

A Parent Company's Liability for Anti-Monopoly Damages to its Subsidiary's Creditors Considering the New Regulations of Corporate Groups

Beata Wiczerzyńska

Dr. Assistant Professor, Faculty of Law and Administration, Kazimierz Pułaski University of Technology and Humanities in Radom, correspondence address: ul. Chrobrego 31, 26-600 Radom, Poland; e-mail: b.wiczerzyńska@uthrad.pl

 <https://orcid.org/0000-0002-2257-9688>

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Abstract: The operations of a corporate group managed by a parent and guided by a shared strategy and interests of the group may in some cases cause damage to a subsidiary's creditors. This study will in particular focus on the liability towards creditors for anti-monopoly damages caused by a breach of competition laws and not resulting from the binding orders of a parent company to its subsidiary. It is especially important to establish if and possibly how a parent's liability arises for anti-monopoly damages to its subsidiary's creditors where it's not related to a binding order, considering the special regulations of liability for damages caused by breaches of competition laws in the context of the new regulations of corporate groups.

1. Introduction

Dynamic changes in the economy force legislators to monitor real trends and to possibly regulate in the situations of risk to the stability and efficiency of the market, to the protection of its participants or consumers.

The formation of big international capital groups of complex structures is a clear trend in an open market economy. It can also be felt in the Polish internal market, since operation as part of a corporate group allows for a spreading of broadly-defined business risk, including tax optimisation,

which is of benefit to a group as a whole¹. Legal systems compete to offer good conditions for business in a given country, too, trying to create the friendliest possible legal environments and encourage entrepreneurs to invest their capitals in a given country.

Corporate groups, however, do run risks associated with the imbalanced interests of their members, the protection of minority holders and of creditors. The legislator² has therefore for some time now noted the need to regulate corporate groups³ as private legal relations between a parent and its subsidiaries in order to address the interest of creditors, governing body members, and small partners (shareholders) in a subsidiary. In addition, the literature has voiced the fundamental postulate of sanctioning the interest of a capital group which could, in reasonable cases, replace the interest of a capital group member⁴.

The work on framing and passing of the bill produced the Amendments to the Code of Commercial Companies ('the CCC') and Certain Other Acts of 9.02.2022⁵, which became effective on 13.10.2022. As stated in the bill⁶, the amendments are principally intended to regulate the corporate group laws (holding and concern legislation) by adding Chapter IV, entitled 'The Corporate Group' and including Articles 21¹ through 21¹⁶, to the Code of Commercial Companies.

¹ According to Article 1a Section 1 of the Corporate Income Tax Act of 15.02.1992, OJ of 2021, item 1800 as amended, the groups of at least two commercial companies having legal personalities and capital links ('tax capital groups') may also be taxpayers. For a tax capital group to be a taxpayer and derive benefits from this status, it must meet the requirements under Article 1a Section 2 of the Act and enter into an agreement to form a tax capital group.

² Cf. e.g. a draft Amendment to the Code of Commercial Companies dated 28.07.2009, prepared by the Civil Law Codification Commission.

³ Paweł Błaszczuk, "Odpowiedzialność cywilna spółki dominującej w projekcie nowelizacji kodeksu spółek handlowych w zakresie grup spółek, cz. I," *Przegląd Prawa Handlowego* no. 2 (2010): 13–21.

⁴ Adam Opalski and Michał Romanowski, "O potrzebie zasadniczej reformy polskiego prawa spółek," *Przegląd Prawa Handlowego* no. 6 (2008): 4–11.

⁵ The Amendment to the Code of Commercial Companies and Certain Other Acts, OJ item 807.

⁶ The statement of reasons for the draft Amendment to the Code of Commercial Companies and Certain Other Acts, the Parliament of the 9 term, parliamentary form no. 1515, 2, accessed August 25, 2022, <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=1515>.

The drafter points out the regulation is incomplete on purpose and applies in particular to the so-called pure holding companies, whereas the intermediate holding companies (despite the repeal of the existing Article 7 of the CCC) continue to be allowed by virtue of the freedom of legal transactions under Article 353¹ of the Civil Code in conjunction with Article 2 of the CCC.

As defined in point 5¹ added to Article 4 §1 of the CCC, a corporate group is a parent company and its subsidiary or subsidiaries which are capital companies that, according to a resolution to join the corporate group, are guided by a shared strategy to realise their shared interest (of the corporate group), which substantiates the parent company uniformly managing its subsidiary or subsidiaries. Article 211 §1 indicates certain general assumptions different from the traditional perspective of the corporate law, whereby each company should be motivated by its own interest only, in that companies in a corporate group (both the parent and its subsidiaries) are motivated not only by an individual company's interest but also that of the group, insofar as it's not intended to harm a company's stakeholders, including its creditors.

The operations of a corporate group managed centrally by a parent and guided by a shared strategy and interests of the group may in some cases cause damage to a subsidiary's creditors. This study will in particular focus on the liability towards creditors for anti-monopoly damages caused by a breach of competition laws and not resulting from the binding orders of a parent company to its subsidiary as defined by Article 21² of the CCC. It is especially important to establish if and possibly how a parent's liability arises for anti-monopoly damages to its subsidiary's creditors where it's not related to a binding order, considering the special regulation of liability for damages caused by breaches of competition laws in the context of the new regulations of groups of companies.

2. The new tort a breach of competition law in private enforcement

Both the contemporary European Union law and the Polish legal order provide for a comprehensive model (system) of enforcing the competition law⁷

⁷ Marian Kępiński, "Pojęcie i systematyka prawa konkurencji," in *System Prawa Prywatnego tom 15 Prawo konkurencji*, ed. Marian Kępiński (Warszawa: C.H. Beck i Instytut Nauk

which includes a public and private enforcement of the rules of competition. The public enforcement is pursued by the Office for Competition and Consumer Protection and courts handling appeals against the Office's decisions, while the private enforcement is implemented by individual entities harmed by the behaviour of other entities violating the competition law and filing their cases with courts.

