



# ICLG

The International Comparative Legal Guide to:

# Competition Litigation 2016

**8th Edition**

A practical cross-border insight into competition litigation work

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**Group Publisher**

Richard Firth

**Published by**

Global Legal Group Ltd.  
59 Tanner Street  
London SE1 3PL, UK  
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EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Competition Litigation*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of competition litigation.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting competition litigation, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in competition litigation in 36 jurisdictions.

All chapters are written by leading competition litigation lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Euan Burrows and Mark Clarke of Ashurst LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at [www.iclg.co.uk](http://www.iclg.co.uk).

Alan Falach LL.M.  
Group Consulting Editor  
Global Legal Group  
[Alan.Falach@glgroup.co.uk](mailto:Alan.Falach@glgroup.co.uk)

# Poland



Dorothy Hansberry-Bieguńska



Małgorzata Krasnodębska-Tomkiel

## Hansberry Tomkiel

### 1 General

#### 1.1 Please identify the scope of claims that may be brought in Poland for breach of competition law.

Please see our response to question 1.2.

#### 1.2 What is the legal basis for bringing an action for breach of competition law?

This chapter focuses upon litigation aspects of private enforcement of competition law. The subject of public enforcement is considered to the extent that it affects private action litigation.

The Act on Competition and Consumer Protection of 16 February 2007 (the “Competition Act”) was amended in January 18, 2015. The prohibition of cartels and vertical restraints (Article 6 of the Competition Act) is similar to the prohibition in Article 101(1) of the Treaty on the Functioning of the European Union (the “TFEU”). The Competition Act (in Article 8) recognises an exemption to the prohibition of horizontal cartels and certain vertical agreements, similar to that in Article 101(3) TFEU. Similarly, the Competition Act’s prohibition of abusing a position of dominance (Article 9) concerns anti-competitive conduct similar to that prohibited by Article 102 TFEU.

With regard to public enforcement, the President of the Polish Competition Authority is the only person or entity who can enforce the Competition Act. The President of the Polish Competition Authority institutes competition investigatory proceedings *ex officio* if there is a threat to the public interest that interferes with competition.

With regard to private enforcement, a plaintiff can invoke Article 189 of the Polish Civil Procedure Code, which is the basis, in conjunction with the Competition Act or Articles 101 and 102 TFEU, or both, to seek a judicial declaration of the invalidity of a contract or an act in law.

There are no specific regulations or acts in Polish law that govern private competition damage actions. There are, however, a number of legal grounds an injured party may use when lodging a civil claim to declare conduct to be in violation of the competition law and to be awarded damages. Such grounds are found in the:

- Polish Civil Code;
- Unfair Competition Act; and
- Act on Pursuing Claims in Group Proceeding (as a member of a class).

#### Polish Civil Code

Private damage claims can be lodged by a natural or legal person on the general basis of the Polish Civil Code. The grounds for claims are any of the following:

- tort liability – Article 415;
- contractual liability – Article 471; and
- unjust enrichment – Article 405.

With respect to establishing tort liability for both material and non-material damages, the prerequisite of ‘fault’ must be proven. Standing is granted to a person who suffered damages caused by the fault on the part of another person who caused the damage.

#### Unfair Competition Act

In addition to the Polish Civil Code, plaintiffs may pursue civil damage claims under the Unfair Competition Act. The Unfair Competition Act refers to and uses the Polish Civil Code. Only undertakings, not individuals, can file a claim pursuant to the Unfair Competition Act.

The Unfair Competition Act is an attractive law to lodge civil competition claims by undertakings as the definition of “an unfair practice” is broadly defined and encompasses violations of the Competition Act. Article 18(1) of the Unfair Competition Act permits a plaintiff to sue for some or all of the following types of relief:

- abandon illegal conduct;
- remove results of illegal conduct;
- publish a statement in a prescribed form;
- repair damage;
- return unjustified benefits; or
- make a contribution to a specified charity.

Article 3(1) of the Unfair Competition Act, one of the legal bases for claiming competition law infringements, broadly defines unfair competition practices as being activities ‘contrary to the law or good practice which threaten or infringe the interest of another entrepreneur or customer’. Infringements of the competition laws may constitute acts of unfair competition.

