

ISSN 1689-9024

YEARBOOK  
*of* ANTITRUST  
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STUDIES

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Vol. 2008, 1(1)



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**Centre of Antitrust and Regulatory Studies  
Faculty of Management, University of Warsaw**

**Fourth Publication of the Publishing Programme**

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Warszawskiego, Warszawa 2008

Cover: Dariusz Kondefer

ISSN 1689-9024

**PUBLISHER**



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**LAYOUT**



ELIPSA Publishing House  
ul. Inflancka 15/198, PL – 00-189 Warszawa  
Tel./Fax + 48.22.635.03.01; + 48.22.635.17.85;  
e-mail: [elipsa@elipsa.pl](mailto:elipsa@elipsa.pl); [www.elipsa.pl](http://www.elipsa.pl)

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## Editorial foreword

The editorial board is pleased to present the first volume of the **YEARBOOK OF ANTITRUST AND REGULATORY STUDIES (YARS)** published by the newly established Centre of Antitrust and Regulatory Studies (CSAiR) which is part of the University of Warsaw Faculty of Management. More detailed information about CSAiR can be found at [www.wz.uw.edu.pl](http://www.wz.uw.edu.pl). The YARS publication series provides a platform for the wider presentation and analysis of the problems and achievements of the Polish antitrust and regulation fields, viewed from both the legal and the economic perspective. The YARS periodical is intended to:

- **present** the most important and current issues surrounding **competition protection**, mainly restrictive practices and mergers but also state aid, and **pro-competitive sector-specific regulation**, mainly in the telecommunications, postal services, energy and transport sectors;
- **focus on** the underlying assumptions, experiences and achievements of competition protection and sector-specific regulation in **Poland**, taking into consideration the consequences of Poland's membership of the European Union, OECD and WTO;
- **contain papers written primarily by Polish authors**: academics, legal practitioners and consultants, judges and civil servants (including Polish staff of the EU institutions), mostly **lawyers and economists**; each volume of YARS will additionally contain a **guest article** written by a foreign lawyer or economist concerning issues of relevance to the subject matter of this periodical;
- **introduce** the Polish antitrust and regulation field **to foreign readers**: academics, legal practitioners, consultants as well as the staff of public authorities and courts dealing with antitrust and regulatory cases in other countries.

This periodical is mainly directed at foreign readers. The editorial board hopes that it will prove of interest particularly because it concerns problems occurring in the “new” part of Europe. Therefore, the contributions contained in this periodical will have to be viewed from the perspective of the fact that 20 years ago Poland entered a profound economic and political transformation process, ultimately joining the European Union 5 years ago. The enactment of the first Polish Antimonopoly Act and the establishment of its first Antimonopoly Authority in 1990 paved the way for Poland to start solving its post-socialist monopolisation problems; trade was liberalised, the freedom of economic activity strongly supported, monopolistic practices were intervened against and a level playing field for competition was created. At the same time, independent regulatory authorities

endorsed with powers of pro-competitive and pro-consumer regulation were created in sectors dominated by incumbents. As academics and practitioners, many of those involved in the creation of CSAiR and YARS have actively participated in this process in a support and advisory capacity; never however losing sight of our own role as competition advocates.

The editorial board hopes that the YARS publication series will contribute to the global legal and economic field of antitrust and regulatory studies. YARS is meant to provide the Polish academic field with an information exchange platform with institutions conducting research and development in this field, especially in the European context. In fact, YARS is intended to be the “Polish connector” for institutions of similar character and focus within the global legal and economic antitrust and regulation community. For this reason, distinguished academic professors and individuals from outside the academic field from Poland as well as abroad will be invited to join the Advisory Board of YARS. As the publisher of YARS, CSAiR remains open to enter into any type of co-operation, be it of an academic or practical nature, with any institutions resembling CSAiR and with any periodicals that are concerned with a similar subject matter to YARS. As the founder and editor-in-chief of YARS, I take full responsibility for the fulfilment of these goals.

Each of the volumes of YARS will contain several original papers which will undergo a review process by two anonymous and independent reviewers. Each of the volumes of the periodical will contain a review of relevant **legislation and jurisprudence, case comments, books reviews, and reports** concerning relevant academic events such as conferences or workshops in the antitrust and regulatory field, including activities of CSAiR. More detailed information about the basic concept of YARS, the review criteria and form, as well as the general call for papers can be found on the official website of CSAiR ([www.wz.uw.edu.pl](http://www.wz.uw.edu.pl)).

YARS 2008 vol. 1(1) contains a guest paper written by Professor Ian S. Forrester QC, and Anthony Dawes. The editorial board appreciates their outstanding contribution. The main part of the current volume of YARS contains six original papers written by Polish authors that deal with key current problems of Polish antitrust or regulation. The editorial board is grateful for all of these contributions, especially considering the special challenges that face authors of a new and foreign language periodical. Additionally, YARS 2008 vol. 1(1) contains EC and Polish legislation and jurisprudence reviews, ten commentaries on key judgments of Polish courts in antitrust and regulatory matters, two book reviews and several reports concerning relevant academic events organised by CSAiR in 2007. The editorial board wishes to thank all of the authors. Finally, the editorial board would like to express its gratitude to Prof. Dr. Alojzy Z. Nowak, the Dean of the University of Warsaw Faculty of Management for his continuing support of this project.

The editorial board wishes that YARS will become an important and useful part of legal and economic libraries concerning antitrust and regulatory issues, providing them with a much needed insight into the workings of a “new” EU Member State.

Warsaw, December 2008.

*Tadeusz Skoczny*  
Editor-in-chief

# G U E S T     A R T I C L E

## **Parallel Trade in Prescription Medicines in the European Union: The Age of Reason?**

by

Ian S. Forrester\* QC and Anthony Dawes\*\*

*“Hamlet:*

*Madam, how like you this play?*

*Queen:*

*The lady doth protest too much, methinks.”*

William Shakespeare, *Hamlet Act 3, scene 2.*

### **Introduction**

European competition law, uniquely in the world, attributes high importance, and uses the competition rules, to achieve market integration. In the early years, EC competition decisions punished manufacturers and resellers who contractually inhibited parallel traders. Such actions may have rewarded “free riders” but also helped to create consumer awareness of cross-border shopping opportunities. However, the case of prescription medicines is different.

Parallel trade in prescription medicines, unlike parallel trade in other products, is driven by discrepancies between how Member States set prices. Member States individually choose whether to set higher prices, which will support research and development (R&D), employment and the emergence of new medicines, or whether to set lower prices and thus reduce the pressure on national health budgets. Neither of these two policies is right or wrong, but they result in very

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\* Queen’s Counsel at the Scots Bar, Visiting Professor, University of Glasgow, White & Case, Brussels. The author is part of the team that represents GlaxoSmithKline (GSK) before the European Court of Justice in *Syfait v. GlaxoSmithKline* and *Sot. Lélos kai Sia E.E. and Others v. GlaxoSmithKline*, as well as in *GlaxoSmithKline Services v. Commission*, however, these are purely personal views.

\*\* White & Case, Brussels. The above disclaimer applies.

different price levels across the EU, thereby creating disparities which parallel traders are able to exploit. That trade, though economically irrational, is as a matter of Community policy, perfectly legal and highly profitable for the wholesalers.

The European pharmaceutical industry has therefore argued that since such price regulation distorts normal conditions of competition in the sector, the industry should be entitled to adopt measures reacting to – but not prohibiting or eliminating – parallel trade, and that such measures should not be considered contrary to the European Community (“EC”) competition rules<sup>1</sup>. By contrast, parallel traders<sup>2</sup>, the European Commission (“the Commission”) and certain Member States<sup>3</sup> have maintained that the pharmaceutical industry cannot seek to adopt measures preventing parallel trade in prescription medicines as to do so would run contrary to one of the fundamental (and unique) goals of EC competition law.

These issues are of great economic importance and legal interest. This paper will therefore review some of these controversies and show that the specific legal and economic context in which the European prescription medicines sector operates sets parallel trade in prescription medicines apart from parallel trade in other goods. We argue that this specific context should entitle pharmaceutical companies to adopt proportionate measures to react to such parallel trade.

## **The specific and legal economic context in which parallel trade in prescription medicines takes place sets the sector apart from trade in other goods**

### **Parallel trade is not needed by payers to reduce the price of prescription medicines**

Parallel trade is conventionally considered to make markets more efficient, which brings about lower prices for consumers and introduces inter-brand price competition. In the case of prescription medicines, however, there is

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<sup>1</sup> See European Federation of Pharmaceutical Industries and Associations (‘EFPIA’), *Competition Policy in the Pharmaceutical Sector – Article 82 EC: Can It Be Applied to Control Sales by Pharmaceutical Manufacturers to Wholesalers?*, Research Project, November 2004, accessible at: <http://www.efpia.eu/Content/Default.asp?PageID=559&DocID=4354>.

<sup>2</sup> See European Association of Euro-Pharmaceutical Companies (‘EAEPIC’), *Understanding Competition in the Distribution of Pharmaceutical Products in Europe: An Analysis of the Application of Article 82 EC to Supply-restrictions in the Pharmaceutical Sector*, September 2005, accessible at: [http://www.eaepc.org/admin/files/eaepc\\_article\\_82\\_study\\_september\\_2005.pdf](http://www.eaepc.org/admin/files/eaepc_article_82_study_september_2005.pdf).

<sup>3</sup> The Republic of Poland has intervened in both the *GlaxoSmithKline Services Unlimited* appeals (Cases C-501/06 P, *GlaxoSmithKline Services Unlimited v Commission* and C-513/06 P, *Commission v GlaxoSmithKline Services Unlimited*, pending) and *Lelos* preliminary references (Joined Cases C-468-478/06 *Sot. Lelos kai Sia EE and Others v. GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton*, judgment of 16 September 2008, not yet reported).

effectively no price competition at patient level. Patients do not “shop around” for the cheapest prescription medicine since the State pays all or most of the cost, and sets the price. So there is no intra-brand competition for prescription medicines as there is for sports equipment, food or washing machines. Patients cannot choose between prescribed medicines on the basis of price: each pharmacy charges the same price in accordance with national regulations. Most of the potential “savings” from parallel trade are therefore consumed by intermediaries at either the wholesale or the pharmacy level. Thus, there is no intra-brand price competition in the normal sense.

Parallel trade is also not needed by governmental payers to reduce the price of prescription medicines. They can do it directly. For example, the United Kingdom (“UK”) imposed unilateral profit reductions of 4.5% in 1999 and of 7% in 2004 on all prescription medicines delivered by pharmaceutical companies. Germany similarly introduced price cuts on the ex-factory prices of prescription medicines not affected by reference pricing of 6% in 2003, of 16% in 2004 and of 6% in 2005. Other Member States have also imposed similar price cuts: for example Italy (5% in 2002, 7% in 2003, 6.8% in 2004 and over 9% in 2006), Spain (6% in 1999/2000, 4.2% in 2004 and 2% in 2006), etc.

Some Member States have also introduced “claw back” regulations in order to recover part of the windfall profits earned by pharmacies and wholesalers via parallel trade. For example, UK intermediaries engaged in parallel imports were not passing on those profits to patients, who pay the same amount (zero or a fixed prescription fee, depending on the patient) regardless of whether or not a product was parallel-imported. Moreover, the UK health system was reimbursing pharmacies that had purchased prescription medicines from parallel traders at the higher “official” rate for original prescription medicines, regardless of the actual price pharmacies paid to wholesalers. A discount recovery scheme, the so-called “claw back”, was therefore established, not in order to encourage parallel trade, but to claw back some of the profits accruing to pharmacists and wholesalers.

Moreover, it seems that the Member States who have put in place such schemes would happily dispense with the alleged savings they receive from parallel trade. In 1999, Mr. Frank Dobson, the then UK Secretary of State for Health, noted that for every pound the National Health System (‘NHS’) saved through the claw back, £ 6 were lost by the British pharmaceutical industry, which was a “bad bargain” for the UK<sup>4</sup>. Equally, in 2005, the then Health Minister, Jane Kennedy MP, stated that the savings attributable to the claw back were less than 1% of the UK budget for prescription medicines<sup>5</sup>.

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<sup>4</sup> See Script No. 2428, 14 April 1999, p. 2.

<sup>5</sup> Mrs. Kennedy stated on 6 June 2005 that savings were £60 million in England and Wales.

Consequently, parallel trade of prescription medicines from one Member State to another does not confer on those who pay for medicines significant advantages. Patients and national governments are largely unaffected in what they expend by whether the prescription medicines they get are parallel-imported or not.

### **The effects of parallel trade of prescription medicines on R&D**

Competition in the prescription medicines sector is based around innovation in the development of new medicines. This should ensure that new products reach the market and benefit consumers<sup>6</sup>. It is only through innovation that pharmaceutical companies are able to discover new medicines.

A pharmaceutical company's return on investment is highly dependent on a limited number of products which are increasingly costly to develop and which enjoy a limited period of exclusivity before patent expiry. Those costs were quantified in 2005 in the region of EUR 800 million per commercialised prescription medicine. As only one or two out of 10,000 compounds initially tested make it to the market, successful prescription medicines must therefore pay for the costs of all the other unsuccessful ones.

Moreover, due to the long lead time between the awarding of a patent for a compound and the grant of a marketing authorisation for the medicine<sup>7</sup>, coupled with substantial delays in obtaining prices or reimbursement approvals, or both in some countries<sup>8</sup>, the period of commercial monopoly where a

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<sup>6</sup> Commission Communication COM(1998) 588 final of 25 November 1998 on the Single Market in Pharmaceuticals, pp. 3, 11, 16.

<sup>7</sup> All medicinal products must be evaluated by the relevant competent authorities and approved before they may be sold. The same levels of quality, safety and efficacy must be demonstrated by all medicinal products and in all Member States. See Article 6 of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, as amended, OJ [2001] L 311/67 and Article 3 of Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, OJ [2004] L 136/1.

<sup>8</sup> In 2004, EFPIA commissioned IMS Health to produce a bi-annual study of delays between marketing authorization and effective patient access to new medicines in different EU Member States. The resulting „Patients' W.A.I.T. Indicator Report" (Waiting to Access Innovative Therapies) reveals substantial differences in patient access to new medicines across the European Union. The latest edition – the Patients' W.A.I.T. Indicator Phase 8 Report published in November 2007 – shows that, for 18 of the 20 European countries covered in the report, 20 to 94% of the medicines that received a marketing authorisation between 1 January 2003 and 31 December 2006 were still not available to patients on 30 June 2007. See <http://www.efpia.eu/content/default.asp?PageID=559&DocID=3658>.

pharmaceutical company may effectively seek to recoup its investment on a product prior to the expiry of patent protection is as little as eight or nine years<sup>9</sup> as when the compound goes off-patent and generic medicines come on to the market, there is a dramatic fall in price. Pharmaceutical companies launch new patented products in order to earn profit which finances today's R&D in order to discover tomorrow's medicines. According to the European Commission's 2007 scorecard of worldwide corporate investment in R&D<sup>10</sup>, the pharmaceutical sector is now the top global investor in R&D and has the highest R&D intensity ratios of all sectors.

In that regard, parallel trade in prescription medicines reduces the profits that pharmaceuticals companies are able to invest in R&D activities. Parallel traders not only make no contribution to pharmaceutical innovation but they reduce the profits of manufacturers in high-cost countries, which, in turn, limits the ability of manufacturers to invest in the R&D of the future.

### **Parallel trade risks delaying the launch of new medicines**

Before a pharmaceutical product can be put on the list for prescription by doctors, its price must be set by the competent public authority. The question arises of whether the company having decided to accept to sell in a Member State like Spain, Greece or Italy at a certain price must also accept to supply at the same price the needs of patients in other countries. If so, this could create a disincentive to launch in low-price countries

“it is entirely conceivable that, if they cannot negotiate a price increase in low-price Member States, dominant pharmaceutical undertakings would respond to an obligation to supply parallel traders within a given Member State by removing existing products from the market in that State, if they were able to do so, and by delaying the launch of new products there. Price differentials would be replaced by a greater fragmentation of the market, with a differing range of products available from State to State”<sup>11</sup>.

Certain patients in some low-priced Member States would therefore have limited or no access to the newest medicines, something which is neither the

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<sup>9</sup> So-called Supplementary Protection Certificates (“SPCs”) prolong patent duration, but it remains true that the overall period is short. See Council Regulation No (EEC) 1768/92, of 18 June 1992, concerning the creation of a supplementary protection certificate for medicinal products, OJ [1992] L 182/1.