The principal private law expected to facilitate seeking the rights of those harmed through the breaches of competition law in court is the Claims for Remedying of Damages Caused by the Breaches of Competition Law Act⁸. It introduces and defines some special principles of liability for anti-monopoly damages⁹ and principles of actions for damages in civil proceedings. The Act's regulations implement the Directive 2014/104/EU of the European Parliament and of the Council¹⁰.

Article 3 of the Damages Act is its substantive legal core, which states those responsible for infringements are bound to repair damages done to anyone through breaches of the competition law unless they are not in tort. This provision introduces a new form of tort to the Polish law – an infringement of the competition law. It also institutes independent grounds for the obligation to repair anti-monopoly damages, modifying the standard conditions of the liability in tort under Article 415 of the Civil Code for the purposes of this class of tort. These modifications, as Piotr Machnikowski points out, involve: (1) a limited group of those liable, (2) a special form of an act's illegality, (3) a reversed burden of proof (presumption of guilt), (4) a broadly defined group of those authorised to seek damages¹¹ – anyone can seek anti-monopoly damages to be repaired with a civil

Prawnych PAN, 2014), 11.

⁸ The Claims for Remedying of Damages Caused by the Breaches of Competition Law Act dated 21.07.2017, OJ item 1132, 'the Damages Act'.

⁹ Konrad Kohutek, *Szkoda antymonopolowa. Zasady odpowiedzialności oraz dochodzenia roszczeń odszkodowawczych* (Warszawa: Wolters Kluwer Polska, 2018), subsection 1.3., Lex/el.

¹⁰ Directive 2014/104/EU of the European Parliament and of the Council of 26.11.2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (EU OJ L 349), 'the Damages Directive'.

¹¹ Piotr Machnikowski, "Komentarz do art. 3," in *Ustawa o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji. Komentarz*, ed. Katarzyna Lis-Zarias and Piotr Machnikowski (Warszawa: C.H. Beck, 2018), 84–86.

court, regardless of whether they are in a direct contractual relationship with those liable or not.

As part of private enforcement of claims for anti-monopoly damages, the following can be distinguished: (A) an action for consequential damages following on an anti-monopoly authority's decision finding an infringement of competition law – the so-called follow-on action; and (B) an action for stand-alone damages, without an authority's prior decision finding an infringement, that is, filed by a private claimant (victim) – the so-called stand-alone action¹². To improve the efficiency and procedural effectiveness of follow-on actions and facilitate the pursuit of anti-monopoly damages, Article 30 of the Damages Act introduces the preliminary issue of administrative decisions by the Office for Competition and Consumer Protection. Such a decision (or a judgment by the Court for Competition and Consumer Protection concerning appeals against such decisions) binds on a civil court establishing the facts of an anti-monopoly tort¹³. This binding force applies to the person liable for damages (the recipient of an authority decision), therefore, the court may not establish any facts in this respect on its own. As far as stand-alone actions are concerned, on the other hand, a civil court determines the liability and the person responsible for anti-monopoly damages on an independent basis¹⁴.

¹² Elżbieta Buczkowska and Marcin Trepka, "Brak przesłanek do zawieszenia postępowania przez sąd cywilny rozstrzygający sprawę o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji od czasu rozstrzygnięcia postępowania antymonopolowego lub odwoławczego od decyzji Prezesa Urzędu Ochrony Konkurencji i Konsumenta w przedmiocie tego samego naruszenia – uwagi na tle art. 177 § 1 k.p.c.," *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, no. 4(10) (2021): 22.

¹³ Beata Wiczerzyńska, "Prejudycjalny charakter decyzji Prezesa Urzędu Ochrony Konkurencji i Konsumentów w kontekście odwrócenia ciężaru dowodu winy w sprawach prywatnego egzekwowania prawa konkurencji," in *Prawda w postępowaniu cywilnym. Quid est Veritas?*, ed. Monika Strus-Wołos and Mariusz Wiczerzyński (Radom: Wydawnictwo UTH Radom, 2021), 246.

¹⁴ Agnieszka Stefanowicz-Barańska, "Komentarz do art. 2," in *Ustawa o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji. Komentarz*, ed. Katarzyna Lis-Zarias and Piotr Machnikowski (Warszawa: C.H. Beck, 2018), 39–41.

3. The party liable for anti-monopoly damages

3.1. The party liable for anti-monopoly damages- entrepreneur in the functional sense

The Damages Act lays down the special rules of liability for damages caused by infringements of the competition law and points out, especially in Article 2 point 4 in conjunction with point 2, an entrepreneur under Article 4 point 1 of the Competition and Consumer Protection Act¹⁵ who infringes on the competition law may be held liable for anti-monopoly damages. Article 2 point 1 of the Damages Act specifies an ‘infringement of the competition law’ means a breach of prohibitions set out in Article 101 or Article 102 of the Treaty on the Functioning of the European Union or those in Article 6 or Article 9 of the Competition and Consumer Protection Act (these prohibit agreements restricting competition or the abuses of a dominant status).

It is important in this connection to determine the range of entities capable of infringing on the competition law and thus becoming liable for anti-monopoly damages or to whom the liability for such damages can be attributed. It has already been noted only an entrepreneur under Article 4 point 1 of the CCPA, that is, defined for the purposes of the public anti-monopoly law, can be liable for anti-monopoly damages. Accordingly, (1) the entrepreneur defined by the Entrepreneurs Law; (2) individuals, legal entities and organisations without a legal personality but endowed with a capacity to enter into legal transactions by force of the Act that organise or provide public utility services which are not business activities under the Entrepreneurs Law; (3) private professionals operating in their own name and on their own account or carrying out business as part of their professions; (4) associations of entrepreneurs, namely, chambers, societies, and other organisations of entrepreneurs as well as the associations of such organisations are the entrepreneurs bound to follow the anti-monopoly law and its prohibitions against agreements restricting competition or against the abuses of a dominant status.