An undertaking must be able to allege fault on the part of a defendant that caused it to suffer damage. A catalogue of remedies that could be pursued by an undertaking whose interests have been threatened or violated is set out in Article 18(1) of the Unfair Competition Act. Standing under the Unfair Competition Act is also available to a national or regional organisation representing the interests of undertakings for some categories of unfair competition acts.

#### 1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The basis for competition law claims are based upon national and international law.

A plaintiff has the right to lodge a claim based on an infringement of the Competition Act and of Article 101 and Article 102 TFEU in a Polish common court.

#### 1.4 Are there specialist courts in Poland to which competition law cases are assigned?

The Court of Competition and Consumer Protection (the CCCP) is a sub-division of the Regional Court in Warsaw. The cases before this court are limited to appeals from the administrative decisions of the Polish Competition Authority. Thus, although the CCCP could be considered to be a speciality court, it is not available to hear private damage action claims. Rather, such cases are lodged before civil courts with jurisdiction over a given case.

#### 1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

The Group Claims Act came into force on 19 July 2010. This Act concerns claims in cases in which one type of claim is demanded by at least 10 people. The scope of the Group Claims Act is limited to consumer rights cases, dangerous product liability cases and tort actions. Infringements of the Competition Act are torts that can be pursued by using the Group Claims Act.

A three-judge panel will decide upon the admissibility of a group claim. If the court admits a claim, it will order the publication in the press of an appropriate announcement on the initiation of proceedings and will allow persons to join the proceedings within a two-month period. Thus, the Group Claims Act uses the opt-in approach, which means that only those persons who expressly agreed to be included can be members of the group.

The Group Claims Act allows for claiming both pecuniary and non-pecuniary claims. Cases concerning pecuniary claims are allowed under the condition that the claimed value for each group member is unified taking into consideration all common circumstances of the case. Thus, the amount of a claim must be generally unified for each member of the group, although the unification may be done in sub-groups. A sub-group must consist of at least two persons.

A group must be represented by a claimant or representative, a person who is a group member or a consumer spokesperson. Under the Group Claims Act, an attorney can be paid in the form of a contingency fee based upon the amount of the value awarded. An attorney’s fee cannot exceed 20 per cent of the awarded amount.

A defendant has the right to request that the court order the claimant to pay a deposit as security for costs of the proceedings. A deposit cannot exceed 20 per cent of the value of the claim.

#### 1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

Private competition actions are to be brought before a court with jurisdiction for where the defendant resides, has its registered office or where the damage occurred. Alternatively, a court in a jurisdiction chosen by the contractual parties will be entitled to hear the claim.

#### 1.7 Does Poland have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction and if so, why?

No; to date, the lack of discovery and lengthy judicial proceedings have not been attractive to private plaintiffs.

#### 1.8 Is the judicial process adversarial or inquisitorial?

The judicial process is adversarial.

## 2 Interim Remedies

#### 2.1 Are interim remedies available in competition law cases?

Under certain circumstances, interim remedies are available in competition law cases.

#### 2.2 What interim remedies are available and under what conditions will a court grant them?

A plaintiff can seek to secure pecuniary and non-pecuniary claims by moving for an injunction. A civil court may grant an interim injunction either before a lawsuit is filed or after, during the proceedings. A court must find that a plaintiff has established the likelihood of its claim; and that it has a legal interest in obtaining a preliminary injunction. According to the Code of Civil Procedure, a legal interest in the granting of an injunction exists when the lack of such a relief will render the enforcement of a judgment issued in the case impossible or significantly more difficult, or will otherwise render the achievement of the goal of the proceedings in the case impossible or significantly more difficult. The court of first instance’s decision on the granting of an injunction may be appealed.

## 3 Final Remedies

#### 3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

Please see the responses to questions 1.2 and 2.2.

#### 3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Competition private damage claims are calculated on the basis of the principle of full compensation. Plaintiffs can sue for damage claims and claims to return unjust profits derived from the illegal conduct. Damages should cover actually incurred costs rather than be a means of enrichment of a plaintiff. Damages include both actual losses as well as the loss of future and certain profits. The tort principles of the Polish Civil Code apply to competition damage actions. An injured party has discretion whether to sue for a monetary award or for the restoration of pre-infringement conditions. The latter may, in certain cases, be impossible to achieve, resulting in monetary damages being the only avenue available.