<sup>10</sup> Accessible at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1448&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>11</sup> Opinion of Advocate General Jacobs delivered on 27 October 2004 in Case C-53/03, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v. GlaxoSmithKline plc and GlaxoSmithKline AEVE*, [2005] ECR I-4609, para. 95.

aim of the pharmaceutical industry, nor should it be that of EC competition law. Indeed, as the ECJ noted in *Lelos*,

“in the light of the Treaty objectives to protect consumers by means of undistorted competition and the integration of national markets, the Community rules on competition are also incapable of being interpreted in such a way that, in order to defend its own commercial interests, the only choice left for a pharmaceuticals company in a dominant position is not to place its medicines on the market at all in a Member State where the prices of those products are set at a relatively low level”<sup>12</sup>.

Similarly, if it were impossible for pharmaceutical companies to adopt proportionate measures to react to parallel trade, this might have the effect of exporting the pricing policies of Member States which set prices at a lower level and imposing them on Member States which set prices at a higher level in order to support R&D, employment and the emergence of new medicines.

As a result, while a pharmaceutical company is free to put on the market a product in a Member State on the basis of the price proposed by the Member State authorities, it cannot be the case that, if it has chosen to put a product on the market at a given price, it must then accept to supply patients across the EU at that same price.

### **Parallel trade and increased risks relating to the entry into the legitimate supply chain of counterfeit medicines**

There have also been a number of recent controversies concerning parallel trade and the entry into the legitimate supply chain of counterfeit prescription medicines. According to the Commission, there has been a sharp increase in seized counterfeit medicines in recent years. Statistics report the seizure of 2 711 410 medicinal products at EU customs borders in 2006, an increase of 384% compared to 2005<sup>13</sup> and of 4 081 056 in 2007, a further increase of 51% compared to 2006<sup>14</sup>.

Counterfeit medicines are commonly made in countries outside the EU. Sometimes they contain diluted active ingredient and sometimes they contain

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<sup>12</sup> Judgment in Joined Cases C-468/06-478/06, para. 68.

<sup>13</sup> Report on Community customs activities on counterfeit and piracy – results at the European border – 2006, accessible at: [http://ec.europa.eu/taxation\\_customs/resources/documents/customs/customs\\_controls/counterfeit\\_piracy/statistics/counterf\\_comm\\_2006\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/counterf_comm_2006_en.pdf)

<sup>14</sup> Report on Community customs activities on counterfeit and piracy – results at the European border – 2007, accessible at: [http://ec.europa.eu/taxation\\_customs/resources/documents/customs/customs\\_controls/counterfeit\\_piracy/statistics2007.pdf](http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics2007.pdf)

no active ingredient at all. Common targets for such fraudulent activity are prescription medicines for cardiovascular diseases or erectile dysfunction.

The multiplicity of repackaging and re-boxing and re-labelling procedures which parallel trade involves can make it easier for fraudulent operators to introduce into the supply chain boxes of product which look almost identical to the genuine product to the unpractised eye. For example, on 24 May 2007, the UK regulatory authority (the Medicines and Healthcare products Regulatory Agency or MHRA) issued four separate Drug Alerts following the discovery of multiple batches of counterfeit cancer, cardiovascular and psychiatric prescription medicines in the parallel supply chain in the UK. All the counterfeit tablets had been supplied in French livery and the packaging had been over-labelled and/or replaced for sale in the UK as parallel imported products<sup>15</sup>.

The risk of counterfeits entering the legitimate supply chain is an increasingly serious issue, so serious that the Commission, as part of the broader public debate on the future of pharmaceuticals in Europe, is analysing “patients’ safety aspects of prescription medicines in the distribution chain, including aspects related to parallel trade and to counterfeiting of prescription medicines”<sup>16</sup>. Moreover, as Enterprise Commissioner Verheugen stated on 15 January 2008, in response to a parliamentary question<sup>17</sup>, the first results of the Commission’s study show that the repackaging linked to parallel trade poses a “considerable risk” for the safety of the patients. He explained that “[t]he reasons for that are numerous e.g. there are problems with the packaging and labelling of the products as well as with product recalls, the complexity of the distribution channels and the supply.” As a result, the Commissioner announced that the Commission will prioritise this issue and issue a legislative proposal to tackle counterfeits, which is scheduled for adoption before the end 2008.

Finally, the Commission has also recently published the results of a study commissioned in 2006 from Europe Economics<sup>18</sup>, which confirms that the “system of parallel trade in patented medicines under present legislation is

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<sup>15</sup> For more details, see C. Stothers, “Counterfeit Pharmaceuticals Enter The Parallel Supply Chain” (2007) 2 *Journal of Intellectual Property Law & Practice* 797.

<sup>16</sup> *The Future of Pharmaceuticals for Human Use in Europe*, accessible at: [http://ec.europa.eu/enterprise/pharmaceuticals/pharmacos/docs/doc2007/2007\\_07/consultationpaper-2007-07-19.pdf](http://ec.europa.eu/enterprise/pharmaceuticals/pharmacos/docs/doc2007/2007_07/consultationpaper-2007-07-19.pdf).

<sup>17</sup> Oral Question for Question Time at the part-session in January 2008 pursuant to Rule 109 of the Rules of Procedure of the European Parliament by Mairead McGuinness MEP, H-0980/07, accessible at: <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20080115&secondRef=ITEM-017&language=EN#2-245>

<sup>18</sup> *Safe Medicines through Parallel Trade*, 13 May 2008, accessible at: [http://ec.europa.eu/enterprise/pharmaceuticals/pharmacos/docs/doc2008/2008\\_10/report13may\\_corr.pdf](http://ec.europa.eu/enterprise/pharmaceuticals/pharmacos/docs/doc2008/2008_10/report13may_corr.pdf)

damaging to patients in a number of ways”<sup>19</sup> and that these “main adverse results are systemic, and not the result of failings by individual businesses or regulators”<sup>20</sup>. The study therefore concludes that

“the clearly preferable policy option would be to legislate to prohibit repackaging and re-labelling, and to ensure that the original packaging is not opened before the pack reaches the patient. This would result in a dramatic reduction in the level of parallel trade and in the loss or redeployment of some 10,000 jobs. It would however remove the harm to patients that results from parallel trade, improve the operation of the EU Single Market by making it possible for increased supplies of medicines to be purchased by healthcare providers in lower-income Member States, and contribute positively to other EU objectives including the Lisbon Strategy for a more competitive economy, improved environmental policy, and better regulation”<sup>21</sup>.

We submit that it is interesting to consider whether the risks to patient health and safety of widespread and unsupervised repackaging of prescription medicines are outweighed by the economic advantages conferred upon those engaging in parallel trade. The precautionary principle has regularly been invoked to justify prohibitions even where there are modest health risks to the public<sup>22</sup>.

### **The specific and legal economic context of the European prescription medicines sector entitles companies to adopt proportionate measures to react to the challenges created by parallel trade**

The case law of both Community and national courts has increasingly recognised that, in light of the economic reality, pharmaceutical companies are entitled to appropriate measures responding to the unusual problems presented by parallel trade in prescription medicines.

#### **Relevant Community law precedents**

##### ***Bayer (Adalat)***

The first noted EC judicial pronouncement in the modern phase which we will describe was *Bayer (Adalat)* where the Court of First Instance (“CFI”) called into question the appropriateness of the Commission stretching the

<sup>19</sup> Para. 4 of the Executive Summary of the Study.

<sup>20</sup> Para. 7 of the Executive Summary of the Study.

<sup>21</sup> Para. 10 of the Executive Summary of the Study.

<sup>22</sup> Communication from the Commission on the Use of the Precautionary Principle, COM(2000) 1 final. For more discussion of the precautionary principle, see I. Forrester, “The Dangers of Too Much Precaution” [in:] M. Hoskins, W. Robinson (eds.), *A True European: Essays for Judge David Edward*, Oxford/Portland, 2003.

concept of agreement under Article 81(1) EC for the purpose of attempting to bring about market integration in the prescription medicines sector.

In the 1980s and early 1990s, Bayer pursued a system of limiting supplies of its medicinal product Adalat to certain wholesalers in France and Spain. Bayer's system consisted of refusing or reducing orders from "notorious" individual wholesalers, with a view to denying to likely exporters supplies they would sell in higher-price countries. Thus the policy was intended to reduce exports, and this intention was known in the marketplace. Bayer's posture would for many lawyers have appeared risky on the theory that its offers to sell were subject to an unwritten but well known term.

Indeed, these risks were confirmed in January 1996 when, the Commission adopted a decision<sup>23</sup>, considering that there was an unwritten export prohibition well known and reluctantly agreed to by wholesalers, which had been part of the "continuous commercial relations" between Bayer France and its wholesalers since at least 1991, and between Bayer Spain and its wholesalers since at least 1989. The Commission asserted there was an agreement between Bayer and its wholesalers in that Bayer's policy was conveyed to the traders by many indicators.

In its judgment, the CFI overturned the Commission's findings, making clear that.

"the proof of an agreement between undertakings within the meaning of Article [81(1)] of the Treaty must be founded upon the direct or indirect finding of the existence of the subjective element that characterises the very concept of an agreement, that is to say a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market, irrespective of the manner in which the parties' intention to behave on the market in accordance with the terms of that agreement is expressed (...) The Commission misjudges that concept of the concurrence of wills in holding that the continuation of commercial relations with the manufacturer when it adopts a new policy, which it implements unilaterally, amounts to acquiescence by the wholesalers in that policy, although their de facto conduct is clearly contrary to that policy."<sup>24</sup>

Paragraph 174 of the judgment goes even further:

"It follows that in the context of that article (Article 81(1), formerly 85(1)), the effects on the conduct of an undertaking on competition within the common market may be examined only if the existence of an agreement, a decision of an association of undertakings or a concerted practice within the meaning of Article [81(1)] of the Treaty has already been established (...) It follows that the aim of that provision is

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<sup>23</sup> Commission Decision 96/478/EC of 10 January 1996 relating to a proceeding under Article [81] of the EC Treaty (Case IV/34.279/F3 – *Adalat*), OJ [1996] L 201/1.

<sup>24</sup> Case T-41/96, *Bayer AG v. Commission*, [2000] ECR II-3383, para. 173 of the judgment.

not to eliminate obstacles to intra-Community trade altogether; it is more limited, since only obstacles to competition set up as a result of a concurrence of wills between at least two parties are prohibited by that provision.”

The CFI also criticised the Commission for stretching the scope of Article 81(1) EC to bring about market integration in the prescription medicines sector. The CFI stated that “under the system of the Treaty it is not open to the Commission to attempt to achieve a result, such as the harmonisation of prices in the medicinal products market, by enlarging or straining” the scope of the competition rules, “especially since that Treaty gives the Commission specific means of seeking such harmonisation where it is undisputed that large disparities in the prices of medicinal products in the Member States are engendered by the differences existing between the state mechanisms for fixing prices and the rules for reimbursement, as is the case here”<sup>25</sup>. The CFI also considered that the Commission’s conviction that parallel trade would harmonise prices for prescription medicines was “devoid of all foundation”<sup>26</sup>.

On appeal, the European Court of Justice (“ECJ”) upheld the CFI’s judgment<sup>27</sup>, ruling more cautiously that an agreement for the purposes of Article 81(1) EC “cannot be based on what is only the expression of a unilateral policy of one of the contracting parties, which can be put into effect without the assistance of others”<sup>28</sup>. Moreover, the mere concomitant existence of an agreement which is in itself neutral, and a measure restricting competition that has been imposed unilaterally, does not amount to an agreement prohibited by Article 81(1) EC. Consequently, the ECJ held that

“the mere fact that a measure adopted by a manufacturer, which has the object or effect of restricting competition, falls within the context of continuous business relations between the manufacturer and its wholesalers is not sufficient for a finding that such an agreement exists”<sup>29</sup>.

The result of Bayer (Adalat) is therefore that pharmaceutical companies may reduce the quantities of products they supply to wholesalers, provided that they do so unilaterally.

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<sup>25</sup> Ibid, para. 179.

<sup>26</sup> Ibid, para. 181.

<sup>27</sup> Joined Cases C-2/01 P and C-3/01 P, *Bundesverband der Arzneimittel-Importeure eV and Commission v. Bayer AG*, [2004] ECR I-23.

<sup>28</sup> Ibid, para. 101.

<sup>29</sup> Ibid, para. 141.

### *GSK Spain*

In June 2006, the CFI partially annulled a Commission decision<sup>30</sup> that had found that Glaxo Wellcome's, GlaxoSmithKline's ("GSK") predecessor, General Sales Conditions in Spain, which had been notified to the Commission, had the object and the effect of restricting competition and GSK did not demonstrate that they contributed to the promotion of technical progress, the first necessary condition for exemption under Article 81(3) EC.

This has been referred to as the "dual pricing" case, but this is a misnomer, as in reality GSK only set the price of prescription medicines either not reimbursable or not sold in Spain. By contrast, the price for prescription medicines which are reimbursable and sold in Spain is set under Article 100 of Spanish Law 25/1990 (now Article 90 of Spanish Law 29/2006) i.e. by the Spanish State and not by GSK.

In its judgment<sup>31</sup>, the CFI, after noting that competition between pharmaceutical companies is based on innovation rather than price<sup>32</sup>, considered that the applicability of Article 81(1) EC cannot depend merely on whether an agreement may limit parallel trade but on whether its object or effect may limit competition to the detriment of the final consumer<sup>33</sup>.

"Consequently, while it is accepted that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition, that applies in so far as the agreement may be presumed to deprive final consumers of those advantages ... However, if account is taken of the legal and economic context in which GSK's General Sales Conditions are applied, it cannot be presumed that those conditions deprive the final consumers of medicines of such advantages. In effect, the wholesalers, whose function, as the Court of Justice has held, is to ensure that the retail trade receives supplies with the benefit of competition between producers are economic agents operating at an intermediate stage of the value chain and may keep the advantage in terms of price which parallel trade may entail, in which case that advantage will not be passed on to the final consumers"<sup>34</sup>.

The CFI further noted that price differences between Member States are a structural consequence of differences in national regulatory regimes<sup>35</sup>.

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<sup>30</sup> Commission Decision 2001/791/EC of 8 May 2001 (*Glaxo Wellcome*), OJ [2001] L 302/1.

<sup>31</sup> Case T-168/01, *GlaxoSmithKline Services Unlimited v Commission*, [2006] ECR II-2969.

<sup>32</sup> *Ibid.*, para. 106.

<sup>33</sup> *Ibid.*, para. 119.

<sup>34</sup> *Ibid.*, paras. 121–122.

<sup>35</sup> *Ibid.*, para. 127.

“[T]he prices of the products in question, which are subject to control by the Member States, which fix them directly or indirectly at what they deem to be the appropriate level, are determined at structurally different levels in the Community and, unlike the prices of other consumer goods to which the Commission referred in its written submissions and at the hearing, such as sport items or motor cycles, are in any event to a significant extent shielded from the free play of supply and demand. That circumstance means that it cannot be presumed that parallel trade has an impact on the prices charged to the final consumers of medicines reimbursed by the national sickness insurance scheme and thus confers on them an appreciable advantage analogous to that which it would confer if those prices were determined by the play of supply and demand”<sup>36</sup>.

The CFI therefore concluded that the price of prescription medicines, set by national governments in function of their own choices concerning budget, public health, encouragement of investment and other public policy considerations lies “structurally outside the play of supply and demand and is established at structurally different levels throughout the Community”<sup>37</sup>. This means that, according to the CFI, “[a]s the prices of the medicines concerned are to a large extent shielded from the free play of supply and demand owing to the applicable regulations and are set or controlled by the public authorities, it cannot be taken for granted at the outset that parallel trade tends to reduce those prices and thus to increase the welfare of final consumers”<sup>38</sup>.

Consequently, while an agreement is caught by Article 81(1) EC in so far as it may be presumed to harm final consumers, the CFI found that this cannot be assumed in relation to the parallel trade of prescription medicines in Europe. Rather, the specific context of the prescription medicines sector makes it necessary for the Commission to undertake an effects-based analysis under Article 81(1) EC.

In that regard, while the CFI ultimately upheld the Commission’s subsidiary conclusion that the notified agreement restricted competition by effect<sup>39</sup>, the CFI went on to annul the part of the Commission Decision that rejected GSK’s request for an exemption under Article 81(3) EC, because the Commission had not appropriately addressed GSK’s “relevant, reliable and credible” arguments about the effects of parallel trade on its R&D in perhaps the most innovation-driven industry<sup>40</sup>.

In so doing, the Court discussed at some length the special characteristics of the prescription medicines sector, in particular, the importance of competition

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<sup>36</sup> *Ibid*, paras. 133 and 134.

<sup>37</sup> *Ibid*, para. 141.

<sup>38</sup> *Ibid*, para. 147.

<sup>39</sup> *Ibid*, paras. 165–192.