¹⁵ The Competition and Consumer Protection Act of 16.02.2007, OJ of 2021, item 275, ‘the CCPA’.

The literature notes the definition of entrepreneur under Article 4 Section 1 of the CCPA is designed not to define the entities treated as entrepreneurs but those capable of interfering with, restricting or eliminating competition and then to bind them with the prohibitions provided for by the Act. The term 'entrepreneur' as specified by the public law systemic definition under Article 4 of the Entrepreneurs Law¹⁶ is used here and expanded with some entities that may affect competition although they are not clearly classified as entrepreneurs under the EL¹⁷. From the perspective of the competition law, the concept of entrepreneur needs therefore to be referred to any entities that, in a variety of their activities, take part in the market by offering goods and services and are thus capable of influencing the conditions of the market competition¹⁸. Article 4 point 1 of the CCPA defines 'the entrepreneur' broadly and focuses on its functional nature and an entity's activities rather than its legal and organisational status¹⁹. This means 'the entrepreneur' for the purposes of the competition law is treated functionally, as an entity in the economic sense²⁰.

3.2. The doctrine of a single economic body and its consequences for the competition and corporate laws

Since it is the characteristics of business activities in the market that decide the qualification of entities as entrepreneurs in the competition law, the same law lays down the definition of 'the capital group', a pioneering novelty in the Polish legal system contained already in the 2000 Act, that is, far earlier than in the current amendment to the corporate law. Article 4 Section 1 point 14 of the CCPA identifies a capital group as all entrepreneurs controlled, directly or indirectly, by a single entrepreneur, including the latter as well. The 'control' means, in line with Article 4 Section 1 point 4,

¹⁶ The Entrepreneurs Law of 6.03.2018, OJ of 2021, item 162 as amended – 'the EL'.

¹⁷ Maciej Eteł, "Kilka uwag o pojęciu „przedsiębiorca” w prawie ochrony konkurencji," *inter-netowy Kwartalnik Antymonopolowy i Regulacyjny*, no. 3(3) (2014): 80.

¹⁸ Grzegorz Materna, "Komentarz do art. 4," in *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, ed. Tadeusz Skoczny (Warszawa: C.H. Beck, 2014), 73.

¹⁹ Konrad Kohutek, *Glosa do postanowienia SN z dnia 24 września 2013 r., III SK 1/13* (Warszawa: Wolters Kluwer Polska, 2015), Section 1.3, Lex/el.

²⁰ Cezary Banasiński and Monika Bychowska, „Pojęcie grupy kapitałowej na użytek polskiego i unijnego prawa konkurencji,” *Przegląd Prawa Handlowego*, no. 12 (2011): 29.

that a group leader (the dominant entrepreneur) holds rights that allow for a decisive influence over another entrepreneur or other entrepreneurs (subsidiaries). The basic consequence of this separation of the capital group seems to be the assumption that the controlling (dominant) entrepreneur is responsible for actions undertaken by the controlled, subsidiary entrepreneurs²¹. This is close to the notion of the capital group understood as a single economic body which, though consisting of a number of separate legal beings, constitutes a single entity in economic terms²².

This proceeding economisation of the application of competition has given rise, first in the United States, then in the European Union, and now in Poland as well, to a concept or perhaps already a doctrine of a single economic body or unit. Put simply, the theory assumes several formally independent entities are treated as one entrepreneur (undertaking in the EU meaning) if, in effect of their functional connections, they behave uniformly in the market and realise an identical economic purpose²³. Thus, a capital group is a single organism, one economic entity.

The doctrine of a single economic body has at least two kinds of consequences for the anti-monopoly law. On the one hand, it allows for the exemption of agreements between members of a single economic unit from the prohibition stipulated by Article 6 of the CCPA (and Article 101 of the CJEU), since, guided by a shared strategy, mutual economic bonds, and a joint economic purpose, they are not independent entities in functional terms (while non-competition agreements can only be made between independent entities), they do not compete with each other and their cooperation has no effect on the conditions of market competition²⁴. This exemp-

²¹ Michał Będkowski-Kozioł, „Komentarz do Artykułu 4. XIV Grupa kapitałowa,” w *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, ed. Tadeusz Skoczny (Warszawa: C.H. Beck, 2014), 196.

²² The Supreme Court's judgment of 21 December 2012, case V CSK 9/12, Lex No. 1311859. The court points out that, from the viewpoint of the anti-monopoly act, a capital group is treated as a single economic entity, while entrepreneurs in the same capital group are treated according to the doctrine of single economic unit.

²³ Richard Wish and David Bailey, *Competition Law* (Oxford: Oxford University Press, 2012), 92–94.

²⁴ The President of the Office for Competition and Consumer Protection decision of 30.12.2014, case DOK-9/2014, 122–124, accessed August, 26, 2022, https://decyzje.uokik.gov.pl/bp/dec_prez.nsf/43104c28a7a1be23c1257eac006d8dd4/853b4211138c6d-

tion makes for the so-called safe harbour. It can be used by economic units where a subsidiary does not enjoy a real freedom of deciding its operations in the market, since its parent can issue orders and thus exercise a real control over its subsidiaries²⁵. This will restrict the notion of entrepreneur and economic activities in relation to its literal and formal legal understanding.