As mentioned above, competition private damage claims are calculated on the basis of the principle of full compensation. One of the methods that has been used in Poland for calculating damages is the differentiating method. This method is based upon a comparison between the current financial positions of an injured party with the



hypothetical situation likely to have existed had no illegal conduct occurred. The differentiating method, similar to other methods of determining the value of economic loss resulting from an infringement, often calls for the assistance, input or verification of an economic expert.

Exemplary damages are not available under Polish law.

As damage awards are based upon the civil law's general structure of liability, it is necessary for a plaintiff to show the loss that results from the infringement, its amount, the defendant's guilt and their nexus.

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### **3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?**

---

Polish law does not provide for punitive or exemplary damages. The amount of a fine imposed by the Polish Competition Authority or by another competition authority cannot be taken into account by a court when deciding upon the proper amount of damages to award. This makes sense, as the Polish law is based upon the rule that damages should compensate the full damages suffered by the injured party.

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## **4 Evidence**

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### **4.1 What is the standard of proof?**

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There is no definition of the standard of proof. Circumstances justifying a claim must be proven. The exception is injunctive relief, in which the standard of proof for a plaintiff is: proof of the probability of the circumstances justifying the motion.

In order to be awarded damages, a plaintiff has to prove all the circumstances and facts supporting its case. If its claim is based on Article 415 of the Civil Code, it has to prove: (i) the occurrence of illegal conduct; (ii) the fault of the person responsible for the damage; (iii) the damage suffered; and (iv) a causal link between the damage and the loss.

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### **4.2 Who bears the evidential burden of proof?**

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The burden of proof relating to a fact rests on the person who attributes legal effects to a given fact. A claimant bears the burden of establishing whether there has been an infringement of competition law and in demonstrating that, "but for" the infringement, loss would not have been suffered. The plaintiff must prove every element of its claim – including all the circumstances justifying the claim and all of the facts to which they attribute legal consequences (concrete loss and precise quantum).

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### **4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in Poland?**

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No, they do not.

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### **4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?**

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The use of evidence and testimonies of experts and economists is not uncommon. An important distinction, however, is the weight of the evidence provided by a private expert; that is, one called by a party, and that of a court-appointed independent expert.

There is no general limitation placed upon a party from hiring an expert to draft and submit an opinion on the claimed violation or damages. Such an expert is referred to as a private or party-appointed expert. The weight of such evidence is low and considered to be on a par with the weight of any witness a party calls. The reason is that the Polish judicial system assumes that a private expert will be 'biased' towards the party that calls (and usually commissions) him or her, and thus such opinions will be considered as part of that party's evidential submissions.

Either party or the court itself may call for the appointment of an independent expert witness. A court-appointed witness may be an individual or a scientific institution. The evidential weight afforded such a witness is high, and in any event, higher than that of a private expert witness. Typically, a court will consult with the parties before choosing and instructing an expert. A court-appointed expert most often submits a written opinion to the court. The selection of the expert as well as the content of the opinion may be challenged by the parties.

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### **4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?**

---

The Polish legal system does not provide for an equivalent of the pre-trial discovery that exists in common law legal systems. There is no obligation under Polish law for parties to exchange or to provide one another with documents or information prior to the commencement of litigation. Article 310 of the Polish Civil Procedure Code permits a court to order certain evidence to be secured pre-trial if, for instance, the production of such evidence at a later date might be impossible or hinder the proceedings. It is in the court's discretion whether to grant a party's motion for evidence from another party in the proceedings or from a third party.

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### **4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?**

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A witness who has been summoned by a court to testify, must appear. A non-excused failure to appear and/or a refusal to answer questions is subject to a fine or being incarcerated. Please note that a witness has the right to refuse to answer a question if by answering, the witness could expose himself or his close relatives to criminal liability or to a direct and substantial material loss.

Witnesses must testify only on facts that are known to them. Every party to the proceedings and the court has the right to question a witness. The form of questioning a witness called by another party, however, is not akin to the method of cross-examination in common-law systems.

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### **4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?**

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Decidedly, a decision issued by the Polish Competition Authority or by the European Commission will be of probative value for a Polish civil court in a follow-on damages action.