<sup>40</sup> *Ibid*, para. 263 et seq.

by innovation. The CFI accepted that parallel trade represented a clear reduction of the possibility of pharmaceutical companies to invest more in R&D:

“[P]arallel trade has the effect of reducing [research & development-destined] income, to an uncertain but real degree. That practice, which economists know as ‘free riding’, is characterised by the fact that the intermediary leaves the role which he traditionally plays in the value chain and becomes an arbitrageur and thus obtains a greater part of the profit. The legitimacy of that transfer of wealth from producer to intermediary is not in itself of interest to competition law, which is concerned only with its impact on the welfare of the final consumer. In so far as the intermediary participates in intrabrand competition, parallel trade may have a pro-competitive effect. In the medicines sector, however, that activity is also seen in a special light, since it does not bring any significant added value for the final consumer”<sup>41</sup>.

By contrast, if GSK were allowed to impose certain limitations on parallel trade, these would be beneficial for innovation:

“The fact that the profit is retained by the producer will in all likelihood give rise to a gain in efficiency by comparison with the situation in which the profit is shared with the intermediary, because a rational producer which is able to ensure the profitability of its innovations and which operates in a sector characterised by healthy competition on innovation has every interest in reinvesting at least a part of its surplus profit in innovation”<sup>42</sup>.

The CFI’s judgment is currently under appeal to the ECJ<sup>43</sup>.

### *Syfait*

*Syfait* was the first case in which the ECJ was requested to provide guidance on the application of Article 82 EC to unilateral conduct of pharmaceutical companies intended to react to parallel trade in prescription medicines.

The case stemmed from complaints lodged in 2000 and 2001 with the Hellenic Competition Commission (“HCC”) by a number of wholesalers, alleging that by limiting supplies of certain drugs from its Greek subsidiary, GSK was abusing its dominant position, contrary to Article 82 EC. The wholesalers in question had been addressing ever-larger orders for prescription medicines to GSK Greece, mainly for export, to exploit the price differentials in prescription medicines between EU Member States. In 2000 GSK, for one

<sup>41</sup> Ibid, para. 273.

<sup>42</sup> Ibid, para. 274.

<sup>43</sup> Cases C-501/06 P, *GlaxoSmithKline Services Unlimited v Commission*; C-513/06 P, *Commission v GlaxoSmithKline Services Unlimited*; C-515/06 P, *EAEPC v GlaxoSmithKline Services Unlimited*; and C-519/06 P, *Aseprofar v GlaxoSmithKline Services Unlimited*.

product, had reached the point of supplying seven times Greek demand, yet shortages persisted on the Greek market. GSK therefore took the decision to suspend supplies to wholesalers for a few weeks to ensure that pharmacy supplies were restored. Subsequently, it decided to supply wholesalers with quantities corresponding to Greek annual consumption plus a safety margin (amounting to 25% of annual Greek consumption).

The HCC referred the case to the ECJ, asking whether the refusal by GSK to supply, in unlimited quantities, all the orders placed by wholesalers, could constitute an abuse of a dominant position, in light of the fact that “parallel trade is particularly profitable for the wholesalers because of the different prices, resulting from State intervention, in the Member States of the European Union, that is to say by the fact that pure conditions of competition do not prevail in the pharmaceuticals market, but a regime which is governed to a large extent by State intervention”.

In his Opinion, Advocate General Jacobs considered that a pharmaceutical undertaking holding a dominant position does not necessarily abuse that position by refusing to meet in full the orders sent to it by wholesalers, even if that action will limit parallel trade. In reaching this conclusion, the Advocate General referred in particular to:

- the pervasive and diverse state intervention in the pricing of prescription medicines, which is responsible for price differentials between the Member States<sup>44</sup>;
- the regulation by the Community and the Member States of the distribution of prescription medicines, which imposes nationally demarcated obligations upon pharmaceutical undertakings and wholesalers to ensure the availability of adequate stocks of those products<sup>45</sup>;
- the potentially negative consequences of parallel trade for competition, the common market, and incentives to innovate, given the economic characteristics of the pharmaceutical industry<sup>46</sup>; and
- the fact that end consumers of prescription medicines may not in all cases benefit from parallel trade, and that public authorities in the Member States, as the main purchasers of such products, cannot be assumed to benefit from lower prices, given that they are themselves responsible for fixing prices within their territories<sup>47</sup>.

As a result, the Advocate General concluded that because of the specific characteristics of the European prescription medicines sector, GSK could not

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<sup>44</sup> Opinion of Advocate General Jacobs delivered on 27 October 2004, paras. 77–79.

<sup>45</sup> *Ibid.*, paras. 80–82.

<sup>46</sup> *Ibid.*, paras. 89–95.

<sup>47</sup> *Ibid.*, paras. 96–99.

be said to have abused its dominant position<sup>48</sup>. Furthermore, the Advocate General agreed that the parallel trade of prescription medicines does not necessarily result in any substantial benefits for ultimate consumers of such medicines.

The Grand Chamber of the ECJ never proceeded to a final ruling on the merits of that case, since it considered the reference to be inadmissible on the grounds that the HCC was not a court or tribunal for the purpose of Article 234 EC. Advocate General Jacobs's Opinion was, however, followed by the Hellenic Competition Committee in its decision of 1 September 2006 on the merits<sup>49</sup>. It held that GSK had not breached Article 82 EC and more specifically it had not abused its dominant position by refusing to supply the wholesalers to fuel parallel exports: there was no abuse of dominance, either for the October 2000-February 2001 period, when GSK had put in effect a system of direct supply of pharmacies and hospitals, or for the period after February 2001, when it had resumed supplies to wholesalers on the basis of a quota system.

The HCC's conclusion as to the non-applicability of Article 82 EC was based on, *inter alia*, the following reasons:

“(a) the fact that in the European pharmaceutical sector no strict competition conditions apply, due to state interventionism in the price-fixing of pharmaceuticals, (b) the percentage by which the quantities supplied by the dominant undertaking exceeded national consumption, (c) the effect of parallel trade on the profit of the dominant undertaking, (d) the lack of any benefit for the end consumer entailed by parallel trade and (e) the overall economic and regulatory context of the decision”<sup>50</sup>.

### *Lelos*

In 2006, the Athens Civil Court of Appeal referred to the ECJ, the same questions, based on the same facts, as those already referred by the HCC in *Syfait*.

The case was argued before the Grand Chamber of the ECJ in January 2008 and Advocate General Colomer delivered his Opinion on 1 April 2008. While he agreed with Advocate General Jacobs that there can be no *per se* abuse of Article 82 EC, even where a dominant undertaking has deliberately sought to restrict parallel trade, Advocate General Colomer contended that such a subjective intention “*can often indicate that an anticompetitive outcome*

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<sup>48</sup> Ibid, paras. 101–102

<sup>49</sup> Decision 318/V/2006 of 1 September 2006, accessible at: <http://www.epant.gr/Apofaseis.php3>.

<sup>50</sup> Ibid, Section VI.i.b, point 3.

*is being sought*<sup>51</sup>” and may constitute an aggravating factor contributing to the presumption that such behaviour was abusive<sup>52</sup>.

Advocate General Colomer also refused to accept that state intervention through price setting or the imposition of public service obligations to ensure adequate national supply of patients may constitute an objective justification for such an abuse. On the contrary, the Advocate General considered that even though “the pharmaceuticals market does not operate under normal competitive conditions”, pharmaceutical companies retain a certain margin of manoeuvre to negotiate prices with the Member States<sup>53</sup> and that the duty to ensure adequate supplies to national patients does not justify cutting off supplies to “rival” wholesalers, because the needs of patients in Member States are not subject to sudden change and statistics for various illnesses are reliable, offering companies a degree of predictability which enables them to adapt to market demands<sup>54</sup>.

Finally, Advocate General Colomer rejected as “misleading” the contention that the protection of a pharmaceutical company’s legitimate business interests may justify its conduct and that there is any causal link between the losses sustained by pharmaceutical companies due to parallel trade and their investment in R&D. In his words, these arguments were “aimed only at seducing public opinion, which is sensitised to the vital importance of R&D for competitiveness, by shifting the focus from business rivalry to research policy.”<sup>55</sup> The Advocate General felt that GSK had not indicated any positive effects resulting from its refusal to supply prescription medicines to Greek wholesalers<sup>56</sup>.

The ECJ’s judgment was therefore awaited with particular interest as the Court had before it contrasting Opinions from two of its Advocate Generals on the same legal issue.

On the one hand, the ECJ considered some of the policy arguments which the pharmaceutical industry has traditionally put forward in order to justify imposing limits on parallel trade.

First, the judgment confirms that a pharmaceutical company is abusing its dominant position if it refuses to meet ordinary orders by wholesalers of prescription medicines in order to prevent parallel exports. This principle is not new, although it was extensively commented upon<sup>57</sup>.

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<sup>51</sup> *Lelos*, Opinion of 1 April 2008, para. 49.

<sup>52</sup> *Ibid*, paras. 50–51.

<sup>53</sup> *Ibid*, para. 93.

<sup>54</sup> *Ibid*, para. 96.

<sup>55</sup> *Ibid*, para. 113.

<sup>56</sup> *Ibid*, para. 118.

<sup>57</sup> Judgment in Joined Cases C-468/06-478/06, para. 66.

Second, the ECJ found that parallel trade does create some benefits both by exerting “pressure on prices” and opening up an alternative source of supply for purchasers<sup>58</sup>.

Third, the ECJ doubted that state intervention in the prescription medicines sector means that pharmaceutical companies have no influence upon the level at which prices are set and that such intervention entirely removes the prices of prescription medicines from the forces of supply and demand<sup>59</sup>.

Fourth, the Court considered that “where a medicine is protected by a patent which confers a temporary monopoly on its holder, the price competition which may exist between a producer and its distributors, or between parallel traders and national distributors, is, until the expiry of that patent, the only form of competition which can be envisaged”<sup>60</sup>.

Fifth, in situations where parallel exports lead to shortages in the Member State of export, it is for the competent health authorities of that Member State, and not for dominant pharmaceutical companies, to take the appropriate and proportionate steps to address such shortages<sup>61</sup>.

On the other, the judgment contains important and welcome statements confirming that pharmaceutical companies are entitled to adopt measures responding to the unusual problems presented by parallel trade in prescription medicines.

First, the Court accepted that the “price differences between Member States for certain medicines are ... the result of the different levels at which the prices and/or the scales to be applied to those medicines are fixed” by the State and not due to other parameters, such as currency fluctuations<sup>62</sup>, something which the European Commission and parallel traders had not been willing to concede.

Second, the Court rejected the argument that once a pharmaceutical company decides to put its product on the market in a certain Member State at the price set by the State, it can no longer take any measures to protect its interests:

“In the light of the Treaty objectives to protect consumers by means of undistorted competition and the integration of national markets, the Community rules on competition are also incapable of being interpreted in such a way that, in order to defend its own commercial interests, the only choice left for a pharmaceuticals company in a dominant position is not to place its medicines on the market at all

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<sup>58</sup> Ibid, paras. 53–56.

<sup>59</sup> Ibid, paras. 61–63.

<sup>60</sup> Ibid, para. 64.

<sup>61</sup> Ibid, para. 75.

<sup>62</sup> Ibid, para. 59.

in a Member State where the prices of those products are set at a relatively low level”<sup>63</sup>.

Finally, the Court made clear that a dominant pharmaceutical company must be in a position to take steps that are reasonable and in proportion to the need to protect its own commercial interests:

“although a pharmaceuticals company in a dominant position, in a Member State where prices are relatively low, cannot be allowed to cease to honour the ordinary orders of an existing customer for the sole reason that that customer, in addition to supplying the market in that Member State, exports part of the quantities ordered to other Member States with higher prices, it is none the less permissible for that company to counter in a reasonable and proportionate way the threat to its own commercial interests potentially posed by the activities of wholesalers which wish to be supplied in one Member State with significant quantities of products that are essentially destined for parallel export”<sup>64</sup>.

In particular, a dominant pharmaceutical company must be able to protect its own commercial interests when confronted with orders that are out of the ordinary, in light of both the previous business relations and the requirements of the market in the relevant Member State:

“a producer of pharmaceutical products must be in a position to protect its own commercial interests if it is confronted with orders that are out of the ordinary in terms of quantity. Such could be the case, in a given Member State, if certain wholesalers order from that producer medicines in quantities which are out of all proportion to those previously sold by the same wholesalers to meet the needs of the market in that Member State”<sup>65</sup>.

**Relevant national decisions and academic literature also support the proposition that the pharmaceutical industry is entitled to take reasonable and proportionate steps to respond to parallel trade**

National courts and competition authorities across the EU have also concluded that the pharmaceutical industry is entitled to take reasonable and proportionate steps to respond to parallel trade.

In France, the Competition Council has found that “the correct application of competition law requires to take into account completely the existence of price regulation”<sup>66</sup> and that accordingly “we fail to see what justification

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<sup>63</sup> Ibid, para. 68.

<sup>64</sup> Ibid, para. 71.

<sup>65</sup> Ibid, para. 76.

<sup>66</sup> Case 05-D-72 of 20 December 2005 *relative à des pratiques mises en oeuvre par divers laboratoires dans le secteur des exportations parallèles de médicaments*, para. 269, authors’ own

would allow an economic operator to impose on a producer who does not dispose of the freedom to fix the price of its products intended to be used on a territory, to apply in a general way the same terms of sale for products intended exclusively for other territories where the conditions of market are different”<sup>67</sup>.

This decision was confirmed by the Paris Court of Appeal, which found that “in light of the particular situation that prevails in France, it is not excessive for a pharmaceutical company to defend its commercial interests by refusing to deliver its products set at a fixed price administered to an operator who sells no product on the national market for which the price has been fixed and who seeks to obtain this product only on condition that the price fixed by the authorities in view of its use on in the national territory allows it to resell the product) on a foreign market with profit”<sup>68</sup>.

In Spain, the Competition Tribunal<sup>69</sup> has held that it is not right to say that “pharmaceutical companies enjoy independence in freely determining their prices, because Spanish legislation is governed by a system of price intervention of pharmaceuticals, which must be authorised by the Administration in all stages of their marketing”. Moreover, a judgment of Spain’s second highest court (the Audiencia Nacional), has declared that “parallel exports mainly benefit wholesalers, who obtain disproportionate, unexpected and exceptionally high profits (“wind-fall profits”). In other terms, parallel exports do not constitute any direct benefit for consumers that pay the same price for the pharmaceutical product, whether it originates or not from a parallel import”<sup>70</sup>.

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translation from the French original: “*la bonne application du droit de la concurrence nécessite de prendre pleinement en compte l’existence d’une réglementation des prix*”.

<sup>67</sup> *Ibid*, para. 267, authors’ own translation from the French original: “*on ne voit pas quelle justification permettrait à un opérateur économique d’imposer à un producteur qui ne dispose pas de la liberté de fixer ses prix pour les produits destinés à être utilisés sur un territoire, d’appliquer d’une manière générale les mêmes conditions de vente pour des produits destinés exclusivement à d’autres territoires où les conditions de marché sont différentes*”.

<sup>68</sup> 1st Chamber, Section H, Judgment of 23 January 2007, authors’ own translation from the French original: “*au vu de la situation particulière que prévaut en France (...) il n’est pas abusif pour un laboratoire de défendre ses intérêts commerciaux en refusant de livrer ses produits à un prix administré à un opérateur qui ne vend aucun produit sur le marché national pour lequel la réglementation du prix a été élaborée et qui ne recherche ce produit qu’à la condition que le prix fixé par les pouvoirs publics en vue d’un usage sur le territoire national lui permette de le revendre sur un marché étranger avec profit*”.

<sup>69</sup> Resolution of 5 December 2001, Expte. R 488/01, *Laboratorios Farmacéuticos*.

<sup>70</sup> Judgment of the Audiencia Nacional of 26.1.2005 (appeal nº 364/2001), authors’ own translation from the Spanish original: “*las exportaciones paralelas benefician principalmente a los mayoristas, que obtienen ganancias desproporcionadas, inesperadas y excepcionalmente elevadas (“wind-fall profits”). Es decir, las exportaciones paralelas no representan ningún beneficio directo*”.

In Greece, a series of decisions and judgments have also made similar findings.

First, as noted above, the HCC, in the aftermath of the *Syfait* preliminary reference, duly adopted Advocate General Jacobs's findings, and concluded that there was no Article 82 EC violation and that GSK had not abused its dominant position by introducing a quota system for its supply of prescription medicines to Greek wholesalers.

Second, the Athens Court of Appeals reversed the only ruling out of 17 cases, which had found that GSK had abused its dominant position under both Greek and EC competition law by refusing to supply Pharmacon D. Politis, a local wholesaler, with certain prescription drugs destined for export to the United Kingdom<sup>71</sup>. The Court of Appeals held that GSK's conduct was not abusive and placed emphasis on the fact that the Greek State set the price for all prescription drugs at the lowest level in the EU. In the Court's view, no negative effects on the Greek market were proven and parallel trade brought no benefit to final consumers. At the same time, according to the Court, GSK had to protect its legitimate interests. Prices were set only for Greece, in the Court's words.