On the other hand, and importantly for the subject matter under discussion, this doctrine expands the so-called boundaries of undertaking, whose economic motivation is aiming for synergies from the benefits of scale and scope arising from the economic integration of formerly independent entities²⁶. This in turn expands the subjective scope of anti-monopoly liability, assuming that an apparently independent entrepreneur in fact carries out the decisions made in the parent company's decision-making centre in the same economic unit, that whole unit should be legally liable for its actions²⁷. Both the aspects of the doctrine of single economic unit are not directly grounded in law, but arise from and are developed as part of its application and analysed in literature.

The theory and concept of the single economic unit and the capital group, developed in the competition law, have been borrowed by the doctrine of

31c1257ec6007ba8f4/\$FILE/Decyzja%20DOK%209_2014%20w%20sprawie%20porouzmienia%20%5BAgrotur-Marcko-Texpol%20%5Dwersja%20BIP.pdf; a similar decision of the President of the Office for Competition and Consumer Protection dated 28.12.2017, case DOK-3/2017 151–152, accessed August, 26, 2022, [https://decyzje.uokik.gov.pl/bp/dec_prez.nsf/43104c28a7a1be23c1257eac006d8dd4/86ddcc14923ba0e2c125823b004ae-84b/\\$FILE/2017_12_28_DOK3_410_1_12_decyzja_DOK_3_2017%20wersja%20jawna.pdf](https://decyzje.uokik.gov.pl/bp/dec_prez.nsf/43104c28a7a1be23c1257eac006d8dd4/86ddcc14923ba0e2c125823b004ae-84b/$FILE/2017_12_28_DOK3_410_1_12_decyzja_DOK_3_2017%20wersja%20jawna.pdf) [accessed: 26.08.2022].

²⁵ Christopher Townley, “The Concept of an ‘Undertaking’: The Boundaries of the Corporation – A Discussion of Agency, Employees and Subsidiaries,” in: *EC Competition Law: A Critical Assessment*, ed. Giuliano Amato & Claus-Dieter Ehlermann (Oxford: Hart Publishing, 2007), 17.

²⁶ Zbigniew Jurczyk and Piotr Semeniuk, “Koncepcja jednego organizmu gospodarczego w prawie ochrony konkurencji, Wydawnictwo Naukowe Wydziału Zarządzania UW, Warszawa 2015, 325,” *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, no. 5(5) (2016): 60–61.

²⁷ Piotr Semeniuk, *Koncepcja jednego organizmu gospodarczego w prawie ochrony konkurencji* (Warszawa: Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, 2015), 34. The author seems to have conducted the most extensive analysis of the doctrine of the single economic body in the context of the competition in the specialist Polish literature.

corporate law. For instance, A. Szumański, addressing the issue of the holding company in corporate law, notes the holding company is a single economic body in economic terms and it's only from the legal viewpoint that it consists of entities that are independent from one another²⁸. Likewise, A. Opalski and M. Romanowski identify the need to reform the Polish corporate law in relation to the corporate group, among other things, and say: "The capital group is in fact a single economic body, though without a legal personality, as it is formed by legally separate capital companies that are organisationally subordinate to a parent company. The latter plays the role of <the brain> of an entire capital group, determining its strategy and the means to its implementation. ... The effects of the capital group's economic integrity make one question some aspects of the civil law separation of the capital group members"²⁹.

It has already been noted that, in accordance with the Damages Act, anti-monopoly damages can be caused by entrepreneurs who infringe on the competition law. Since the doctrine of the single economic unit states a subsidiary entrepreneur (in a corporate group) cannot engage in independent market operations but must follow the guidelines (instructions) from the parent company, then, as indicated by C. Banasiński and E. Piątek, "From the viewpoint of the Act [the CCPA], it doesn't matter whether actions contrary to the Act are undertaken by the dominant entrepreneur itself or via its daughter companies"³⁰. In relation to corporate groups, the present amendment to the CCC reflects this view, since – contrary to the legislator's implied intention to create the interest of a corporate group as inherent in and balanced within a certain collective – the interest of a corporate group is in fact the interest of its majority shareholder, or parent company, which actually determines the group's strategy, issues instructions, usually informal, and subordinates the group members to its

²⁸ Andrzej Szumański, "Ograniczona regulacja prawa holdingowego (prawa grup spółek) w kodeksie spółek handlowych," *Państwo i Prawo*, no. 3 (2001): 20.

²⁹ Opalski, Romanowski, „O potrzebie zasadniczej reformy,” 8.

³⁰ Cezary Banasiński and Eugeniusz Piontek, *Ustawa o ochronie konkurencji i konsumentów. Komentarz* (Warszawa: LexisNexis, 2009), 240.

own interest. The remaining members of the group (subsidiaries) are but instruments serving to realise the interest of the parent company³¹.

3.3. The parent company's liability for anti-monopoly damages caused by its subsidiaries- the doctrine and the EU judicial decisions

To refer the foregoing observations to the key issue of determining the group of entities liable for an anti-monopoly loss, an answer should be attempted to the question whether liability for anti-monopoly damages can be attributed to a parent company operating in a corporate group which is a single economic body where damage is caused by the behaviour of its subsidiary.

It should first of all be noted the improved efficiency of seeking claims for anti-monopoly damages declared in connection with both the Damages Directive and the Polish Damages Act is impaired, since the EU regulations, and thus the Polish Act, fail to harmonise the rules of the parent's liability for damages, which is regarded as a regulatory gap in the Damages Directive that will cause great numbers of petitions for preliminary decisions to be filed with the Court of Justice³². This also gives rise to doubts in the literature.

