NEWSLETTER

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PRIVATE ENFORCEMENT DIRECTIVE – A DISSERVICE?

The need for transposition into Polish law of the Directive 2014/104 /EU of the European Parliament and Council **on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union** will make most likely deterioration of the situation of entities that will want to claim compensation of cartel participants in Poland. In practice, thanks to the abovementioned Directive, it is the defendants paradoxically will gain further options for dragging the process in time and defend against the claims.

Purpose - to hit the cartels with damages!

On the 26th of November 2014 the European Parliament and the Council adopted Directive 2014/104/EU **on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union**, subject to the provisions of national law (ie. Private Enforcement Directive). Member States have deadline until December 27, 2016 on the transposition of the Directive - currently adaption of the provisions of Polish law in this area is taking place. In this text we would like to focus on one of the issues that would be a *novum* in Polish law, and which at the same time can have, in our opinion, crucial importance to achieve the objectives of the Directive.

The intention of the European legislator, adopting the Directive, was to harmonize the laws of the Member States relating to the claims for compensation from persons who have committed a breach of competition law. However, the main objective was to encourage Member States to implement solutions that increase the efficiency of investigations of such claims by third parties injured. The idea is simple - if for a breach of competition law can be easily claimed compensation, it is not only the competition authorities, but thousands of businesses turn to the system to combat infringements of competition law.

Article 11 of the Directive requires Member States to ensure that companies which have infringed competition law as a result of joint actions, were liable jointly and severally for the damage (to the full extent of the damage).

In Polish law, the above principle is expressed today in the art. 441 of the Civil Code. Therefore, if art. 11 Directive confined the introduction of the principle of joint and several liability without any exceptions in this respect - then, firstly, Polish law does not require a change in this aspect, and secondly, we would be talking about a just axiologically justified regulation at European level, which, however, would not bring much new to the legal orders of European countries.

Noble intentions

Nevertheless, the European legislature together with the introduction of the general principle of joint and several liability has included in Article 11 of the Directive a number of exceptions

and exceptions to the exceptions, which - as it seems - can in practice significantly impede claim compensation from those infringing competition law (compared to the state before making transposition of the Directive).

Article 11 of the Directive states that MŚP (small and medium-sized enterprises) are excluded from the principle of joint and several liability and are liable only to their direct and indirect purchasers if:

a) at any time during the period of infringement of competition law, his share in the relevant market was below 5%
and
b) the application of the ordinary rules of joint and several liability irreparably endanger its economic efficiency and result in total loss of value of its assets.

At the same time, as already mentioned, the European legislator has provided for a derogation from the above exceptions. Quoted above exceptions to the principle of joint and several liability will not apply if the MŚP guided violation of competition law or incited other undertakings to participate in that infringement or MŚP were previously considered to have committed a breach of competition law.

Unexpected effects under Polish law

Regardless of how to transpose the cited regulation, transferring to the Polish legal system solutions adopted in article 11 of the Directive with a high degree of probability can, paradoxically, in some cases, be effective in major difficulties in pursuing claims against those infringing competition than under current rules.

Approaching the issue from the perspective of practitioners of litigation, we see that the first line of defense of defendant, based on the principle of solidarity, in the case of damages for breach of competition rules - will be arguments' increase by the defendant that include it into the category of MŚP (within the meaning of Commission's recommendations 2003/361/EC).

In the Polish reality, they category of MŚP create enterprises which employ fewer than 250 persons and whose annual turnover does not exceed EUR 50 million and/or an annual balance sheet total not exceeding EUR 43 million. Compliance with the criteria for MŚP is affected by the additional possiblity to operate in a network of partner companies or related companies. In order to show the status of MŚP, it is necessary that the criteria are met for two consecutive financial years. However, in other Member States may apply different definitions of MŚP.

As a consequence, it can not be ruled out that in order to examine the needs of the proceedings, if the defendant shows the status of MŚP, will be necessary to carry out evidence in this field by court expert - what is most probably in most cases called by defendants.

The question of the status of MŚP is not the only matter to investigate the need to consult an expert. The task of the expert will also consider whether at any point in time of the infringement of competition law, the participation of the offender in the relevant market does not exceed 5%. Making the above findings by an expert, however, not all - for exemption from liability will have to show the defendant, that the application of the ordinary rules of joint and several liability irreparably endanger its economic efficiency and result in total loss of value of its assets. The problem is indeterminate above premise - which will also have to face the hand, and the court hearing the case.

Practical trouble

It seems that there is a risk of blocking processes by the defendants for damages by the notorious questioning expert's opinions and effective boost for preparing opinions complementary in case the content of the opinion was to be unfavorable for the defendant. The multiplicity and complexity of the issues with which Expert will have to measure, in many cases will lead to the prolongation of the proceedings for a period of at least several years, which may bear on the side of some victims question about the sense to take legal action.

Of course, plaintiffs may counterargument that the defendant directed the violation of competition law and urged other undertakings to participate in that infringement or has been previously found to have committed a breach of competition law. It is not difficult to note that the demonstration of the leading role of the defendant, as well as demonstration of the circumstances soliciting other entities to participate in the infringement are associated with evidence of huge difficulties.

You should also pay attention to the potential implications of MŚP exclusion from the principle of joint and several liability for the issue of settlements between perpetrators of violations of competition law (recourse).

It had better be, came out as always..

Therefore, it must be assumed in practice that suing MŚP for breach of competition law would make sense if a claimant be direct or indirect purchaser of the defendant's (MŚP) products or services covered by the infringement of competition law.

In many cases, it turns out, that the injured party, after the transposition of the Directive, will have a worse situation than he had before the process of its implementation. Paradoxically, therefore, we deal with a situation where the European legislator to some victims had done so called 'disservice'.

On the margins should be noted that the European legislature has limited the application of the principle of joint and several liability also towards entrepreneurs who have been exempted from punishment (participants of leniency program). In this regard criteria taken by the European legislator seem to be - of course after making rational transposition - not to carry a significant practical difficulties, so that's why we have limited our consideration to the special status of MŚP.

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