Third, and in a separate development, the Greek Supreme Court, (the "Areios Pagos") handed down its judgment in the *Servier*<sup>72</sup> case, in which it concluded that Servier's quota schemes were not a violation of Greek/EC competition law. The Supreme Court noted *inter alia* the profits that the wholesalers were making due to the fact that the Greek State had set the prices of prescription medicines at the lowest rate in the EU, that there were some shortages in Greece due to the soaring parallel exports and that even the reduced quotas supplied far exceeded Greek demand. The Supreme Court concluded that "the refusal to supply by [Servier] was neither unreasonable, nor abusive, nor contrary to the good morals". Servier's quota system

"was not intended to restrict competition but rather to protect its economic interests, which were encroached upon by certain wholesalers through their parallel exports, and thus to secure the satisfaction of the local needs of the medicines' import countries, which is not in the least unreasonable or illegal. If this were considered unreasonable, it would be possible for [Servier] to be required to supply unlimited quantities of its products to the appellants, at the free will of the latter, thus essentially supplying all EU-destined products through them, which is of course unacceptable".

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*para los consumidores que pagan el mismo precio por el producto farmacéutico, proceda o no de una importación paralela".*

<sup>71</sup> Judgment No 7770/2007 of 22 November 2007. This case is part of the *Lelos* line of cases. However, it was never referred because it was procedurally separate. There were also five more cases in which GSK prevailed at first instance and which the wholesalers did not appeal.

<sup>72</sup> Judgment No 1334/2007 of 11 June 2007.

Finally, there is an growing body of academic literature which follows the logic and approves of the *Bayer (Adalat)*, *GSK Services Unlimited* and now *Lelos* judgments<sup>73</sup>.

## Conclusions

In light of the economic reality, which is increasingly confirmed by relevant judicial authorities, we submit that hindering parallel trade in prescription medicines does not damage patients and national health budgets.

It is therefore to be welcomed that both Community and national case law has confirmed that pharmaceutical companies are entitled to adopt measures responding to – but not prohibiting or eliminating – parallel trade, and such

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<sup>73</sup> Compare F. Jenny “Pharmaceuticals, Competition and Free Movement of Goods” [in:] *EU Competition Law and Policy, Developments and Priorities*, Hellenic Competition Committee (ed.), Athens Conference, April 19th 2002, Athens, Nomiki Vivliothiki, p. 83–84; P. Rey, J.S. Venit, “Parallel Trade and Pharmaceuticals: A Policy in Search of Itself” (2004) 29 *E.L.R.* 153; Dawes A., “Neither Head nor Tail: The Confused Application of EC Competition Law to the Pharmaceutical Sector” (2006) 27 *E.C.L.R.* 269; V. Korah, *Intellectual Property Rights and the EC Competition Rules*, Oxford/Portland, 2006, p. 149; D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *European Union Law*, Cambridge 2006, p. 999–1000; E. Dieny, “Appréciation au regard du droit communautaire de la concurrence d’un accord visant à réduire le commerce parallèle des médicaments” (2006) *JCP La Semaine Juridique* 2153; R. Eccles, “Parallel Exports in the Pharmaceuticals Sector: Take Nothing for Granted” (2007) 28 *E.C.L.R.* 138–142; H. Calvet, “Commerce parallèle et droit européen : La fin d’un dogme ?” (2007) 10 *Revue Lamy de la Concurrence* 138; L. Souto Soubrier “The Concept of an Agreement and Beyond: How to Block Parallel Imports of Pharmaceuticals to Protect the Heart of Competition” [in:] G. Amato, C.D., p. 81; V. Korah, “Judgment of the Court of First Instance in *GlaxoSmithKline*” (2007) 6 *Competition Law Journal*, p. 101; W-H. Roth, “Möglichkeiten und Grenzen eines einheitlichen Binnenmarktes für Arzneimittel” [in:] J. Schwarze, U. Becker (eds.), *Arzneimittel im Europäischen Binnenmarkt, Europarecht Beiheft 2/2007*, Baden-Baden 2007, p. 37–42; P. Behrens, “Parallelhandelsbeschränkungen und Konsumentenwohlfaht – Zur neueren Rechtsrechung von EuG und EuGH” (2008) 6 *Zeitschrift für Wettbewerbsrecht* 20; V. Junod, “An End to Parallel Imports of Medicines? Comments on the Judgment of the Court of First Instance in *GlaxoWellcome*” (2007) 30 *World Competition* 291; C. Köning, C. Engelmann, “Parallel Trade Restrictions in the Pharmaceutical Sector on the Test Stand of Article 82 EC: Commentary on the Opinion on Advocate General Jacobs in the Case *Syfait/Glaxosmithkline*”, (2005) 25 *E.C.L.R.* 465; R. Smits, “On Parallel Trade and Preliminary Issues – A Healthy Approach to Competition Law Enforcement?” (2006) 33 *Legal Issues of European Integration* 61. See also A. Nikpay, L. Kjølbbye and J. Faull [in:] J. Faull, A. Nikpay (eds.), *The EC Law of Competition*, Oxford, 2007, p. 260, viewing the *O2, Österreichische Postsparkasse* and *GlaxoSmithKline Services Unlimited* judgments of the CFI broadly in line with the general approach set out in the Commission’s Article 81(3) EC Guidelines, which focus on consumer welfare (Commission Notice – Guidelines on the Application of Article 81(3) of the Treaty, OJ [2004] C 101/97).

measures are not contrary to the EC competition rules. Parallel traders had previously been free-riding on case law which referred to sectors and cases that bore no relation to the special features of the European prescription medicines sector. To the extent there is an assumption that parallel trade in Europe safeguards intra-brand competition, the recent case law does not call this assumption into question: on the contrary, it confirms it, while noting that this assumption is inapplicable to the prescription medicines sector in Europe precisely because of that sector's very specific features.

It is therefore to be hoped that the long-running obsession of European competition law with parallel trade in prescription medicines may (at last) be coming to an end.

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# A R T I C L E S

## **Controlled Chaos with Consumer Welfare as the Winner – a Study of the Goals of Polish Antitrust Law**

by

Dawid Miąsik\*

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### ***Abstract***

This article presents the main issues relating to the goals of modern Polish competition law. It examines the relationship between the subject-matter of competition law, its function and its goals. It identifies various goals of competition law as well as their acceptance in the legal doctrine and jurisprudence. The study shows that the goals of Polish competition law have always been limited to enhancing efficiency and consumer welfare, with this latter term being understood in a post-Chicago-school fashions, rather than accordingly to its Chicago-school origin. This article shows how an 18-years competition law system, rather accidentally than deliberately,

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took the best ideas from both the American and the European legal tradition and mix them up into an incoherent, yet workable system of competition protection which is favourable towards efficient operations and, at the same time, safeguards consumers against exploitation and diminished choice.

**Classifications and key words:** competition, goals, public interest, efficiency, consumer protection, consumer welfare, competitor, economic freedom, restriction of competition.

## I. Introduction

Without a doubt, competition law statutes around the world have one thing in common – their substantive rules are drafted in a language so general and imprecise that they resemble far more the provisions of constitutional law<sup>1</sup>, than those of any other coherent body of law. Leaving any interpreter with one of the widest possible margins of discretion, this generality allows substantive provisions of antitrust law to remain unchanged for hundreds (US), a few dozen (EC) or several years (Poland) seeing as its rules may easily be adapted to changing economic, political and social circumstances and, of course, legal or economic concepts. The core rules remain unchanged yet their application evolves with time. How is it possible that the same provision, the same semantic structure, is understood and applied in a substantially different way? How can it be that the same conduct was first perceived as anticompetitive, then as procompetitive and it is now, in turn, viewed with caution? The answer to these questions, and indeed many others, lies in the goals of competition law. They influence the way the law in books becomes the law in action. It is the goals of competition law rather than its statutory provisions that determine which conduct is prohibited, which practice is allowed and how and when can a conduct find approval? Differences in goals are also responsible for divergent applications of identical, or highly similar, rules contained in various legal systems.<sup>2</sup>

Goals of competition law are rarely defined in statutory provisions. Even if they are, the room for interpretation is still great. Any references made to the goals of competition law are vague and can be understood in a great variety of ways. These goals can also be reflected in their country's legislative history, in the wording of their statutory prohibitions and in the economic and legal

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<sup>1</sup> Pointed out by the US Supreme Court as early as the judgment delivered in *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359–60 (1933).

<sup>2</sup> R. Whish, *Competition law*, Oxford 2001, p. 16.

doctrine. However, case-law remains the most important source of information concerning the goals of competition law seeing as it is cases that illustrate how the bodies responsible for the enforcement of competition law understand the scope of its prohibitions. Case-law determines which conduct restricts and which does not restrict competition as well as what circumstances are to be taken into account in a competition-related analysis. Even a localised lack of interest in a particular market practice shown by competition law enforcement bodies can be indicative of the goals of antitrust.

The purpose of this study is to examine the goals of modern Polish competition law. Its history began in 1990 with the entry into force of the Act of 24 February 1990 on Counteracting Monopolistic Practices and Protection of Consumers (hereafter, the Act of 1990)<sup>3</sup>. It has been subsequently repealed by the Act of 15 December 2000 on Competition and Consumer Protection (hereafter, the Act of 2000)<sup>4</sup> which was in turn replaced by the Act of 16 February 2007 on Competition and Consumer Protection (hereafter, the Act of 2007)<sup>5</sup>. These legislative changes have not resulted in any substantial modifications of the objectives pursued by Polish competition law<sup>6</sup>. This study does not cover the cartel regulations of 1930s<sup>7</sup> due to lack of continuity in the legal tradition nor, for reasons related to the economy, the Antimonopoly Act of 1987<sup>8</sup>.

## II. The subject-matter, the function and goals of competition law

Before examining the goals of Polish competition law, three interrelated yet separate concepts have to be identified that are often used interchangeably in this context, which leads to confusion between the object and the purpose of competition law.

Competition law (antitrust law) consists of a set of legal rules that protect the existence of competition seen here as the mechanism that regulates the

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<sup>3</sup> Act of 24 February 1990 on Counteracting Monopolistic Practices and Consumer Protection (consolidated text: Journal of Laws 1997 No 49, item 318 with amendments).

<sup>4</sup> Act of 15 December 2000 on Competition and Consumer Protection (consolidated text: Journal of Laws 2005 No 244, item 2080 with amendments).

<sup>5</sup> Journal of Laws 2007 No 50, item 331, with amendments.

<sup>6</sup> Judgment of the Supreme Court of 24 July 2003, I CKN 496/01, UOKiK Official Journal 2004, No 1, item 283.

<sup>7</sup> Act of 28 March 1933 on Cartels, Journal of Laws 1933, No 31, item 270 and Act of 13 July 1939 on Cartel Agreements, Journal of Laws 1939, No 63, item 418.

<sup>8</sup> Act of 28 January 1987 on counteracting monopolistic practices in national economy, Journal of Laws 1987 No 3, item 18.

functioning of the markets<sup>9</sup>. The subject-matter of competition law is the regulation of economic conduct of undertakings through a set of prohibitions. These are directed towards such business practices which are harmful to the competitive process itself<sup>10</sup>. Competition law does not care about the quality of the competitive process, which lies in the domain of the law on unfair competition that determines the prohibited methods of market rivalry. Competition law is also not interested in market distortions resulting from state interventions taking the form of various subsidies that are damaging to the equality of competition. This is the subject-matter of state-aid rules.

The function of competition law is the protection of competition against distortions resulting from the behavior of professional market participants, that is, undertakings. Competition, the preservation of competition, competition restraint etc. can be understood differently depending on the goals to be achieved through competition law. The goals of competition law explain why competition is protected, as well as why are certain practices considered to be anticompetitive or procompetitive. It is the goals of competition law that form the background of decisions based on its substantive provisions because they determine their interpretation and application. The function of competition law is constant and identical for all legal systems that encompass it. Competition is and should be protected because it is beneficial for consumers, the economy and therefore for the whole society. In contrast, the goals (objectives) of competition law are various and differ among jurisdictions<sup>11</sup>, because a wide variety of benefits is associated with competition, ranging from socio-political to purely economic<sup>12</sup>.

A quick look at the opinions expressed by Polish scholars shows a variety of views on this issue. They range from the protection of the constitutional freedom of economic activity<sup>13</sup> to consumer interests and welfare (albeit not

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<sup>9</sup> For definitions of competition (antitrust) law see also A. Jurkowska, *Porozumienia kooperacyjne w świetle wspólnotowego i polskiego prawa ochrony konkurencji. Od formalizmu do ekonomizacji*, Warszawa 2005, p. 34.

<sup>10</sup> This is often referred to as protection of the freedom of competition, see M. Stefaniuk, *Publicznoprawne reguły konkurencji*, Lublin 2005, p. 14.

<sup>11</sup> For an outline of potential objectives, which may be pursued by competition law see R. Whish, *Competition...*, p. 15–19; L. A. Sullivan, W. Grimes, *The law of antitrust...*, p. 9–16; V. Korah, *An introductory guide to EC competition law and practice*, Oxford 2004, p. 9–17; K. Cseres, *Competition law and consumer protection*, The Hague, p. 244–306; M. Monti, *EC competition law*, Cambridge 2007; p. 20–52; D. Miąsik, *Reguła rozsądku w prawie antymonopolowym. Studium prawnoporównawcze*, Zakamycze 2004, p. 41–52.

<sup>12</sup> E. Kosiński, *Rodzaje i zakres sektorowych wyłączeń zastosowania ogólnych reguł ochrony konkurencji*, Poznań 2007, p. 30.

<sup>13</sup> Z. Jurczyk, “Cele polityki antymonopolowej w teorii i praktyce” [in:] C. Banasiński, E. Stawicki (eds), *Konkurencja w gospodarce współczesnej*, Warszawa 2007, p. 36.

within the meaning adopted by the Chicago-School)<sup>14</sup>, separated in the middle by the approach pursued by the Harvard-School<sup>15</sup> and the concept of economic efficiency<sup>16</sup>, including allocative efficiency considered to be the sole objective of competition law<sup>17</sup>.

A quick look at Polish jurisprudence shows a state of almost total chaos when it comes to the topic of this paper. The aforementioned notions of the subject-matter, the function and the goals of competition law have been used quite freely, and totally interchangeably, to provide a background for particular decisions and judgments that should have been in fact determined with reference to the goals of competition law only.

In some cases reference to the content of Article 1 of the Act of 1990, of the Act of 2000 and of the Act 2007 was repeated (protection of competition, undertakings and consumers)<sup>18</sup>. In those instances, the subject-matter, the function and the goals of competition law were mixed up. In other cases, statements can be found that the purpose of competition law is “to secure conditions for the development of competition” and “to secure the protection of consumer rights”<sup>19</sup>, even though the first purpose reflects the function of competition law while the second purpose is to general. This is followed by cases containing statements that the goal of competition law is to protect market competition seen as an “institutional phenomenon” which is the basis of free market economy<sup>20</sup>. Other examples include declarations pursuant to which “the good protected under the act is the existence of competition as the atmosphere in which economic activity is conducted” while the protection

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<sup>14</sup> D. Miąsik, *Reguła...*, p. 429.

<sup>15</sup> E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2002, s. 10.

<sup>16</sup> K. Kohutek, [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2008, p. 43; Z. Jurczyk, “Cele polityki...”, p. 36.

<sup>17</sup> E. Kosiński, “Cele i instrumenty antymonopolowej interwencji państwa w gospodarce” (2004) 3 *Kwartalnik Prawa Publicznego* 40–41.

<sup>18</sup> Judgment of the Supreme Court of 24 July 2003, I CKN 496/01, UOKiK Official Journal 2004, No 1, item 283.

<sup>19</sup> Judgment of the Supreme Court of 24 May 2004, III SK 41/04, (2005) 13 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 199; judgment of the Supreme Court of 10 May 2007, III SK 24/06, (2008) 9–10 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 152.

<sup>20</sup> Decision of the President of UOKiK of 4 July 2008, DOK-3/2008; decision of the President of UOKiK of 31 December 2007, DOK-99/2007; decision of the President of UOKiK of 7 April 2008, DOK-1/2008; decision of the President of UOKiK of 7 April 2008, DOK-1/2008; Judgment of the Antimonopoly Court of 5 December 2001, XVII Ama 8/01, Lex 56500; judgment of the Antimonopoly Court of 27 June 2001, XVII Ama 92/00, Lex 55944, judgment of the Antimonopoly Court of 6 June 2001, XVII Ama 78/00, Lex 56162; judgment of the Court of Competition and Consumer Protection of 22 February 2003, XVII Ama 3/02, unpublished.

of consumers (as purchasers of goods and services offered under competitive conditions) is executed “by the way”<sup>21</sup>. Statements can even be found that “the task of the antimonopoly authorities and antitrust law is to lead to a total (unlimited) and effective competition on the relevant market”<sup>22</sup>. Sometimes the competition authority and the courts seem to follow the approach pursued by the Harvard school considering “the operation on the market of many independent undertakings, offering their products to consumers at a different price, quality and quantity” to be a prerequisite for competition. “Only if such market conditions are met can a consumer, by making a choice, influence the conduct of undertakings rewarding those, whose offers are beneficial for consumers and eliminating those, who are not competitive”.