The Polish doctrine, as voiced by P. Machnikowski³³ and D. Wolski³⁴, who are in agreement, points to the nature of the Polish Damages Act as a means of transposing the EU Directive, which means the CJEU is competent in determining the correct understanding of the notion of entrepreneur by interpreting the concept as it is used in Article 2 part 2 of the Damages Directive 2014/104/EU. The authors believe the subjective scope of 'the party liable for damages' in the Damages Act is sufficiently broad by reference to the meaning of an entrepreneur in the public competition law

³¹ Aleksander Kappes, "Rzekoma ochrona współników mniejszościowych w prawie holdinowym," *Przegląd Prawa Handlowego*, no. 8 (2022): 16.

³² Giorgio Monti, Chapter 3: "Liability issues not codified by the Damages Directive: how to fill such gaps?," in: *Private Enforcement of EU Competition Law. The Impact of the Damages Directive*, ed. Pier Luigi Parcu, Giorgio Monti and Marco Botta (Northampton: Edward Elgar Publishing, 2018), 49.

³³ Machnikowski, "Komentarz do art. 3," 89.

³⁴ Dominik Wolski, "Komentarz do art. 3 pkt 2.1," in *Roszczenia o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji. Komentarz*, ed. Anna Piszcz and Aleksander Stawicki (Warszawa: Wolters Kluwer Polska, 2018) Lex/el.

and bringing the even more extensive concept of the single economic unit, born in the EU judicial decisions, to the field of private law relationships would be unreasonable. A certain dissonance can be felt here as, in this view, the CJEU is to interpret the meaning of entrepreneur (undertaking) in order to determine the subjective scope of the notion of the party liable for anti-monopoly damages, while the concept of the single economic unit, developed by the same court for the purposes of the interpretation, is to be ignored.

In objecting to and disputing the above view, reference must be made to judicial decisions, which instruct the view is to be respected. As Polish court decisions in anti-monopoly cases are still scant³⁵, the EU court rulings should be relied on, given in cases concerning the liability for anti-monopoly damages and making broader references to the decisions handed out in connection with the public application of competition laws.

In a desire not to incur the charge of non-obligatory application of the pro-EU interpretation in cases that don't affect the trade between the member states, it's useful to cite an apposite observation of the Supreme Court³⁶ that the public law of competition protection is not subject to the process of harmonisation, yet this doesn't exclude the possibility and rationality of using the *acquis communautaire* when interpreting the Polish anti-monopoly legislation (including the private enforcement), since, even given the absence of a formal obligation of a pro-Union interpretation, it can become a source of intellectual inspiration and an instance of legal reasoning and understanding of certain concepts that can prove useful to the interpretation of the Polish law³⁷. This aspect will be utilised below.

It should also be noted the EU anti-monopoly law does not employ the term 'entrepreneur' (like the Polish law does) but 'undertaking' for

³⁵ Joanna Affre and Przemysław Rybicki, "Odpowiedzialność deliktowa uczestników kartelu – aspekty podmiotowe w świetle wybranego orzecznictwa," *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, no. 3(9) (2020): 20. The authors point out that, until 2020, only the Regional Court in Gdańsk, out of all the regional courts in Poland, had heard four cases based on the Damages Act, with the suits admitted in two. The Regional Court in Warsaw, meanwhile, heard two actions against MasterCard and VISA concerning overcharging for interchange.

³⁶ The Supreme Court's decision of 24 September 2013, case III SK 1/13, LEX No. 1380965.

³⁷ The Supreme Court's judgment of 9 August 2006, case III SK 6/06, LEX No. 354144.

the entities bound to observe it. This term was not defined normatively before and its scope and interpretation were grounded in the decisions of EU courts. It now has its legal definition in Article 2 Section 1 point 10 of the so-called ECN+ Directive³⁸, which states ‘an undertaking’ under Articles 101 and 102 of the CJEU means any entity engaged in economic activities regardless of its legal status or a method of its financing. This definition is based on the so-called Höfner formula³⁹, developed and accepted by the EU judicial decisions. Like O. Odudu points out, the notion of undertaking serves to determine an entity a certain behaviour can be attributed to, among other purposes⁴⁰.

The EU court decisions arise, inter alia, from the latter assumption, declaring the question of determining which entity is bound to repair damages caused by an infringement of Article 101 of the CJEU is regulated directly in the EU law, since the writers of its treaties decided to use the term ‘undertaking’ as an autonomous notion in the EU law⁴¹. In connection with the subject matter discussed here, the concept should be understood to denote an economic unit even if, legally, it consists of several private individuals or legal entities⁴². This broad definition of undertaking did arise from the public legal application of the competition law (public enforcement), yet, as the Court has noted, actions for damages for infringing the rules of competition (private enforcement) are an integral part of the whole system serving to enforce those rules, therefore, the concept of ‘undertaking’ cannot have another conceptual scope in the context of public and another of

³⁸ Directive of the European Parliament and of the Council (EU) 2019/1 of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, the so-called ECN+ Directive, accessed August 27, 2022, <https://eur-lex.europa.eu/legal-content/PL/TX-?uri=CELEX:32019L0001>.

³⁹ The CJEU judgment of 23 April 1991, case C-41/90 *Höfner and Elser v. Macrotron*, ECR [1991] I-1979, point 21. Cf. also the Court's judgment of 11 July 2006 in the case C-205/03 P *FENIN v. the Commission*, LEX No. 226721.

⁴⁰ Okeoghene Odudu, “The Meaning of Undertaking within 81 EC,” *Cambridge Yearbook of European Legal Studies*, no. 7 (2005): 211.

⁴¹ The CJEU judgment of 27 April 2017, case C-516/15 P *Akzo Nobel et alia v. the Commission*, EU:C:2017:314, point 46.

⁴² The CJEU judgment of 20 January 2011, case C-90/09 P *General Química et alia v. the Commission*, EU:C:2011:21, point 35.

the private enforcement⁴³. W. Wurmnest sees this holistic approach as sensible, since the law is infringed upon by ‘undertakings’ defined in the light of the EU standards. The unit members of a given entity must be liable for damages as part of both the channels of the EU law enforcement system⁴⁴.

