damages until the effective and full payment of the compensation.

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5. **Burden of proof/Passing-on defence**

As mentioned above, the Act provides for some presumptions which all aim to strengthen the situation of aggrieved persons and entities, one of them being the presumption that an overcharge is passed on to indirect purchasers. This presumption can be relied on solely by the indirect purchaser. Indirect purchasers can rely on the presumption that the overcharge was passed on to them by the direct purchasers in their claims against the infringer. This
presumption is rebuttable, but the burden of proof in such respect lies entirely with the defendant (infringer).

The infringing party (defendant) cannot take advantage of this presumption as a part of the defence against the action brought by the direct order—in such cases the infringer must prove that the overcharge was fully or partially passed on.

In both situations, in order to shift the burden of proof, the defendant (infringer) must prove that there was no passing-on from the direct purchaser to the indirect purchaser (when the indirect purchaser is the claimant) or that the overcharge was passed-on to the indirect purchaser (in the event the direct purchaser acts as the claimant). In such cases, the defendant must rely on standard evidentiary methods (documentary, economic analysis, expert opinions, witness statements, and so forth).

6. Pre-trial discovery and disclosure, treatment of confidential information

There is no typical pre-trial discovery under Polish law. However, the Act provides for a simplified procedure for obtaining evidence in support of damage claims under pending litigation. The claimant (the aggrieved party) can apply to the court to oblige the defendant, the OCCP or other third parties to disclose evidence being in their possession. The disclosure is granted based on a legally binding decision which constitutes an enforcement order.

The claimant can use the documents obtained only for the given court proceedings. The earliest moment when the disclosure procedure can start is at the filing of the lawsuit, as Polish law does not foresee any pre-trial disclosure.

The Act provides that the disclosure must be proportionate and must not relate to the leniency statements submitted under a leniency programme or settlement submissions. Misuse of disclosed evidence will result in the court handling the claim disregarding that evidence. A non-discretionary fine of up to PLN 20,000 (EUR 4,700) can be imposed on a party requesting the disclosure of evidence in bad faith.

As far as confidential information is concerned, if any such information occurs in the court files as a result of disclosure at the initiative of one of the parties, the court conducts the proceedings behind closed doors. Moreover, if such information is included in documents or other materials obtained because of the disclosure, the court limits the access to such evidence to the necessary degree or order on the specific rules of familiarization with such evidence.

7. Limitation Periods

Polish civil law regarding torts provides for a general limitation period of three years from the day on which the injured party learned about the damage and about the person liable to redress it, or might have learned about it if he/she had exercised due diligence. However, such a time limit may not be longer than ten years from the day on which the event causing the damage occurred.
By way of exception, the three-year limitation period for damages claims arising out of competition law infringements has been extended to five years. This limitation period is suspended for the duration of proceedings conducted by the OCCP or other competent authorities (e.g. the European Commission or the competition authority of another Member State). This suspension will cease one year after the date of issuance of a legally binding decision or termination of the proceedings in a different way.

8. Appeal

First-instance court judgments in private antitrust litigation are subject to appeal at second instance courts (Courts of Appeal). Court of Appeal judgments are final and binding but can be subject to appeal to the Supreme Court (limited to questions of breach of substantive law or severe procedural error which affected the outcome of the case).

9. Class actions and collective representation

In Poland, the mechanism of pursuing claims in group proceedings was introduced to the legal system by an Act of 17 December 2009. There have been very few group cases. However, in theory, it is possible for competitors of an entrepreneur who committed an act of unfair competition to make claims in group proceedings. Consumers seeking compensation for damages resulting from delicts can also make claims in group proceedings. There are only a few minor limitations of claims which cannot be subject to class actions.

Class actions are understood as proceedings where claims of the same type, based on the same or similar facts, are pursued by at least ten individuals. A representative of the group (a group member or certain authorized entity) conducts the proceedings on behalf of and for the benefit of all the group members. Although the practice has shown that it is difficult to prove that all claimants form a “class” (group), a significant number of class actions have been heard by Polish courts to date. According to publicly available data, there have been almost 300 class actions submitted to courts and the majority of them were or still are being examined as to the merits.

10. Key issues

The entry into force of the presumptions facilitating private actions

Before the Act entered into force, it was extremely difficult, if not impossible, for claimants to initiate a procedure for damage claims for competition law infringements. The burden of proof was to a large extent borne by the aggrieved party, who at the same time had no actual access to evidence. The Act introduced a new type of tort, and provided several presumptions, strengthening the situation of the injured parties and facilitating the action for claims.
Starting point of the limitation period

Pursuant to Polish law regarding torts, the starting point for a limitation period is the day on which the injured party (i) learns about the damage and about the person liable to redress it, or (ii) the day on which he/she might have learned about the damage if he/she had exercised due diligence. The question may accrue depending on how this actual moment is understood. This is particularly vital with regard to follow-on actions. Some may argue whether the starting point in such cases is the moment of initiation of the proceeding by the OCCP, the issuance of the decision or the moment when the decision becomes final. It seems that the starting point for a limitation period would be the moment when the decision becomes final, as only then can the claimants obtain full clarity on the unlawfulness of the practice and the identification of the infringer.