Referencing preparatory materials is not very helpful either. For example, the Government’s draft of the 2007 Act was justified as follows “the act is an effective instrument of competition protection” (p. 1) and “basic goals of the act are the protection of undertakings and consumers in the public interest” (p. 4). This fact clearly shows that even the legislator does not really know: why is the regulation of competition protection desired? Why is competition protected? And, what goals should be achieved through competition law?

One of the most interesting issues surrounding competition law and the economic order, namely, to identify, to describe and to execute the goals of competition law is thus left to the bodies responsible for enforcing the substantive provisions of competition law and to the legal doctrine.

### III. In search of guidance – the title and the preamble

For EU lawyers, it is quite natural to refer to preambles of European regulations or directives in search of guidance as to the intentions behind a specific piece of legislation. However, preambles are not common in the Polish legal tradition. Therefore, the fact that the Act of 1990 contained a preamble, which preceded its substantive provisions, emphasised the importance attributed to competition law in a country undergoing an economic and legal transition. Although not binding, the preamble was considered to be an important source of inspiration for the competition authority and courts, and was considered to be capable of influencing the interpretation of the substantive provisions

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<sup>21</sup> Judgment of the Court of Competition and Consumer Protection of 16 November 2005, XVII Ama 97/04, published in: UOKiK Official Journal 2006, No 1, item 16.

<sup>22</sup> Decision of the President of the UOKiK of 10 October 2005, DOK-127/2005.

of this Act<sup>23</sup>. The preamble spoke of the following “goals”: 1) securing the development of competition, 2) the protection of undertakings against monopolistic practices and, 3) the protection of consumer interests.

The wording of the preamble suggested that all three goals were of equal importance. However, it was established early on that the first “goal” was of most importance, even though it is clear that the first “goal” listed in the preamble was not really a goal but rather, a legislative description of the function of the Act<sup>24</sup>. Contrary to what is generally considered to be the main function of competition law (“the protection of competition”), the wording of the preamble signified that, to an economy moving away from state-control and towards the free-market, the creation and maintenance of a competitive environment was of greatest importance<sup>25</sup>. Putting aside the character of this phrase, “securing the development of competition” could have been understood as directing the activities of the competition authority against companies holding large market shares (strong market positions) since limiting their activities through the intervention of competition authorities led to the opening of markets for new entrants. This, in turn, implies that the prohibitions stipulated in the Act of 1990 should be applied against those practices which were directed against the competitive structure of the market<sup>26</sup>. At the time when the Act of 1990 was adopted, the economy was dominated by state-, or formerly state-owned enterprises, which were not used to competitive pressure. In such circumstances, the emphasis put on the development of competition allowed the markets to be freed and competition to be introduced as the main driving force of the economy. The development of competition meant an increase in the available offers<sup>27</sup> and, in turn, forced existing market operators to act more efficiently to satisfy consumer needs<sup>28</sup>.

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<sup>23</sup> S. Gronowski, *Ustawa antymonopolowa – komentarz*, Warszawa 1999, p. 22; D. Miąsik, *Reguła rozsądku...*, p. 363; Judgment of the Antimonopoly Court of 11 December 1996, XVII Ama 59/96, LEX no 56166; judgment of the Supreme Court of 29 May 2001, I CKN 1217/98, (2002) 1 *Orzecznictwo Sądu Najwyższego – Izba Cywilna*, item 13.

<sup>24</sup> S. Gronowski, *Ustawa...*, p. 19; T. Skoczny, “Dostosowanie prawa polskiego do prawa wspólnotowego w zakresie materialnego prawa antymonopolowego” [in:] P. Saganek, T. Skoczny (eds), *Wybrane problemy dostosowania prawa polskiego do prawa Unii Europejskiej*, Warszawa 1999, p. 146; D. Miąsik, *Reguła rozsądku...*, p. 363; judgment of the Antimonopoly Court of 26 September 1990, XV Amr 1/90, (1992) 1 *Wokanda*; Judgment of the Antimonopoly Court of 29 December 1993 r., XVII Amr 42/93, (1994) 5 *Wokanda*; Judgment of the Antimonopoly Court of 24 January 1991, XV Amr 8/90, (1992) 2 *Wokanda*.

<sup>25</sup> D. Miąsik, *Reguła rozsądku...*, p. 364.

<sup>26</sup> A Fornalczyk, “Competition law and policy in Poland in 1990–95” [in:] T. Skoczny (ed.), *Harmonisation of the polish competition legislation with competition rules of the European Communities, summary and recommendations*, Warszawa 1997, p. 37.

<sup>27</sup> T. Skoczny, *Dostosowanie...*, p. 146.

<sup>28</sup> I. Wiszniewska, *Granice kartelowo-prawne licencji patentowych*, Wrocław 1990, p. 50.

There was no other way to force efficiency on undertakings that were used to operating in a state-controlled economy characterised by severe shortages of all commodities and most of the services.

However, this is only one possible reading of the first and most important goal of the Act of 1990. It would be equally correct to understand the phrase “securing the development of competition” as meaning that not only should the markets be kept open for all potential entrants, but that the rivalry among independent undertakings and freedom of economic activity are the key concepts connected to the development of competition. This alternative approach finds supports in the second goal of this Act, that is, “the protection of undertakings against monopolistic practices” (here the term “goals” was used correctly). One may be tempted to consider this part of the preamble to suggest that the competition authority had the duty to protect the interests of undertakings. This falls short of protecting competitors against competition. However, the preamble warranted undertakings with protection through the intervention of the competition authority only to the extent, to which the harm to their economic interests resulted from anticompetitive practices and not from competition itself<sup>29</sup>. This, in turn, supports the thesis that the protection of competitors has never been considered as one of the legislative goals of Polish competition law.

The last of the goals of the Act of 1990 stipulated in its preamble referred to the protection of consumer interests. Similarly to safeguarding the interests of undertakings, consumers were protected only against anticompetitive practices. However, referral to consumer interests may indicate that the conduct of undertakings should be assessed in the light of its impact on this group of market participants. If consumer protection was to be taken into consideration when applying the substantive provisions of the Act of 1990, what was bad for consumers ought to restrict competition, while what was good for them should not generally be prohibited. It was also suggested that consumer needs may only be satisfied by efficient undertakings<sup>30</sup> and that their interests may only be harmed through the exercise of market power<sup>31</sup>.

In contrast to the Act of 1990, neither the Act of 2000 nor the Act of 2007 has a preamble. Both Acts share the same title (“Act on competition and consumer protection”) which suggests that they were intended to perform two functions: protect competition and protect consumers. It is difficult to ascertain what role should the protection of consumers play within the ambit of antitrust rules contained in the act. Among the duties of the competition

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<sup>29</sup> D. Miąsik, *Reguła rozsądku...*, p. 365.

<sup>30</sup> I. Wiszniewska, *Granice...*, p. 50.

<sup>31</sup> M. Tadeusiak, “Competition and consumer protection on monopolized markets in the light of antimonopolistic decisions in 1990–1995” [in:] T. Skoczny (ed.), *Harmonisation...*, p. 75.

authority lays the protection of consumers against practices infringing their collective interests (due to the implementation of the EC Directive 98/27). However, a reference to consumer protection was made already in the original version of the Act of 2000, before the implementation of the 98/27 Directive. The title of both Acts suggests therefore that consumer interests may play an important role in the application of the substantive antitrust prohibitions stipulated in both acts, thus influencing the goals of Polish competition law.

#### IV. The role of the public interest

An important role in determining the goals of Polish competition law has been played by the concept of “public interest”. It has been consistently held that the substantive provisions of the Act of 1990, the Act of 2000 and the Act of 2007 may only be applied when the conduct under examination harms not merely an individual, but public interest.

Initially, the Act of 1990 did not mention the public interest. However, in one of its first judgments, the Antimonopoly Court declared that “only those cases may be examined under the provisions of the act which infringe the public interest in the development of competition, protection of undertaking and consumer interest against anticompetitive practices”<sup>32</sup>. The development of this doctrine led to the creation of a new substantive condition that had to be met when applying the provisions of the 1990 Act namely that the competition authority was obliged to determine and explain how the conduct under investigation infringed, or threatened to infringe, the public interest<sup>33</sup>. Reference to the public interest can be found in Article 1 of the Act of 2000 as well as the Act of 2007.

What derives from the case-law based on the application of the Act of 1990 is that a harm to the public interest could be found where “the harmful effects of the conduct violating the Antimonopoly Act were felt by a wider number of market participants”<sup>34</sup>, sometimes supported by a more general statement – “or

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<sup>32</sup> Judgment of the Antimonopoly Court of 24 January 1991, Amr 8/90, (1992) 2 *Wokanda*.

<sup>33</sup> Judgment of the Antimonopoly Court of 3 August 1994, XVII Amr 15/94, (1995) 5 *Wokanda*; judgment of the Antimonopoly Court of 6 June 2001, XVII Ama 78/00, Lex no 56162.

<sup>34</sup> Judgment of the Antimonopoly Court of 29 December 1993, XVII Amr 42/93, (1994) 5 *Wokanda*, p. 56; judgment of the Supreme Court of 29 May 2001, I CKN 1271/98, (2002) 1 *Orzecznictwo Sądu Najwyższego – Izba Cywilna*, item 13; judgment of the Supreme Court of 28 January 2002, I CKN 112/99, (2002) 11 *Orzecznictwo Sądu Najwyższego – Izba Cywilna*, item 144.

if those actions resulted in other negative effects on the market”<sup>35</sup>. Ultimately, the development of case-law attached greater emphasis to the former criterion of “harm felt by a wider number of market participants”, which excluded the application of the substantive provisions of Polish competition law in cases, where only one company or consumer was harmed or complained to the competition authority. The doctrine, which developed on the basis of this undertakings of the public interest, did not see every conduct that literally infringed the substantive provisions of the Act of 1990 as a restriction of competition and thus, mandating an intervention by the competition authority<sup>36</sup>. The conduct under examination had to make an impact on the competitive process<sup>37</sup>. This in turn makes it possible to suggest that it was not the purpose of the Act of 1990 to protect an individual undertaking against competition. Even though competition was viewed as the process of rivalry, a simple limitation of this rivalry was not considered as uncompetitive. Similarly, a violation of contractual obligations was not considered as uncompetitive – not every breach of contract results from a restrictive practice – and even if such a breach fitted into the definition of one of the restrictive practices stipulated in the Act of 1990, it was not prohibited because it did not infringe the public interest<sup>38</sup>.

A rational need to separate trivial cases from important ones can help explain the fact that the public interest doctrine developed into the most important precondition for the application of the Act of 1990. Reference to this concept constituted an easy method for eliminating from the scope of scrutiny all those cases which harmed the economic interests of undertakings filing complaints to the competition authority. It allowed the competition authority and the courts to put aside cases without an appreciable restriction of competition as well as cases, where such a negative effect was highly unlikely to be established since the restraint in question was not a restriction of competition but merely an infringement of the economic interests of the applicant resulting from competition itself. For example, cases concerning increases in rent affecting business owners were dismissed as negatively affecting individual interests only<sup>39</sup>.

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<sup>35</sup> Judgment of the Antimonopoly Court of 29 December 1993, XVII Amr 42/93, (1994) 5 *Wokanda*; judgment of the Supreme Court of 27 August 2003, I CKN 527/01, Lex No 137525.

<sup>36</sup> Judgment of the Antimonopoly Court of 29 December 1993, XVII Amr 42/93, (1994) 5 *Wokanda*, p. 56. Judgment of the Antimonopoly Court of 24 January 1991, XV Amr 8/90, (1992) 2 *Wokanda*.

<sup>37</sup> Judgment of the Supreme Court of 29 May 2001, I CKN 1217/98, 2002 (1) *Orzecznictwo Sądu Najwyższego – Izba Cywilna* item 13.

<sup>38</sup> Judgment of the Antimonopoly Court of 24 January 1991, XV Amr 8/90 (1992) 2 *Wokanda*.

<sup>39</sup> Judgment of the Antimonopoly Court of 29 December 1993., XVII Amr 42/93, (1994) 5 *Wokanda*; judgment of the Antimonopoly Court of 24 January 1991 r., XV Amr 8/90, (1992) 2 *Wokanda*.

Although the Act of 1990 was repealed in 2000, the public interest criterion has been interpreted in a similar manner in the Acts of 2000 and in the Act of 2007. However, an increasing number of cases can be found where the courts departed from the aforementioned approach to the public interest. The courts now seem to consider that the public interest is violated by any competition restricting practice, irrespective of the number of market participants that have been affected by it<sup>40</sup>. Pursuant to this growing body of case-law, a given conduct violates public interests if it restricts competition. One of the clearest examples of this development can be found in the judgment concerning the refusal by the Polish dominant incumbent telecoms operator to negotiate and sign interoperability agreements with independent dial-up internet providers<sup>41</sup>. The Antimonopoly Court ruled in this case that “the existence and development of competition on all relevant markets is in the public interest, thus any activity which restricts the creation or development of competition infringes the public interest”. A similar approach was adopted in a case, which concerned blocking telecoms access for foreign companies providing teletext services<sup>42</sup>, where the Antimonopoly Court ruled that the “elimination of foreign undertakings from the Polish market restricted competition and therefore infringed the public interest”. This approach has been supported by the Supreme Court for a notable time<sup>43</sup>.

## V. Goals of Polish competition law

### 1. Enhancing economic efficiency

The enhancement of economic efficiency has been advocated as at least one of the goals of competition law almost since the beginning of the history of modern Polish antitrust law. The fact was emphasised that the main goal of

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<sup>40</sup> Judgment of the Supreme Court of 5 June 2008, III SK 40/07, not yet published.

<sup>41</sup> Judgment of the Court of Competition and Consumer Protection of 21 March 2005, XVII Ama 16/04, published in: UOKiK Official Journal 2005, No 2, item 27.

<sup>42</sup> Judgment of the Court of Competition and Consumer Protection of 18 December 2002, XVII Ama 19/2001, UOKiK Official Journal 2003, No 2, item 260.

<sup>43</sup> Judgment of the Supreme Court of 26 February 2004, III SK 2/04, (2004) 4 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 343; judgment of the Supreme Court of 26 February 2004, III SK 1/04, (2004) 18 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 323; judgment of the Supreme Court of 12 May 2004, III SK 44/04, (2005) 9 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 136; judgment of the Supreme Court of 5 June 2008, III SK 40/07, not yet published.

the Act of 1990 was to protect competition considered to be a mechanism for improving the effectiveness of the economy<sup>44</sup>. It was assumed that undertakings interested in maximising their profits must lower prices and introduce new products in order to attract consumers since otherwise, their customers would be taken by their competitors. Competition was seen as a force exercising pressure on existing market operators to improve their productive and dynamic efficiency<sup>45</sup>. Restrictions of competition were considered to lead to less efficient market operations – the main negative effect associated with monopolistic practices<sup>46</sup>. The main source of those practices was the “existence of economic structures abusing their market power”<sup>47</sup>. While the Act of 2000 was in force, some authors supported the thesis that allocative efficiency should be its only goal<sup>48</sup>. At the same time, other commentators advocated a more balanced approach declaring that the Act of 2000 was designed to protect competition as a mechanism that forms the cornerstone of the economy, while the protection of consumers and competitors should be taken into account only indirectly<sup>49</sup>. This position is compatible with the consumer welfare standard<sup>50</sup> and the emphasis given to the impact of the conduct of an undertaking on the quality and price of its products<sup>51</sup>. The protection of competition, considered to be the mechanism facilitating the increase of efficiency as well as the source of progress and development, is deemed to be the purpose of the Act of 2007; the protection of consumers and undertaking against exploitative practices should be realised only indirectly<sup>52</sup>.

How did the competition authority and the courts respond to these suggestions? Even as early as the first half of the 1990s, the protection of the market was occasionally hailed as “the main goal of the act”<sup>53</sup>. This supported the thesis that an intervention by the competition authority was justified in

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<sup>44</sup> T. Skoczny, *Dostosowanie...*, p. 144–145; T. Skoczny, *Ustawy antymonopolowe krajów postsocjalistycznych*, Warszawa 1992, p. 11; I. Wiszniewska: *Granice...*, p. 50.