As a consequence and in line with the established decisions of the Court, the behaviour of a subsidiary that shows the features of a competition law infringement can be attributed to its parent where, in spite of its separate legal personality, such subsidiary does not determine its market behaviour autonomously but, in principle, implements the instructions from its parent, given in particular the economic, organisational, and legal bonds between these two legal entities. This is the case because, in the circumstances, the parent and the subsidiary are parts of the same economic unit and thus form a single undertaking as defined by the EU competition law⁴⁵. Where the parent holds all or nearly all the capital of the subsidiary that has infringed upon the EU rules of competition, there is a challengeable presumption the parent does indeed have a decisive influence over its subsidiary⁴⁶. The more recent court decisions stress it’s not the holding of all or nearly all the capital of the subsidiary in itself but the degree of a parent’s control over its subsidiary in connection with such capital holding that substantiates the presumption of a real decisive influence. In effect, a parent company holding all voting rights conferred by its shares in its subsidiary is in a situation parallel to that of a parent company holding all or nearly all the capital of a subsidiary, so that the parent is capable of determining the economic and commercial strategies of its subsidiary. A parent

⁴³ The CJEU judgment of 14 March 2019, case C-724/17 *Vantaan v. Skanska Industrial Solutions Oy*, EU:C:219:2004, points 45–47.

⁴⁴ Wolfgang Wurmnest, „Liability of “undertakings” in damages actions for breach of Articles 101, 102 TFEU: Skanska case C-724/17” *Common Market Law Review* Volume 57, Issue 3 (2020): 923, <https://doi.org/10.54648/cola2020698>.

⁴⁵ The CJEU judgments of: 25 October 1983, case 107/82 *AEG-Telefunken v. the Commission*, EU:C:1983:293, points 49–53; 11 July 2013, case C-444/11 P *Team Relocations et alia v. the Commission*, EU:C:2013:464, point 157, and of 17 September 2015, case C-597/13 P *Total v. the Commission*, EU:C:2015:613, point 35.

⁴⁶ The CJEU judgment of 10 September 2009, case C-97/08 P, *Akzo Nobel et alia v. the Commission*, LEX No. 513748; upheld by more recent decisions – the judgment of 27 January 2021, case C-595/18 P *The Goldman Sachs Group Inc. v. the Commission*, ECLI:EU:C:2021:73, point 32.

company holding all voting rights given by its shares in its subsidiary is capable, just like a parent company holding all or nearly all the capital of a subsidiary, of exerting a decisive influence over the behaviour of its subsidiary⁴⁷. A parent company's liability is independent from its involvement in a cartel and even independent from the awareness of an infringement. In the light of the presumption identified above, evidence is sought not of a parent's participation in an infringement but only of its formally being part of an entity participating in an infringement. Any form of guilt on the part of a parent company is not necessary to impose a fine or provide grounds for fining a parent. It lets the Commission address its decision to impose a fine to a parent without the need to establish that parent's direct involvement in an infringement⁴⁸.

The above implies the liability of a parent company for the behaviour of its subsidiary, including the liability for anti-monopoly damages, is not subject to any doubts in the EU judicial decisions, which is fully understandable.

The Polish anti-monopoly legislation can also be said to include the subjective identity in the public and private enforcement⁴⁹. This is corroborated in the Damages Act, where the definition of the party liable for damages refers, as mentioned before, to the notion of 'entrepreneur', regulated by the public competition law in the CCPA. It will be reinforced after the implementation of the Directive 2019/1 – the so-called ECN+ Directive. Its motive 46 points out that 'to assure an effective and uniform application of Articles 101 and 102 of the CJEU, the concept of undertaking, included in Articles 101 and 102 of the CJEU and to be applied in accordance with the decisions of the Court of Justice of the European Union, shall

⁴⁷ The judgment of 27 January 2021, case C-595/18 P *The Goldman Sachs Group Inc. v. the Commission*, ECLI:EU:C:2021:73, point 35.

⁴⁸ The Court's judgment of 14.07.2011 in the case T190/06 *Total SA and Elf Aquitaine SA v. the Commission*, accessed August 28, 2022, https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:62006TJ0190_SUM&from=LV; and in more recent decisions – the judgment of 27 January 2021 in the case C-595/18 P *The Goldman Sachs Group Inc. v. the Commission*, ECLI:EU:C:2021:73, point 33.

⁴⁹ Konrad Kohutek, "Odpowiedzialność odszkodowawcza przedsiębiorcy kontynuującego działalność gospodarczą sprawcy naruszenia prawa konkurencji. Głos do wyroku TS z dnia 14 marca 2019 r., C-724/17," *Europejski Przegląd Sądowy*, no. 6 (2019): 40.

mean an economic unit even if the latter consists of several natural or legal entities.’ As a result, national competition protection authorities should be able to apply the notion of undertaking in order to find a parent company liable and to punish it for practices exercised in any of its subsidiaries, where the parent and the subsidiary are part of a single economic unit. To prevent undertakings from avoiding liability for fines imposed for some infringements of Articles 101 and 102 of the CJEU by introducing some legal or organisational changes, national competition protection authorities should be able to trace legal or economic successors to a liable undertaking and to penalise such successors for the infringements of Articles 101 and 102 of the CJEU in line with the Court of Justice of the European Union’s decisions. On foot of this postulate, Article 13 Section 5 of the Directive stipulates that the Member States ensure the application of the concept of undertaking for the purposes of penalising parent companies and legal and organisational successors to such an undertaking. This regulation does apply to public enforcement, however, the unity of the competition law enforcement system makes it applicable to private enforcement as well.