Calculation of damages

One of the biggest practical problems in competition law infringement is calculating the damage suffered by an aggrieved party. In this respect, the Act introduces a significant presumption that any breach of competition law causes damage. With regard to the methods of determining the amount of damage, the Act refers to the guidelines of the European Commission and indicates that the guidelines may be found helpful by Polish courts. As a rule, the calculation of damage is based on counterfactual analysis. It is necessary to make a comparison between the actual situation of the aggrieved party and the situation of the party if the infringement had not occurred. This can be done, for example, by means of comparative methods such as referring the actual situation to the period before or after the infringement or to the situation on other markets. Another way is to simulate market outcomes by use of economic models.

The Act enables courts to request assistance from the OCCP with the calculation of damages. Although not obligatory, the assistance of the OCCP, with the expertise of its employees and available tools, may prove invaluable for the aggrieved party.

Key cases in antitrust damages actions in Poland

As mentioned above, initiating a procedure for damage claims for competition law infringements proved difficult under the previous regime. One private enforcement case under the previous regime that is worth mentioning concerns the cement cartel case (I ACa 1322/13). A private claimant submitted a statement of claims requesting damages against a leniency applicant before the infringement decision became final. The courts of all instances confirmed that it is the claimant who must prove the antitrust infringement if there is no final infringement decision. The lawsuit was dismissed, as the courts found that the private claimant did not prove all the aspects of the alleged collusions, in particular basing its case on the fact that the leniency applicant’s admitted participation in a cartel is not enough.

Since the entry into force of the Act, only a few actions have been initiated and none of them have been finally decided to date.

As for Polish courts, private enforcement still seems to be a sort of terra incognita. A number of Polish entrepreneurs who were affected by international cartels have sought
damages in countries with a much greater tradition and experience in that area *i.e.* in France, Germany or the United Kingdom.

The following paragraphs outline actions initiated after the entry into force of the Act and do not attempt to be exhaustive.

**Interchange fees**

In April 2018 Polish entrepreneurs filed a claim for damages against banks for higher interchange fees. The claim concerns damages for the overpayment of the interchange fee in the time period of 2008 to 2014.

The interchange fee is paid by each entrepreneur enabling card payment. The interchange fee is a fixed component of the fee from banks issuing payment cards or agents acting on their behalf. The interchange fee is charged on the gross value of a sales transaction, usually as a specified percentage of the transaction value and paid to issuing banks and card organizations such as Maestro, MasterCard, VISA and American Express. Ultimately, when a customer pays for a good with a card, the merchant receives the gross value less a commission (e.g. PLN 100 gross price of the goods—PLN 2 commission = PLN 98 receipt in the merchant’s account). The entrepreneurs claimed that due to an anti-competitive agreement, the fee was higher than it ought to have been *i.e.* 0.3% instead of 0.2% of the gross value of each transaction.

The claimants derive the “right” fee from the entry into force of the amendment to the Act on Payment Services. The claimants suspect that the banks and card organizations agreed on jointly setting the interchange fees. In this respect, the claimants refer to the decision of the President of the OCCP of 29 December 2006, which, as of today is not legally binding (the OCCP decision was challenged by the allegedly infringing parties in the civil court, and the revision procedures are still pending). Moreover, the claimants also refer to the European Commission’s decision in the VISA case (AT.39398 Visa MIF) and the CJEU’s ruling in the MasterCard case (C-382/12). However, both the President of the OCCP’s decision and the Commission’s decisions have only evidential value, as the former concerns a different time period and the latter covers a different factual situation.

**Truck manufacturers cartel**

Another lawsuit based on the Act as a part of a wider, European private enforcement action concerning a truck manufacturers cartel (European Commission’s decision of 19 June 2016) is pending before the District Court in Wroclaw (X GC 790/17). However, since the Act fully applies only to infringements that occurred after 27 June 2017, some Polish entrepreneurs joined a private enforcement action which was initiated before German courts.

**Cement cartel**

In January 2019, a private enforcement action based on the Act was submitted to the Warsaw District Court by entities injured by cement producers.

The cement cartel case is known as one of the biggest cases in the history of Polish competition law enforcement. In 2009 the President of the OCCP imposed the highest
possible fine of PLN 411 million on the seven largest cement producers. The infringing parties had been dividing the market, exchanging confidential information and setting prices for more than eleven years. In 2018, after almost a decade of battling in court, the decision became final. However, the penalties were reduced by one third. This has given impetus to private enforcement actions initiated by aggrieved entrepreneurs, mostly those using cement as a semi-finished product, namely concrete producers.

**Chemical products for the mining industry**

In June 2020, two more private enforcement actions were submitted to the Katowice District Court (XIV GC 631/19/MN) and Gliwice District Court (X GC 114/20) by two coal mines.

The two lawsuits are based on the same non-final infringement decision of the President of the OCCP alleging price-fixing, market sharing and bid-rigging. Therefore, the Act’s provisions are only applicable in part (i.e. evidence disclosure). Both claimants must prove their case and do not benefit from any presumption included in the Act.
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