<sup>45</sup> S. Gronowski, *Polskie prawo...*, p. 21.

<sup>46</sup> I. Wiszniewska, *Granice...*, p. 314.

<sup>47</sup> P. Podrecki, *Porozumienia monopolistyczne i ich cywilnoprawne skutki*, Kraków 2000, p. 14; S. Gronowski, *Ustawa...*, p. 5.

<sup>48</sup> E. Kosiński, “Cele i instrumenty...” , p. 40–41.

<sup>49</sup> R. Janusz, M. Sachajko, T. Skoczny, “Nowa ustawa o ochronie konkurencji i konsumentów” (2001) 3 *Kwartalnik Prawa Publicznego* 181.

<sup>50</sup> A. Jurkowska, T. Skoczny, “Wyłączenie określonych porozumień specjalizacyjnych i badawczo-rozwojowych spod zakazu porozumień ograniczających konkurencję” (2003) 1 *Przegląd Prawa Handlowego* 17.

<sup>51</sup> P. Dębowski, “Wyłączenie określonych porozumień wertykalnych spod zakazu porozumień ograniczających konkurencję” (2003) 2 *Przegląd Prawa Handlowego* 7.

<sup>52</sup> K. Kohutek, [in:] K. Kohutek, M. Sieradzka, *Ustawa...*, p. 42–43.

<sup>53</sup> Judgment of the Antimonopoly Court of 3 August 1994, XVII Amr 15/94, (1995) 5 *Wokanda*.

those instances, where the conduct under examination affected the allocative functions of the market. This opinion is strengthened by stressing that the protection of competition “consists of actions against abuses of market power”<sup>54</sup> resulting from the exploitation of their market position<sup>55</sup>.

The Antimonopoly Court often repealed decisions of the competition authority because they lacked a market power analysis (albeit understood not as a power over prices but as market share)<sup>56</sup>. Pursuant to this reasoning, undertakings without market power can not infringe competition rules by unilateral conduct. A market share of 7% did not support the assumption that the undertaking concerned had sufficient power<sup>57</sup>. In another case, the Court ruled that on the local market of commercial property, none of the undertakings had a dominant position because the scrutinised companies controlled only 20% of the market where 12 other entities were active. This meant that “a relatively small market share did not allow [the undertaking concerned] to unilaterally impose contractual terms irrespective of the conduct of other competitors or their customers”<sup>58</sup>. However, market power is still treated as equal to significant market share in the Acts of 2000 and the Act of 2007. Therefore, an agreement concerning the withdrawal of a certain type of product from the market was held to be anticompetitive because it made an impact on the whole petrol market seeing as it was concluded between both Polish oil companies<sup>59</sup>.

In a few recent decisions the competition authority emphasised that the rivalry between undertakings results in “optimal economic benefits from the sale of goods and services and maximum satisfaction of consumer needs at the lowest possible price”<sup>60</sup>. This shows a great respect for allocative efficiency. It also confirms that even though competition is still equated with rivalry among independent undertakings, competition law is concerned with the effects of such rivalry and not with the process itself. The fact that the competition authority did not mention efficiency concerns in a direct way in the past, does

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<sup>54</sup> Ibidem.

<sup>55</sup> Judgment of the Antimonopoly Court of 29 December 1993, XVII Amr 42/93, published in: (1994) 5 *Wokanda*.

<sup>56</sup> Judgment of the Antimonopoly Court of 9 April 1997, XVII Ama 4/97, Lex 56458; judgment of the Antimonopoly Court of 21 January 1998, XVII Ama 55/97, (1999) 2 *Wokanda*.

<sup>57</sup> Judgment of the Antimonopoly Court of 21 May 1993, XVII Ama 9/93, (1993) 12 *Wokanda*.

<sup>58</sup> Judgment of the Antimonopoly Court of 29 December 1993, XVII Amr 42/93, (1994) 5 *Wokanda*.

<sup>59</sup> Decision of the President of the UOKIK of 31 December 2007, DOK-99/2007.

<sup>60</sup> Decision of the President of the UOKIK of 7 April 2008, DOK-1/2008; decision of the President of the UOKIK of 4 July 2008, DOK-3/2008; decision of the President of the UOKIK of 29 December 2006, DOK-164/06.

not mean that they were irrelevant. The application of competition law to vertical restraints illustrates that fact best.

As early as in the early 1990s, and contrary to the dominant trend in the Community at the time, the Polish Antimonopoly Court and the competition authority assessed vertical restraints in a fashion more similar to the approach employed in the US<sup>61</sup>. Market power was viewed as the main criterion for intra-brand restraints to be seen as anticompetitive<sup>62</sup>. Most of the cases that ended in a decision or a judgment declaring certain restraints as uncompetitive concerned distribution networks organised by dominant<sup>63</sup> or monopolistic<sup>64</sup> undertakings. In cases concerning companies with high market shares, vertical restraints were viewed as unreasonable restraints of competition<sup>65</sup> that allowed the parties concerned to set prices at higher levels or delay their lowering<sup>66</sup>. In contrast, when the undertaking applying vertical restraints was not dominant, beneficial effects of vertical restraints for competition were emphasised, in particular, consumer benefits<sup>67</sup>. The courts took into account whether the result of the conduct improved consumer welfare thanks to better availability and the impact of vertical restraints on prices. Competition could be restricted only through market foreclosure. Market shares of around 30% were considered to be not high enough to foreclose a market, particularly if market pressure exercised by foreign imports was high<sup>68</sup>. As a result, vertical restraints were held not to restrict competition *per se*. A full inquiry was necessary<sup>69</sup>.

The favourable treatment of vertical restraints adopted under the Act of 1990 has continued seeing as the intervention of the competition authority under the Acts of 2000 and the Act of 2007 remained limited to vertical price

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<sup>61</sup> I. Wiszniewska, *Granice...*, p. 83.

<sup>62</sup> See P. Podrecki, *Porozumienia monopolistyczne...*, p. 140.

<sup>63</sup> With market shares at 60% to 90% – judgment of the Antimonopoly Court of 21 July 1992, XVII Amr 12/92, (1993) 1 *Wokanda*; judgment of the Antimonopoly Court of 6 December 1993, XVII Amr 35/93, (1993) 7 *Wokanda*.

<sup>64</sup> Judgment of the Antimonopoly Court of 6 December 1993, XVII Amr 35/93, (1993) 7 *Wokanda*.

<sup>65</sup> Judgment of the Antimonopoly Court of 21 July 1992, XVII Amr 12/92, (1993) 1 *Wokanda*.

<sup>66</sup> Judgment of the Antimonopoly Court of 6 December 1993, XVII Amr 35/93, (1993) 7 *Wokanda*.

<sup>67</sup> Judgment of the Antimonopoly Court of 8 January 1997, XVII Ama 65/96, unpublished.

<sup>68</sup> Judgment of the Antimonopoly Court of 25 June 1997, XVII Ama 19/97, (1998) 7 *Wokanda*.

<sup>69</sup> Judgment of the Antimonopoly Court of 10 September 1992, XVII Amr 15/92, (1993) 2 *Wokanda*; judgment of the Antimonopoly Court of 9 April 1997, XVII Ama 4/97, Lex 56458.

fixing<sup>70</sup>. Such contracts were held to be agreements that have the restriction of competition as their object because “the price set is set to the obvious detriment of the consumer”<sup>71</sup>.

In cases where exclusivity clauses were examined, the competition authority emphasised that they did not restrict competition *per se*. Exclusivity clauses were said to restrict competition only in specific circumstances when they restrict market access or eliminate undertakings from the market<sup>72</sup>. In a particular case, an exclusive dealing clause affecting the yeast market, which was applied by a major producer, was considered as anticompetitive because the supplier controlled over 50% of the market. Other producers were therefore foreclosed from the market. However, the lack of a coherent approach to the goals of Polish competition law is shown perfectly by the, fact that the exclusivity clause was also declared to be anticompetitive since it “restricted the freedom of dealers and made it impossible for them to compete with other multi-brand dealers”.

No restriction of competition was found in a case concerning an agreement between one of the major electric appliances producers and its largest dealer<sup>73</sup>. The competition authority found that this agreement was not discriminatory, even though it gave higher rebates to this particular dealer only, and ruled that it did not create different conditions for competition among the dealers of this supplier. Pursuant to the reasoning of the competition authority, the supplier was entitled to reward the largest and most active member of its distribution network. Rebates applied in this case did not foreclose access to the market for other producers.

In another case<sup>74</sup>, the competition authority found no restriction of competition in the conduct of the major issuer of service vouchers who was accused of abusing its dominant position by selling vouchers at prices lower than their nominal value and by entering into exclusivity agreements with stores accepting those vouchers. Having analysed the market, the competition authority ruled that the number of outlets accepting these vouchers, was the decisive factor for the purchase rather than the amount of the discount offered. Agreements between stores and the issuers of vouchers were intended to “increase turnover and attract more customers”. Apart from that, the costs

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<sup>70</sup> Decision of the President of the UOKIK of 7 April 2008, DOK-1/2008; decision of the President of the UOKIK of 18 September 2006, DOK-107/06.

<sup>71</sup> Decision of the President of the UOKIK of 7 April 2008, DOK-1/2008; decision of the President of the UOKIK of 4 July 2008, DOK-3/2008 .

<sup>72</sup> Decision of the President of the UOKIK of 29 December 2006, DOK-164/06.

<sup>73</sup> Decision of the President of the UOKIK of 1 August 2006, DOK-87/2006.

<sup>74</sup> Decision of the President of the UOKIK of 19 December 2006, DOK-158/06.

borne by the stores accepting the vouchers made them reluctant to accept vouchers originating from more than one source.

The importance of efficiency was directly emphasised by the Supreme Court at least on a few occasions. The Court ruled that “an agreement between competitors organises the market in such a way that it sends false signals as to the price, demand, number of potential seller or producers” and under such circumstances, the market may no longer perform its functions normally<sup>75</sup>. Although those functions were not defined, reference to the way the market operates indicates that allocative efficiency is at least one of the goals of Polish antitrust law. In a case concerning interoperability agreements concluded with independent dial-up internet providers, the Supreme Court went even further by declaring that “the Act of 2000 aims at securing the existence of competition on the market as the optimal way of allocating resources among the members of the society”<sup>76</sup>. Pursuant to the reasoning of the Supreme Court, competition improves the efficiency of the whole economy because it forces undertakings to satisfy consumer needs and care for their interests by offering better products, additional services, new technologies, a competitive range of prices, etc. Thus, even though lawyers will always define competition as the rivalry between independent undertakings, competition law is not concerned as much about the rivalry itself as it is concerned about its effects. However, goals of competition law are not limited to enhancing efficiency only. Pursuant to the reasoning of the Supreme Court, competition is restricted if the conduct at stake leads to a decrease in production or sales, to higher prices as well as when it limits consumer choice<sup>77</sup>. While this opinion is in clear support of efficiency concerns, it is interesting to note that the Supreme Court defined consumer welfare quite differently to the Chicago-school. Consumer welfare is not limited to the concept of total welfare of the society. The level of consumer choice plays an important role in qualifying a certain conduct as anticompetitive. However, the fact that a given practice deprived consumers of an offer that was previously available does not mean that it is illegal since it may be justified pursuant to domestic rules equivalent of Article 81(3) EC. Competition is desirable and worthy of protection as long as it brings benefits to consumers. As a result, a given practice may still be held as anticompetitive, even if it increases efficiency by lowering costs or improving productivity, if it lacks consumer benefits.

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<sup>75</sup> Judgment of the Supreme Court of 12 May 2004, III SK 44/04, (2005) 9 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 136.

<sup>76</sup> Judgment of the Supreme Court of 19 October 2006, III SK 15/06, (2007) 21–22 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 337.

<sup>77</sup> *Ibidem*.

At this point in the article, it is possible to notice that so far production and dynamic efficiencies have not been mentioned. This does not mean that those types of efficiencies are irrelevant to Polish competition law. On the contrary, this fact shows that the Polish competition authority does not get involved in practices that are either procompetitive *per se* or can be easily justified under the rule of reason analysis such as: R&D, joint-production or technology transfer agreements. Moreover, such agreements benefit from national group exemptions. That fact constitutes – at last – an obvious indication that enhancing efficiency is an important goal of Polish competition law that is recognised indirectly by the legislator<sup>78</sup>.

## 2. Consumer welfare and consumer detriment

All<sup>79</sup> of the official titles of the statutes that form the foundation of the Polish competition law system directly referred to the protection of consumer interests; so did the preamble of the Act of 1990. The negative effects that anticompetitive practices can have in respect of consumers were also noted by the legal doctrine<sup>80</sup>. Reference to the protection of consumers was made in several of the aforementioned cases<sup>81</sup> even though it was not of any practical importance there. In other cases, the protection of consumers was considered as a secondary (subsidiary) goal of Polish competition law<sup>82</sup> since “only undistorted competition gives both undertakings and consumers a guarantee of their constitutional rights to economic freedom and protection of their rights”<sup>83</sup>.

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<sup>78</sup> For a detailed study of block exemptions in force in Polish legal system see A. Jurkowska, T. Skoczny (eds), *Wylaczenia grupowe spod zakazu porozumien ograniczajacych konkurencje we Wspolnocie Europejskiej i w Polsce*, Warszawa 2008.

<sup>79</sup> The title of the Act of 1990 was amended in 1995 by adding the phrase “and protection of competition”.

<sup>80</sup> I. Wiszniewska, *Granice...*, p. 314.

<sup>81</sup> Judgment of the Supreme Court of 24 July 2003, I CKN 496/01, UOKiK Official Journal 2004, No 1, item 283; Judgment of the Supreme Court of 24 May 2004, III SK 41/04, (2005) 13 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 199; judgment of the Supreme Court of 10 May 2007 r., III SK 24/06, (2008) 9-10 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 152.

<sup>82</sup> Judgment of the Court of Competition and Consumer Protection of 16 November 2005, XVII Ama 97/04, UOKiK Official Journal 2006, No 1, item 16.

<sup>83</sup> Decision of the President of the UOKiK of 4 July 2008, DOK-3/2008; decision of the President of the UOKiK of 31 December 2007, DOK-99/2007; decision of the President of the UOKiK of 7 April 2008, DOK-1/2008; decision of the President of the UOKiK of 29 December 2006, DOK-164/06.

Nevertheless, direct references to consumer interests was made in a significant number of cases where a detriment to these interests led to the finding that the scrutinised conduct was seen as anticompetitive. In a recent case cornering an increase in connection charges applicable to international telecoms services provided by independent operators, the competition authority ruled that such an increase eliminated competition from independent providers since “rationally behaving consumers will not be interested in buying more expensive services of a similar quality”<sup>84</sup>. In another case, an agreement to cease production of a certain type of petrol was declared as anticompetitive because it “deprived consumers of the supply of a product that they were still interested in”<sup>85</sup>. In yet another case, the competition authority ruled that a practice of setting resale prices eliminated competition between DIY stores with negative effects felt mostly by consumers<sup>86</sup>.

This approach was also endorsed, at least in some cases, by the Antimonopoly Court which ruled that a restriction of competition may take the form of depriving consumer of the “option to freely choose the service provider”<sup>87</sup>. In another case, the Court ruled that uncertainty as to the potential reaction of competitors makes it difficult for companies to undertake actions to the detriment of consumers<sup>88</sup>. As a result, agreements which limit or eliminate such risk are restrictive of competition since they allow undertakings to exploit consumers.

Pursuant to the case-law of the Supreme Court, practices that restrict the ability of consumers “to choose the type and standard as well as the price of the service”<sup>89</sup> are seen as anticompetitive. The importance of consumer choice and consumer detriment was also emphasised in cases concerning horizontal price fixing<sup>90</sup> and in relation to an agreement that contained exclusivity clauses, which was concluded between a motorway operator and towing companies<sup>91</sup>.

Pursuant to this body of case-law, consumer welfare is understood as providing consumers with the widest possible choice of goods and services at the lowest possible prices and the highest possible quality. However, the

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<sup>84</sup> Decision of the President of the UOKiK of 30 May 2006, DOK-53/06.

<sup>85</sup> Decision of the President of the UOKiK of 31 December 2007, DOK-99/2007.

<sup>86</sup> Decision of the President of the UOKiK of 18 September 2006, DOK-107/06.

<sup>87</sup> Judgment of the Court of Competition and Consumer Protection of 18 December 2002, XVII Ama 19/2001, UOKiK Official Journal 2003, No 2, item 260.

<sup>88</sup> Decision of the President of the UOKiK of 31 December 2007, DOK-99/2007.

<sup>89</sup> Judgment of the Supreme Court of 12 May 2004, III SK 44/04, (2005) 9 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 136.