The draft Act Amending the Competition and Consumers Protection Act and Certain Other Acts of 14 January 2021 (UC69)⁵⁰ proposed by the President of the Office for Competition and Consumer Protection is an attempt at implementing the Directive. The statement of reasons for the draft indicates the implementation of the Directive requires regulation of the possibility of prosecuting a parent company, too, where a subsidiary infringes upon the Act by entering into a prohibited agreement or abusing their dominant status. With a view to legal certainty, such a possibility needs to be confirmed by legislation. Adding Articles 6aa and 9a to the Act is suggested, therefore. They state that where an entrepreneur infringes upon the prohibitions under Article 6 Section 1 or Article 9 of the CCPA, such infringements are also committed by entrepreneur or entrepreneurs with ‘a decisive influence over such an entrepreneur’. This wording will let

⁵⁰ The draft and the statement of its reasons are available at the Council’s website: accessed August, 28, 2022 <https://legislacja.rcl.gov.pl/projekt/12342403/katalog/12757060-#12757060>. According to the minutes No. 40/2021 of the Council of Ministers meeting on 19 October 2021, the Council of Ministers decided that the President of the Office for Competition and Consumer Protection should make further consultations with ministers and only then would the draft continue to be handled.

the Office for Competition and Consumer Protection take action where not only a parent but also a 'grandparent' and other companies with a decisive influence over them are the entrepreneurs having this decisive influence.

The regulation can be said to allow for a determination of the subjective scope of liability for anti-monopoly infringements and thus for a definitive and indisputable establishment of liability for anti-monopoly damages, especially in follow-on actions.

The central line of the draft's provisions should be deemed reasonable and meeting the expectations of practical effectiveness (*effet utile*) of the prohibitions against non-competitive agreements and the abuses of dominant status. Serious objections, on the other hand, can be raised against the details, particularly the condition of a 'decisive influence' over a subsidiary for considering attribution of the liability for the latter's actions to a parent entrepreneur. 'Managing the actions of another entrepreneur' or even 'a uniform management of the actions of another entrepreneur' better express the relationship that should hold between these entrepreneur, which is voiced in some opinions about the draft⁵¹. In line with the postulate of a consistency of the conceptual network, this would accord with the current definition of the corporate group in Article 4 §1 point 5¹ of the CCC – a corporate group is a parent company and its subsidiaries subject to a uniform management of their parent. Therefore, Article 6aa Section 2 of the draft should be modified to indicate a uniform management of actions of another entrepreneur takes place where economic, legal and organisational links between entrepreneurs prevent an entrepreneur whose actions are centrally managed from determining their actions in the market on an independent basis and make them follow the instructions of the entrepreneur managing their actions in connection with an infringement. A reference to a subsidiary following the parent's 'instructions' will satisfy that conceptual consistency of the legal system with the Code of Commercial Companies.

⁵¹ The opinion of the Competition Law Association concerning the draft Act Amending the Competition and Consumers Protection Act and Certain Other Acts of 14 January 2021 (UC69), accessed September 9, 2022, <https://legislacja.rcl.gov.pl/projekt/12342403/katalog/12757018#12757018>.

The ECN+ Directive, despite the deadline of 04 February 2021, has not been implemented to the Polish legal system yet, causing the Commission to instigate the infringement procedure No. 2021/0126 by force of Article 260 Section of 3 the CJEU.

4. Conclusion

An attempt at answering the question whether liability for anti-monopoly damages can be attributed to a parent company operating in a corporate group which is a single economic body where the damages are caused by the behaviour of its subsidiary is the key issue of this paper.

The doctrine of a single economic unit, developed in the context of the EU judicial decisions, expands the so-called boundaries of an undertaking and thus the subjective scope of anti-monopoly liability by treating several formally independent entities as a single entrepreneur (or undertaking in the EU meaning) if they behave uniformly in the market and pursue an identical economic objective due to their functional links.

The Polish doctrine is of the opinion the transposition of that expansive concept of the single economic unit to the private enforcement would be unreasonable.

A series of arguments are advanced against this view, supported with the statements of EU judicial decisions that provide a subsidiary's behaviour exhibiting the features of a competition law infringement can be attributed to a parent company where, in spite of a separate legal personality but given the economic, organisational, and legal bonds between both the legal entities, that subsidiary does not determine its market behaviour in an autonomous manner but, as a matter of principle, carries out the instructions given by its parent.

The implementation of the ECN+ Directive, where the EU legislator postulates that national competition protection authorities should be able to apply the notion of undertaking to find a liable parent company and penalise it for practices used in one of its subsidiaries, where the parent and subsidiary constitute a single economic unit, will be a legislative reinforcement of the view the parent company in a corporate group is liable for anti-monopoly damages caused by its subsidiaries which doesn't give rise to interpretative doubts. Such a clear public enforcement regulation

will translate into the private enforcement of the competition law, as both are the procedures of a single system of enforcing the rules of competition.