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### **4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?**

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Business secrets of a company are protected from certain disclosure during proceedings before the Court of Competition and Consumer

Protection. The court on motion of a party or of its own motion may, by order and to the extent necessary, restrict access to such information by other parties if access to such material would risk disclosure of business secrets or other secrets protected under separate regulations.

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**4.9 Is there provision for the national competition authority in Poland (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?**

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The Polish Competition Authority does not have such a right; however, pursuant to Regulation 1/2003, the European Commission may do so.

## 5 Justification / Defences

**5.1 Is a defence of justification/public interest available?**

A defendant may appeal a decision of the Polish Competition Authority finding a violation of Article 6 of the Competition Act and/or of Article 101 TFEU on the grounds that the conduct had procompetitive benefits that were necessary and proportionate to its charged anticompetitive effects pursuant to Article 8 of the Competition Act and/or Article 101(3) TFEU.

A defendant in a follow-on damage action case is effectively unable to argue such a defence as the issue of liability has been established by the already-issued decision of the Polish Competition Authority or of the European Commission.

**5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?**

Polish law does not expressly provide or exclude the right of a defendant to make a pass-on defence.

**5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?**

Under the Polish Civil Code, if several persons are liable for the commission of a tort, they hold joint and several liability. A plaintiff may sue more than one defendant, and then choose to execute the entire award against one defendant. If a defendant is ordered to pay damages, he or she can sue the other defendants for a refund of each co-defendant’s share of damages. The extent to which a co-defendant is liable for his or her share of damages depends upon the degree to which each co-defendant contributed to the incurred damage.

## 6 Timing

**6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?**

The statute of limitations period for tort damage claims is three years for undertakings and 10 years for individuals. The limitations period begins from the date when a plaintiff first learned of the damage and identified the person responsible for the damage. In

any event, such actions become time-barred after 10 years from the date when the conduct causing the damage occurred, irrespective of the knowledge of a plaintiff.

**6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?**

A breach of competition law claim could take approximately one and a half years to two years in a court of first instance. If an appeal of the first instance court’s decision were filed, there will be an additional two to three years to obtain a final judgment.

## 7 Settlement

**7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?**

Private competition cases can be resolved by a settlement agreement. Settlement agreements in civil proceedings are subject to a court’s authorisation. A court may deny a request to withdraw a lawsuit or a waiver of claims if it finds that the proposed settlement agreement is contrary to the law or principles of social co-existence, or is intended to circumvent the law. In such circumstances, a court may also rule that a settlement between the parties is inadmissible.

**7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted and if so on what basis?**

Please see the response to question 1.5.

## 8 Costs

**8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?**

Litigation costs include court fees, attorneys’ fees and expenses for expert opinions and witnesses. Court fees in the first and second instance are paid by the party filing the claim/appeal. Litigation costs are generally awarded against the losing party. The reimbursement of attorneys’ fees is limited to the amounts set out in the Regulation on Attorneys’ Tariffs and Regulation on Legal Advisors’ Tariffs.

**8.2 Are lawyers permitted to act on a contingency fee basis?**

Polish law does not provide for contingency fees. In addition, the rules of professional conduct of the Polish Bar Association do not permit contingency fees.

**8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?**

Third party funding is not expressly prohibited by Polish law. The authors are unaware if, at the time of drafting this chapter, such funding has been used in civil competition law claims.

## 9 Appeal

### 9.1 Can decisions of the court be appealed?

Yes, first-instance court judgments can be appealed to the relevant court of appeals (if a regional court heard the case in the first instance) or to the relevant regional court (if a district court ruled in the first instance). A verdict of the higher court may be further appealed to the Supreme Court in a cassation. Such an appeal to the Supreme Court can be based only on a breach of material law or procedural errors which substantially influenced the outcome of the case. The Supreme Court accepts only a limited number of appeals for examination (e.g. those constituting a legal precedent or those subject to significant case-law discrepancies).

## 10 Leniency

### 10.1 Is leniency offered by a national competition authority in Poland? If so, is (a) a successful and (b) an unsuccessful applicant for leniency given immunity from civil claims?

An award of leniency by the Chairperson of the Polish Competition Authority does not exempt an undertaking or individual from liability in civil damage actions.