<sup>90</sup> Judgment of the Supreme Court of 9 August 2006, III SK 6/06, UOKiK Official Journal 2007, No 3, item 39.

<sup>91</sup> Judgment of the Supreme Court of 25 April 2007, III SK 3/07, Lex 365055.

level of choice is as important as prices and quality<sup>92</sup>. If the conduct increases consumer choice, then it does not restrict competition. In contrast, if it limits consumer choice, it restricts competition and is acceptable only if it is justified in light of rules equivalent to Article 81(3) EC. Competition is protected because of the benefits it brings to the consumers<sup>93</sup>. If a certain conduct does not result in such benefits, then it may be considered anticompetitive.

The fact that consumer interests have been emphasised so widely and so frequently, does not lead to the application of Polish antitrust law in a consumer-only oriented way departing from the reality in which markets operate. Not every decrease in consumer choice will be contrary to the Act. Predatory prices applied in order to eliminate competitors or deter potential market entry are prohibited irrespective of the fact that in a short term they bring benefits to consumers and are welcomed by them<sup>94</sup>. More importantly, the impact on consumer interests of a conduct reviewed by the competition authority or the courts has also been taken into account at the stage when a restrictive practice could be justified and escape the prohibition. It was established quite early on that the competition authority must assess whether an alleged restriction of competition was not in fact a conduct that better satisfied consumer needs<sup>95</sup> even though there is no direct reference to consumer interests in the provision imposing a ban on anticompetitive practices (Article 6 of the Act of 1990)<sup>96</sup>. As a result, undertakings could employ practices restricting the economic freedom of other market participants as long as they increased consumer welfare through better quality of services offered, among other things (eg. limitation of the number of garages, repairing cars insured by the dominant insurer, allowed the consumers to benefit from cash-free repair services, financed directly by the insurer)<sup>97</sup>.

The approach associated with the consumer detriment doctrine is also incoherent. On the one hand, the Court has declared that consumer interests will be secured under competitive market conditions. On the other hand, it maintained that competition exists only when consumers have a choice between different offers of varied, independent undertakings, irrespective of how much

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<sup>92</sup> Judgment of the Supreme Court of 19 October 2006, III SK 15/06, (2007) 21-22 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 337.

<sup>93</sup> Judgment of the Supreme Court of 1 April 2004, III SK 24/04, (2005) 2 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 28.

<sup>94</sup> Judgment of the Supreme Court of 14 September 2006, III SK 13/06, (2007) 17-18 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 265.

<sup>95</sup> Judgment of the Antimonopoly Court of 26 April 1995, XVII Amr 67/94, Lex 56343; judgment of the Antimonopoly Court of 15 March 1995, XVII Amr 66/94 (1996) 3 *Wokanda*.

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<sup>97</sup> Judgment of the Antimonopoly Court of 26 April 1995, XVII Amr 67/94, Lex 56343.

would their welfare level improve should the number of market participants or their independence actually decrease<sup>98</sup>.

### **3. The lack of protection against unfair competition**

The jurisprudence of the Antimonopoly Court clarified quite early one that the purpose of the Act of 1990 was not to protect business-owners against unfair competition<sup>99</sup>. No infringement of competition rules could be established if a business conduct had no impact on the competitive structure of the markets or the level of consumer choice. The Court's ruling in another case was therefore correct in stating that one undertaking can exploit the difficult situation of another company, for example by imposing an exclusivity clause<sup>100</sup>, as long as such conduct does not result from the abuse of its market power.

This approach is correct and supports the thesis that the protection of competitors against competition has not been considered as one of the goals of Polish competition law. Even if consumers were harmed by unfair commercial practices, this does not mean that competition as such has been restricted. The fact was also declared to be irrelevant that an undertaking loses its clients attracted to a competitor using unfair business methods. In fact, the claim that an act of unfair competition was committed is in reality indicative of the existence of competition in a given market. There is thus no need for the competition authority to intervene – it is up to the undertaking or undertakings suffering from unfair competition practices to seek damages before a general civil court.

### **4. The lack of consideration of non-economic arguments**

Neither the subject matter of Polish competition law nor the wording of its substantive provisions support the consideration of non-economic arguments (unrelated to competition) when declaring a certain conduct as anticompetitive or when justifying it.

It was declared only accidentally that the application of competition law in the public interest should be seen in a wider perspective and include such assessment of circumstances as the protests of farmers against the pricing policy of one of the undertakings, as an indication of a conduct violating

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<sup>98</sup> Judgment of the Court of Competition and Consumer Protection of 16 November 2005, XVII Ama 97/04, published in: UOKiK Official Journal 2006, No 1, item 16.

<sup>99</sup> Judgment of the Antimonopoly Court of 19 September 1991, XVII Amr 9/91.

<sup>100</sup> Judgment of the Antimonopoly Court of 9 April 1997, XVII Ama 4/97, Lex 56458.

the public interest<sup>101</sup>. Similarly, the Antimonopoly Court justified one of the restrictive practices adopted by the incumbent Polish telecoms operator seeing as it helped to improve network coverage, at a time when one had to wait up to several years for a phone line to be installed<sup>102</sup>.

## 5. Reasonable protection of economic and individual freedom

Initially, when the Act of 1990 was in force, Polish competition law was considered to be designed to protect the freedom of competition against its restraints resulting from the conduct of undertakings<sup>103</sup>. Competition was viewed as the process of rivalry and defined as a situation in which “markets remain open for all on equal terms”<sup>104</sup>. The freedom of economic activity was emphasised as was the freedom to contract, the freedom to choose customers and clients and the freedom to determine the content of the concluded agreements<sup>105</sup>. This traditional approach emphasising the importance of the freedom of competition and the freedom of economic activity can be noted even under the Act of 2000<sup>106</sup>.

This approach is supported by case-law where several references can be found declaring that the purpose of the Act of 1990 is to protect the “independence of market participants and their right to equal treatment”<sup>107</sup>. As a result, a restriction of this independence was deemed to be a restriction of competition<sup>108</sup>. The protection of independence was viewed as “counteracting the use of superior position by undertakings controlling a significant market share”<sup>109</sup>. Forcing dealers to undertake certain obligations under the threat of contract termination was held to be abusive<sup>110</sup>. The same applied to cases in

<sup>101</sup> Judgment of the Supreme Court of 27 August 2003, I CKN 527/01, Lex No 137525.

<sup>102</sup> Judgment of the Antimonopoly Court of 25 January 1995, XVII Amr 51/94, (1995) 12 *Wokanda*.

<sup>103</sup> S. Gronowski, *Ustawa...*, p. 16; Z. Jurczyk, “Cele polityki...”, p. 36.

<sup>104</sup> S. Gronowski, *Ustawa...*, p. 27.

<sup>105</sup> S. Gronowski, *Ustawa...*, p. 25; P. Podrecki: *Porozumienia monopolistyczne...*, p. 14.

<sup>106</sup> R. Molski, “Programy łagodnego traktowania – panaceum na praktyki kartelowe?” (2004) 1 *Kwartalnik Prawa publicznego* 184-185; T. Szancilo, “Porozumienia ograniczające konkurencję” (2006) 8 *Przegląd Prawa Handlowego* 36.

<sup>107</sup> Judgment of the Antimonopoly Court of 10 May 1993, XVII Amr 6/93, (1993) 9 *Wokanda*; judgment of the Antimonopoly Court of 21 May 1993, XVII Ama 9/93, (1993) 12 *Wokanda*.

<sup>108</sup> Judgment of the Antimonopoly Court of 11 December 1996, XVII Ama 59/96, LEX no 56166.

<sup>109</sup> Judgment of the Antimonopoly Court of 21 January 1994, XVII Amr 40/93, unpublished.

<sup>110</sup> Judgment of the Supreme Court of 23 February 2006, III SK 6/05, (2007) 5-6 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 86.

which a dominant undertaking imposed certain methods of payment settling or imposed a duty to use services offered by a specific provider<sup>111</sup>. The restriction of competition found in those cases took the form of “depriving the members of the distribution network of the factual influence on the operation of their businesses”.

Even now competition is understood as the rivalry between independent undertakings seeking to obtain a market advantage over their competitors<sup>112</sup>. In order for competition to be undistorted, supply and demand forces must operate freely, that is, without any restraints<sup>113</sup>. Undertakings must therefore act independently. All concerted actions that are capable of limiting the economic freedom of market participants lead to a prohibited distortion of competition<sup>114</sup>. Any limitation of the independence of decision-making is considered to be an indicator of a restriction of competition<sup>115</sup>.

On the other hand, many cases suggest that a restriction imposed on the economic freedom of another undertaking was not anticompetitive as such; it was considered to be anticompetitive only if it resulted from a conduct “which had its origin in dominant market structures”<sup>116</sup>.

## 6. The lack of protection for competitors

It has been established in this paper, when discussing the public interest doctrine and the enhancement of efficiency, that the protection of competitors is not an accepted goal of Polish competition law. Even in cases where references were made to the restriction of the economic freedom of other companies, the undertakings under consideration operated at a different level of the supply and demand chain – they were neither competitors of the entity resorting to the anticompetitive practice nor parties to the prohibited agreement. During a competition-related analysis in such cases, the most important factor to be taken into account is whether the scrutinised conduct does not discourage

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<sup>111</sup> Judgment of the Supreme Court of 24 April 2003, I CKN 258/01, (2004) 7–8 *Orzecznictwo Sądu Najwyższego – Izba Cywilna*, item 115.

<sup>112</sup> Decision of the President of UOKiK of 4 July 2008, DOK-3/2008; decision of the President of UOKiK of 29 December 2006, DOK-164/06.

<sup>113</sup> Decision of the President of UOKiK of 31 December 2007, DOK-99/2007; decision of the President of UOKiK of 7 April 2008, DOK-1/2008.

<sup>114</sup> Decision of the President of UOKiK of 7 April 2008, DOK-1/2008; decision of the President of UOKiK of 29 December 2006 r., DOK-164/06.

<sup>115</sup> Judgment of the Supreme Court of 12 May 2004, III SK 44/04, (2005) 9 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*, item 136.

<sup>116</sup> Judgment of the Antimonopoly Court of 29 December 1993 r., XVII Amr 42/93, (1994) 5 *Wokanda*; judgment of the Antimonopoly Court of 9 April 1997, XVII Ama 4/97, Lex 56458.

consumers from buying products of other non-dominant undertakings<sup>117</sup>. The interests of undertakings affected by exclusionary conduct are only secondary, as shown by the aforementioned case concerning the exclusive dealing clause used in the context of the yeast market. The clause applied by a company controlling over 50% of the yeast market was found to be anticompetitive because it affected consumer choice. Of secondary importance was the fact that it restricted the ability of undertakings bound by an exclusive dealing contract to compete with multi-brand dealers.

Another example can be found in the case concerning the agreement to cease production of a certain type of petrol concluded between both Polish refiners. This practice was prohibited because it deprived undertakings operating at a wholesale level of the possibility to satisfy still existing consumer demand for this product<sup>118</sup>.

## VI. Conclusions

Cases considered by the competition authority and courts, which have been discussed in this contribution illustrate the lack of a coherent approach to the goals of Polish competition law. However, despite the variety of existing opinions on this topic, the fact that the subject-matter of the statutes forming the core of the Polish competition law system is often mixed up with their function and goals, and that – if identified – the goals show an internal inconsistency in their reasoning (e.g. perfect and effective competition at the same time, economic freedom and efficiency, efficiency and consumer choice, etc.), the result ensuing from this disorderly and disorienting body of case-law seems surprisingly coherent.

Non-dominant undertakings interested in enhancing their efficiency should not fear the competition authority as they can structure their agreements in such a manner as to fall within the scope of one of the existing national block exemptions. Even if they fail to do so, they can justify a restriction of competition resulting from co-operation by meeting the criteria contained in the Polish equivalent of Article 81(3) EC. Companies enjoying a dominant position are in a more difficult situation but even here an efficiency defense has not been ruled out. If a dominant firm can prove that consumer welfare will increase as a result of a conduct under review by the competition authority

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<sup>117</sup> Judgment of the Court of Competition and Consumer Protection of 28 February 2008, XVII Ama 52/07, UOKiK Official Journal 2008, No 2, item 18.

<sup>118</sup> Decision of the President of UOKiK of 31 December 2007, DOK-99/2007.

or courts, even dominant undertakings should be able to escape the prohibition contained in the national equivalent of Article 82 EC.

Nevertheless, all undertakings should consider the following questions: in what way does the conduct applied, or to be applied, affect consumers? Is it in any way beneficial to them? What are the benefits? Will consumers receive at least a share of the benefits resulting from conduct that may be doubtful in the eyes of the competition authority? Why is it so important? All this should be considered in the light of the fact that Polish competition law seems to be very consumer-oriented and generally follows the rule that “what is good for consumers, is good for competition”. This, of course, does not preclude other arguments to be considered but so far consumer welfare seems to be the one accepted most frequently.

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# Antitrust Private Enforcement – Case of Poland

by

Agata Jurkowska\*

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### *Abstract*

This article presents the main difficulties surrounding private enforcement of antitrust law in Poland, currently the key implementation problem in the field of antitrust law. Whereas the basic standards concerning the public pillar of antitrust enforcement have already been established, either in the European Community (EC) or in its Member States, the private pillar of antitrust enforcement has not yet been fully developed. The fact that private enforcement of antitrust law is possible, and in fact equal, to public enforcement is not yet commonly recognized. In response to the European Commission's *White Paper on Damages actions for breach of the EC antitrust rules*, private enforcement of antitrust law is presently

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under intense discussion in EC Member States. This article should be considered as one of the contributions to this debate.

It presents the main legal framework of private enforcement of antitrust law in Poland. In order to do so, it directly refers to the Polish Act on competition and consumer protection, the Civil Code and the Civil Procedure Code. This article also discusses Polish case law in this area. It aims to assess whether existing Polish legal provisions are, in fact, sufficient to ensure effective private enforcement of Polish as well as EC antitrust law. The article refers to the main proposals of the European Commission's White Paper.

It is concluded that private enforcement of antitrust law is indeed possible in Poland on the basis of currently applicable procedural rules, even if there are no special instruments designed to facilitate it. However, it cannot be expected that in the current legal climate, private parties will eagerly and frequently apply for damages in cases of a breach of Polish antitrust law. Antitrust cases are special in many aspects and, thus, they require specific solutions in procedural terms. This article aims to pinpoint those areas, where the Polish law needs to be changed in order to develop and promote private enforcement of antitrust law in Poland.

**Classifications and key words:** private and public enforcement, private parties, antitrust damages, court proceedings, collective redress, damage actions.

## I. Introduction

Private enforcement of antitrust law has become a key implementation problem of antitrust law in the EC. The EC initiated an extensive debate on this topic by adopting in 2005 the *Green Paper on Damages actions for breach of the EC antitrust rules (Green Paper)*<sup>1</sup>, followed in 2008 by the *White Paper on Damages Actions for Breach of the EC Antitrust Rules (White Paper)*<sup>2</sup>. With its judgments in *Courage*<sup>3</sup> and

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<sup>1</sup> COM(2005) 672 (20 December 2005). See: E. De Smijter, C. Stropp, D. Woods, "Green Paper on damages actions for breach of the EC antitrust rules" (2006) 1 *EC Competition Policy Newsletter* 1–3.

<sup>2</sup> COM(2008) 165 final, SEC(2008) 404, SEC(2008) 405, SEC(2008) 406. See two documents accompanying White Paper (1) Commission Staff Working Paper accompanying the White Paper on Damages Action for Breach of the EC antitrust rules, COM(2008)165 final, SEC(2008)405, 406; (2) *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios. Final Report*, Report for the European Commission, Brussels, Rome, Amsterdam, 30 March 2008.

<sup>3</sup> C-453/99 *Courage Ltd v. Crehan* [2001] ECR I-6297. See comments to the *Courage* case by the Polish authors: by D. Miąsik, published in: (2006) 2 *Europejski Przegląd Sądowy* 57, and by A. Jurkowska, published in: A. Jurkowska, T. Skoczny (eds), *Orzecznictwo sądów wspólnotowych w sprawach konkurencji w latach 1964–2004*, Warszawa 2007, pp. 698–706.

*Manfredi*<sup>4</sup>, the European Court of Justice (ECJ) strongly engaged in this debate. Simplifying the legal environment surrounding the effective enforcement of EC antitrust law in the national courts of its Member States should be regarded as a further step in the modernisation process of EC antitrust law. In fact, the current antitrust enforcement system was not so much modernised as replaced by a new one – built on two equal pillars (public and private). So far enforcing EC law by private parties in EC Member States has been infrequent, the Commission wants to reverse that tendency.