References

- Affre, Joanna and Przemysław Rybicki. "Odpowiedzialność deliktowa uczestników kartelu – aspekty podmiotowe w świetle wybranego orzecznictwa." *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, no. 3(9) (2020): 8–20.
- Banasiński, Cezary and Eugeniusz Piontek. *Ustawa o ochronie konkurencji i konsumentów. Komentarz*. Warszawa: LexisNexis, 2009.
- Banasiński, Cezary and Monika Bychowska. "Pojęcie grupy kapitałowej na użytek polskiego i unijnego prawa konkurencji." *Przegląd Prawa Handlowego*, 12 (2011): 29–34.
- Będkowski-Kozioł, Michał. "Komentarz do Artykułu 4. XIV Grupa kapitałowa." In *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, edited by Tadeusz Skoczny, 196–210. Warszawa: C.H. Beck, 2014.
- Błaszczyk, Paweł. "Odpowiedzialność cywilna spółki dominującej w projekcie nowelizacji kodeksu spółek handlowych w zakresie grup spółek, cz. I." *Przegląd Prawa Handlowego* no. 2 (2010): 13–21.
- Buczowska, Elżbieta and Marcin Trepka "Brak przesłanek do zawieszenia postępowania przez sąd cywilny rozstrzygający sprawę o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji do czasu rozstrzygnięcia postępowania antymonopolowego lub odwoławczego od decyzji Prezesa Urzędu Ochrony Konkurencji i Konsumenta w przedmiocie tego samego naruszenia – uwagi na tle art. 177 § 1 k.p.c." *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, no. 4(10) (2021): 20–36.
- Etel, Maciej. "Kilka uwag o pojęciu „przedsiębiorca” w prawie ochrony konkurencji." *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, no. 3(3) (2014): 75–82.
- Jurczyk, Zbigniew. „Piotr Semeniuk, Koncepcja jednego organizmu gospodarczego w prawie ochrony konkurencji, Wydawnictwo Naukowe Wydziału Zarządzania UW, Warszawa 2015, s. 325” *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, no.5(5) (2016): 159–167.
- Kępiński, Marian. „Pojęcie i systematyka prawa konkurencji.” In: *System Prawa Prywatnego tom 15 Prawo konkurencji*, edited by Marian Kępiński, 1–18. Warszawa: C.H. Beck i Instytut Nauk Prawnych PAN, 2014.

- Kappes, Aleksander. „Rzekoma ochrona wspólników mniejszościowych w prawie holdingowym.” *Przegląd Prawa Handlowego*, no. 8 (2022): 15–22.
- Kohutek, Konrad. *Glosa do postanowienia SN z dnia 24 września 2013 r., III SK 1/13*. Warszawa: Wolters Kluwer Polska, 2015. Lex/el.
- Kohutek, Konrad. *Szkoda antymonopolowa. Zasady odpowiedzialności oraz dochodzenia roszczeń odszkodowawczych*. Warszawa: Wolters Kluwer Polska, 2018, Lex/el.
- Kohutek, Konrad. “Odpowiedzialność odszkodowawcza przedsiębiorcy kontynuującego działalność gospodarczą sprawcy naruszenia prawa konkurencji. Glosa do wyroku TS z dnia 14 marca 2019 r., C-724/17.” *Europejski Przegląd Sądowy*, no. 6 (2019): 38–45.
- Machnikowski, Piotr. „Komentarz do art. 3.” In *Ustawa o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji. Komentarz*, edited by Katarzyna Lis-Zarias and Piotr Machnikowski, 84–105. Warszawa: C.H. Beck 2018.
- Materna, Grzegorz. „Komentarz do art. 4.” In *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, edited by Tadeusz Skoczny, 72–109. Warszawa: C.H. Beck, 2014.
- Monti, Giorgio. Chapter 3: “Liability issues not codified by the Damages Directive: how to fill such gaps?” In *Private Enforcement of EU Competition Law. The Impact of the Damages Directive*, edited by Pier Parcu, Giorgio Monti and Marco Botta, 42–61. BRAKUJE DANYCH Cheltenham, 2018.
- Odudu, Okeoghene. “The Meaning of Undertaking within 81 EC.” *Cambridge Yearbook of European Legal Studies*, no. 7 (2005): 211–241.
- Opalski, Adam and Michał Romanowski. “O potrzebie zasadniczej reformy polskiego prawa spółek.” *Przegląd Prawa Handlowego* no. 6 (2008): 4–11.
- Semiński, Piotr. *Koncepcja jednego organizmu gospodarczo-ego w prawie ochrony konkurencji*. Warszawa: Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, 2015.
- Stefanowicz-Barańska, Agnieszka. “Komentarz do art. 2.” In *Ustawa o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji. Komentarz*, edited by Katarzyna Lis-Zarias and Piotr Machnikowski, 32–61. Warszawa: C.H. Beck, 2018.
- Szymański, Andrzej. “Ograniczona regulacja prawa holdingowego (prawa grup spółek) w kodeksie spółek handlowych.” *Państwo i Prawo*, no. 3 (2001): 17–28.
- Townley, Christopher. “The Concept of an ‘Undertaking’: The Boundaries of the Corporation - A Discussion of Agency, Employees and Subsidiaries.” In *EC Competition Law: A Critical Assessment*, edited by Giuliano Amato & Claus-Dieter Ehlermann, 1–24. Oxford: Hart Publishing, 2007.

- Wieczerzyńska, Beata. "Prejudycjalny charakter decyzji Prezesa Urzędu Ochrony Konkurencji i Konsumentów w kontekście odwrócenia ciężaru dowodu winy w sprawach prywatnego egzekwowania prawa konkurencji." In *Prawda w postępowaniu cywilnym. Quid est Veritas?*, edited by Monika Strus-Wołos and Mariusz Wieczorek, 236–252, Radom: Wydawnictwo UTH Radom, 2021.
- Wish, Richard and David Bailey. *Competition Law*, Oxford: Oxford University Press, 2012.
- Wolski, Dominik. "Komentarz do art. 3 pkt 2.1." In *Roszczenia o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji. Komentarz*, edited by Anna Piszcz and Aleksander Stawicki, Warszawa: Wolters Kluwer Polska, 2018, Lex/el.
- Wurmnest, Wolfgang. "Liability of "undertakings" in damages actions for breach of Articles 101, 102 TFEU: Skanska case C-724/17." *Common Market Law Review*, vol. 57, Issue 3: (data??) 915 – 934. <https://doi.org/10.54648/cola2020698>.