### 10.2 Is (a) a successful and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

A leniency applicant's statement (or statements) to the Polish Competition Authority, similar to any other documents collected by the Authority during its investigatory proceedings, are not available

to civil litigants. Article 73(1) of the Act prohibits the use of 'information received during the course of the Polish Competition Authority's proceedings' from being used in 'any other proceedings conducted pursuant to separate provisions'. The exceptions to this prohibition are listed in Article 71(2) of the Competition Act, but do not include proceedings before civil courts. Decisions issued by the Polish Competition Authority are published on the Authority's website. To date, the Authority's decisions often include detailed descriptions and discussions of the evidence, including the evidence obtained from a leniency applicant.

## 11 Anticipated Reforms

### 11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

There is an expectation that the need to implement the Directive will require changes in the Polish civil and competition laws that will make the ability to sue for a breach of the competition laws more realistic.

### 11.2 Have any steps been taken yet to implement the EU Directive on Antitrust Damages Actions in Poland?

Currently, the Ministry of Justice is working on the implementation of the Directive in Poland. It is expected that the allotted two-year period will be necessary to make changes in the affected laws and procedures in order to introduce the Directive.

### 11.3 Are there any other proposed reforms in Poland relating to competition litigation?

At the time of drafting this chapter, no.



**Dorothy Hansberry-Bieguńska**

Hansberry Tomkiel  
ul. Złota 59  
00-120 Warsaw  
Poland

Tel: +48 607 400 414  
Email: [dorothy@hansberrytomkiel.com](mailto:dorothy@hansberrytomkiel.com)  
URL: [www.hansberrytomkiel.com](http://www.hansberrytomkiel.com)

Ms. Hansberry-Bieguńska worked for 16 years as a senior trial attorney in the U.S. Department of Justice's Antitrust Division. She also served as an advisor to several competition authorities in Eastern and Central Europe. She was the General Counsel and Vice President of UPC Poland, and went on to manage another Polish media company. After heading a competition practice team as a senior partner in a Polish law firm, she and Małgorzata Krasnodębska-Tomkiel, the former Chairman of the Polish Competition Authority, founded Hansberry Tomkiel, a competition law boutique with a strong emphasis on competition litigation. The firm provides strategic advice and representation in complex competition cases in Poland, Brussels and the US.

**Małgorzata Krasnodębska-Tomkiel**

Hansberry Tomkiel  
ul. Złota 59  
00-120 Warsaw  
Poland

Tel: +48 609 390 007  
Email: [malgorzata@hansberrytomkiel.com](mailto:malgorzata@hansberrytomkiel.com)  
URL: [www.hansberrytomkiel.com](http://www.hansberrytomkiel.com)

Ms. Krasnodębska-Tomkiel is a Polish solicitor and doctor of legal sciences. From 2008-2014, she served as the Chairman of the Polish Office of Competition and Consumer Protection (the "Polish Authority"). Previously, she served as a Vice Chairman and as the Legal Department Director. As the Chairman of the Polish Authority, she managed an organisation of over 460 employees, which included nine Regional offices throughout Poland.

She supervised all competition investigatory and court proceedings, and was responsible for the decision-making process in all areas of implementation of the Polish and EU competition laws. During her tenure as Chairman, her office issued over 4,600 decisions. In addition, Ms. Krasnodębska-Tomkiel initiated and oversaw the creation of the current Competition and Consumer Protection Act as well as the extensive amendments to the Act which came into force on January 18, 2015.

As the Chairman of the Polish Authority, she was in charge of the ICN Special Project concerning cooperation with courts and judges, which promoted the global sharing of knowledge to increase the effectiveness of competition enforcement worldwide (with a special emphasis on presenting economic evidence in competition cases before courts).



Hansberry Tomkiel is a unique competition law boutique that combines the experience of Dorothy Hansberry-Bieguńska, a former US antitrust prosecutor, business executive and practitioner, with that of Małgorzata Krasnodębska-Tomkiel, a solicitor and former Chairman of the Polish Office of Competition and Consumer Protection (UOKiK).

The Hansberry Tomkiel firm offers advice and representation in all areas of competition law with a focus on competition-law related litigation.

The law firm works with both Polish and international companies. To ensure a comprehensive and global approach, it cooperates with well-established and respected national as well as international law firms in Europe and the US.

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59 Tanner Street, London SE1 3PL, United Kingdom  
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255  
Email: [sales@glgroup.co.uk](mailto:sales@glgroup.co.uk)

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