Unlike the amendments of the application system of Article 81 and 82 of the EC Treaty (implemented by Regulation 1/2003), measures adopted to facilitating private enforcement of antitrust law will not only affect the implementation of EC law. Instead, they will broadly influence the enforcement of domestic antitrust rules as well. It is highly likely, however, that procedural rules concerning antitrust damage claims established at the EC level will be implemented by national legislators in respect to the enforcement of domestic antitrust laws. Thus, the debate on private enforcement of EC antitrust rules became simultaneously a discussion on procedures for actions based on national laws. In the majority of Member States, domestic antitrust rules are patterned on EC provisions, so a similarity in the enforcement system of EC and national rules is natural. European initiatives directed at promoting private enforcement may also be considered as a form of incentive for national legislations.

Polish antitrust law does seem to need such an incentive. The private pillar of antitrust enforcement has not developed in Poland yet. There are hardly any cases on civil issues connected with infringements of antitrust law. However, the European debate on private enforcement of competition law should start a similar process in Poland. At the moment, the domestic debate is far from intense – it is in fact quite surprising that even one single opinion from a Polish body was actually submitted to the Commission as a reply to its call for comments to its *White Paper*. This article constitutes a contribution to this debate as it presents current legislation, which is useful (or potentially useful) in the area of private enforcement of antitrust law, as well as existing Polish case law affecting this field. The Commission's *White Paper* remains a natural background for all the considerations below.

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<sup>4</sup> C-295-298/04 *V. Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA, Nicolò Tricarico, Pasqualina Murgolo v Assitalia SpA* [2006] ECR I-06619. See M. Carpagnano, "Private enforcement of Competition Law Arrives in Italy: Analysis of the Judgment of the European Court of Justice in Joined Cases C-295-298/04 *Manfredi*" (2006) 3(1) *Competition Law Review* 51–53.

## II. Polish private enforcement of antitrust law – state of play

### 1. Nullity of practices restricting competition

In Polish antitrust law, prohibitions of practices restricting competition are established by Article 6 (prohibition of cartels) and Article 9 (prohibition of abuse of a dominant position) of the Act of 16 February 2007 on Competition and Consumer Protection (Competition Act)<sup>5</sup>. Infringing these prohibitions generates a sanction of nullity of all the business practices – or their respective parts – constituting a restrictive agreement (see Article 6(2) or an abuse of a dominant position (see Article 9(3)). The rule of nullity opens a way for private enforcement because it stresses the civil dimension of competition restricting practices. Business practices caught by the prohibition of cartels or the prohibition of abuse of a dominant position are null and void *ex lege*. That effect does not depend on a statement of nullity made by the President of the Office of Competition and Consumer Protection (UOKiK) in an administrative decision, or a judgment by a court involved in adjudicating antitrust cases<sup>6</sup> (the Court of Competition and Consumer Protection, Court of Appeals in Warsaw or Supreme Court). As the Supreme Court stated in its resolution of 23 July 2008 (III CZP 52/08)<sup>7</sup>, pursuant to the provisions of the Competition Act referring to nullity, a final and binding decision of the President of UOKiK is not a prerequisite for declaring a contract as null and void. In the same judgment the Supreme Court found however, that a declaration by a court that an entrepreneur infringes a Competition Act prohibition is only a prerequisite for a court's statement on nullity of an analyzed contract and simultaneously a condition for a validity of claims brought to the court.

Legal actions are null and void *ex tunc*, from the moment the actions were taken or a reason for nullity occurring<sup>8</sup>.

The sanction that is prescribed in Article 6(1) and 9(3) of the Competition Act is presumed to be absolute nullity. Contractual actions that are the basis of competition restricting practices, bear an *erga omnes* effect and so, every entity

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<sup>5</sup> Act of 16 July 2007 on Competition and Consumer Protection (Journal of Laws 2007 No 50, item 331; amendments: Journal of Laws 2007 No 99, item 660; Journal of Laws 2007 No 171, item 1206.

<sup>6</sup> K. Kohutek, [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2008, p. 291; E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2002, p. 87. See also point II.2 below.

<sup>7</sup> Resolution of the Supreme Court of 23 July 2008, III CZP 52/08, unpublished.

<sup>8</sup> K. Kohutek, [in:] K. Kohutek, M. Sieradzka, *Ustawa...*, p. 291; P. Podrecki, *Porozumienia monopolistyczne i ich cywilnoprawne skutki*, Kraków 2000, p. 186.

may refer to the sanction of nullity<sup>9</sup>. Contractual actions considered null and void – pursuant to respective provisions of the Competition Act – cannot be validated<sup>10</sup>. It is also impossible to execute contractual actions, to which sanction applies<sup>11</sup>.

At this time, the sanction of nullity set out in the Competition Act is commonly considered to be equivalent to the sanction prescribed in Article 58 of the Polish Civil Code<sup>12</sup>, even if a different opinion – pointing to the specific nature of nullity in antimonopoly law – was expressed in the past in relation to the Act of 24 February 1990 on Counteracting Monopolistic Practices and Consumer Protection<sup>13</sup>. The equivalence of nullity in antitrust and civil law was confirmed in many judgments issued by the Court of Competition and Consumer Protection (previously: Antimonopoly Court). For instance, the Court stated that Competition Act was one of the legal acts that may – pursuant to Article 353<sup>1</sup> of the Civil Code – limit the freedom of contract<sup>14</sup>.

## 2. Enforcement of the Competition Act 2007

Thanks to the changes made to the Competition Act of 2007 in comparison to the Competition Act of 15 December 2000<sup>15</sup>, Polish antitrust law enforcement before the President of UOKiK turned, from a mixed model (public-private), into a purely public enforcement model. Under the current Competition Act, antitrust proceeding before the President of UOKiK can be initiated – on the basis of Article 49 – only *ex officio*, an individual cannot lodge a claim on infringements of the prohibition of cartels or abuse of a dominant position. In other words, individuals cannot force the President of UOKiK to initiate proceedings before the UOKiK. Individuals are only allowed to

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<sup>9</sup> Decision of the President of the UOKiK of 30 April 2007, DOK-53/07, unpublished.

<sup>10</sup> T. Szanciło, “Porozumienia ograniczające konkurencję” (2006) 6 *Przegląd Prawa Handlowego* 41; K. Kohutek, [in:] K. Kohutek, M. Sieradzka, *Ustawa...*, p. 291.

<sup>11</sup> See judgment of the Court of Competition and Consumer Protection of 10 September 20003, XVII Ama 136/02, (2004) 7–8 *Wokanda*.

<sup>12</sup> Act of 23 April 1964 Civil Code (Journal of Laws 1964, No 16, item 93, with amendments). See P. Podrecki, *Porozumienia monopolistyczne...*, p. 187; S. Gronowski, *Polskie prawo antymonopolowe*, Warszawa 1998, p. 169.

<sup>13</sup> Act of 24 February 1990 on Counteracting Monopolistic Practices and Consumer Protection (consolidated text: Journal of Laws 1997, No 49, item 318 with amendments). See T. Ławicki, “Glosa do wyroku SN z dnia 22 lutego 1994 r., I CRN 238/93” (1995) 7 *Państwo i Prawo*.

<sup>14</sup> Judgment of the Antimonopoly Court of 6 September 1993, XVII Amr 26/93, (1993) 4 *Orzecznictwo Gospodarcze*, item 86.

<sup>15</sup> Act of 15 December 2000 on Competition and Consumer Protection (consolidated text: Journal of Laws 2005 No 244, item 2080, with amendments).

submit a notification of an infringement, which is non-binding to the UOKiK (Article 86).

According to the Polish government, this amendment was justified by the need to eliminate the possibility to lodge a claim before the UOKiK by individuals – eliminating such an activity of individuals was presumed to be a prerequisite to help improve the level of private enforcement of antitrust law in Poland<sup>16</sup>. This statement should be regarded as a confirmation of a two-fold system of antitrust law enforcement: public (with the exclusive competence of the President of UOKiK) and private (with the participation of civil courts)<sup>17</sup>. Certainly, the shift towards a public enforcement model before the President of UOKiK is a step in the right direction. Indeed, when individuals were allowed – under the Competition Act of 2000 – to lodge a claim to the UOKiK, they had no incentive to start civil proceedings. An intervention by the President of UOKiK was not only much faster (considering that the average duration of court proceedings in Poland is over one year), but also much cheaper. Naturally, the character and results of public and private enforcement are totally different. However, a majority of entities filing a claim to the President of UOKiK were ‘personally’ satisfied with an administrative decision confirming an infringement of the Competition Act. Currently, when public enforcement lies in the exclusive competence of the President of UOKiK, satisfaction of that kind cannot be achieved by individuals; initiating court proceedings is thus the only way to play a fully active role in establishing an infringement (not to mention the fact, that private enforcement has always been the only road to gain financial satisfaction). Indeed, a new *ex officio* enforcement model of the Competition Act before the President of UOKiK may motivate individuals to intensify their efforts in the context of private enforcement. On the other hand, such an indirect incentive is far too small to radically change the situation and to strengthen the eagerness level of individual to claim antitrust damages.

### 3. Legal basis for private enforcement of antitrust law

Even, if the Polish Competition Act of 2007 was planned to broaden the scope of private enforcement of antitrust law, the legislator did not follow solutions applied in the German competition act where, the so-called 7<sup>th</sup> amendment, introduced a direct legal basis for private enforcement of antitrust

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<sup>16</sup> Government’s Explanatory Note to a Draft Competition Act, p. 17.

<sup>17</sup> A. Jurkowska, “Perspektywy prywatnego wdrażania prawa ochrony konkurencji w Polsce na tle doświadczeń Wspólnoty Europejskiej” (2008) 1 *Przegląd Ustawodawstwa Gospodarczego* 25–26.

law<sup>18</sup>. Under those circumstances, the provisions of the Polish Civil Code and the Act of 16 April 1993 on Combating Unfair Competition<sup>19</sup> (hereafter, Unfair Competition Act) must be applied as the legal basis for establishing responsibility for the breaches of antitrust law in Poland.

The legal rules of the Unfair Competition Act may constitute the legal basis for establishing breaches of antitrust law due to the broad concept of unfair competition practice in Article 3(1) of the Unfair Competition Act. This provision, considered to be a general clause, defines an act of unfair competition as “an activity contrary to the law or good practice which threatens or infringes the interest of another entrepreneur or customer”. Antitrust breaches, which are indeed “contrary to the law”, may be considered to be acts of unfair competition. As a result, the rules on civil liability that are contained in the Unfair Competition Act may be successfully applied to either to them. On the basis of Article 18(1), which opens Chapter 3 of the Unfair Competition Act (entitled “Civil liability”), an entrepreneur whose interests have been threatened or violated may submit the following claims: 1) to abandon unlawful actions, 2) to remove results of unlawful actions, 3) to make a single or repeated statement of a given content and in a prescribed form, 4) to repair a damage, “pursuant to general rules”, 5) to hand over unjustified benefits, “pursuant to general rules”, 6) to adjudicate an adequate amount of money to the determined social goal connected with the support of Polish culture or related to the protection of national heritage (if the act of unfair competition has been deliberate).

However, the Unfair Competition Act may be used as the legal basis for liability for antitrust infringements only by entrepreneurs: claims may be lodged either individually or – pursuant to Article 19(1) point 3 – by a national or regional organisation, whose statutory objective is to protect the interests of entrepreneurs. The Unfair Competition Act does not provide any legal basis that would allow consumers – either individually or collectively – to apply for compensation for antitrust damages. This weakness makes it impossible to treat the Unfair Competition Act as a universal source of rights for victims of breaches of antitrust law – excluding consumers from the scope of the beneficiaries of private enforcement of antitrust law would significantly weaken its effectiveness.

Damage actions for breaches of antitrust law can also be based on the Polish Civil Code, using its provisions means, however, to apply general civil law rules to specific situations such as antitrust damages. The Civil Code contains three

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<sup>18</sup> See M. Będkowski-Koziół, “Prywatne wdrażanie prawa antymonopolowego w RFN – uwagi na tle regulacji siódmej noweli kartelowej” (2007) 12 *Przegląd Ustawodawstwa Gospodarczego*.

<sup>19</sup> Act of 16 April 1993 on Combating Unfair Competition (consolidated text: Journal of Laws 2003 No 153, item 1503 with amendments).

different legal grounds that can be used in the context of damage actions for antitrust infringements. They include, first of all, Article 415 and 471 of Civil Code (establishing a system of general civil liability – tort and contractual one, respectively). Article 415 of the Civil Code states that “[w]hoever by his fault caused a damage to another person shall be obliged to redress it”. The condition of “fault”, which is a prerequisite of the application of Article 415, causes that this provision may be used as a legal ground for antitrust liability only in cases, where a breach of antitrust law was deliberate (agreements, the object of which restricts competition and all cases of abuse of a dominant position seeing as settled case law considers that abuse cannot derive from negligence). The clear advantage of the application of Article 415 of the Civil Code as grounds for liability for antitrust law infringements is the fact that this rule refers not only to material, but also to non-material damages (pecuniary compensation for a wrong (injunctive relief)).

Article 471 of the Civil Code concerns the liability of a debtor for a failure to perform, or a failure to properly perform, an obligation (liability *ex contractu*). That type of liability – as it is presumed in the Polish doctrine of civil law – excludes a possibility of compensation for non-material damages.

It is worth mentioning that the European Commission is of the opinion that “fault” should be seen as a necessary pre-requisite of compensatory liability. Thus, the concept of “fault” is of fundamental importance in this context. Under the Polish law, “fault is captured in a synthetic manner, combining objective and subjective elements”<sup>20</sup>. On the basis of Article 471, a concept of “fault” covers either an intention not to fulfill an obligation or involuntary negligence in performing an obligation. This broad concept seems to correspond to the opinion pursued by the European Commission, which suggests that only an “excusable error” may abolish liability of entrepreneurs for antitrust breaches.

Article 405 of the Civil Code contains rules on unjust enrichment. Benefits resulting from unlawful actions (among them – antitrust breaches) may be regarded as unjust enrichment. The Supreme Court delivered a judgment on 10 August 2006 where Article 405 of the Civil Code was successfully used as the legal grounds for damages in a breach of the Unfair Competition Act<sup>21</sup>. As the European Commission presumes, unjust enrichment may appear in the context of “passing-on” benefits. It should also be recommended for the Polish courts to accept the approach, presented in the *White Paper* (point 2.6) that suggests: “to lighten the victim’s burden” and “to make indirect purchasers

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<sup>20</sup> *Green Paper. An Optimal View of the Civil Code of the Republic of Poland* (Z. Radwański, ed.), Ministry of Justice, Warszawa 2006, p. 108.

<sup>21</sup> Judgment of 10 August 2006, V CSK 237/06, unpublished.

able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety”.

Worth noting is also the fact, that even Article 18(1) points 4 and 5 of the Unfair Competition Act refers to “general rules” of civil liability established in the Civil Code. Actually, applying the Unfair Competition Act may lead – in cases of some claims – to the application of the Civil Code. Due to that, the Civil Code and the Unfair Competition Act should not be regarded as real alternatives. The burden of proof is the same, regardless of the legal basis (a shift in the burden of proof set out in Article 18a of the Unfair Competition Act does not refer to antitrust cases). The Unfair Competition Act contains a special mechanism preventing entrepreneurs from filing unjustified claims (Article 22). Paradoxically, and specially where the President of UOKiK has not taken a prior decision on the case, that mechanism may discourage damage actions from entrepreneurs who fear to be accused of abusing the system of damage claims.

Unlike the Unfair Competition Act (with a limited scope of entities that can benefit from claims based on that Act), the Civil Code has a “universal” applicability for establishing antitrust liability in the meaning that Article 415, 471 and 405 can be used either by entrepreneurs (competitors or co-operators of an infringer) or by consumers. It is compatible with the approach of the ECJ that stated in *Courage* and then in *Manfredi* that “every individual” should have an opportunity to make a claim for damages<sup>22</sup>. The Commission confirmed that opinion in its *White Paper* (point 2.1).

#### 4. (Still no) basis for collective redress

In order to comply with the aforementioned opinion of the ECJ concerning personal standing within antitrust private enforcement, a right to claim for antitrust damages should be granted to a group of consumers. Such a solution, proposed by the Commission in its *White Paper* (point 2.1.), could significantly strengthen the participation of consumers in private enforcement of antitrust law, putting, in turn, stronger pressure on entrepreneurs. The Commission proposes two “complementary systems” of collective redress: 1) representative actions which are brought by an organisation acting for a group, and 2) opt-in collective actions (*White Paper*, point 2.1.).

There were so far no provisions regulating collective redress in the Polish legal system, even though some form of “class actions” or “collective claims”

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<sup>22</sup> *Courage*, para. 24; *Manfredi*, par. 61.

can be identified in the Civil Procedure Code<sup>23</sup>. It is in fact possible for several plaintiffs to bring an action simultaneously<sup>24</sup>. Moreover, pursuant to Article 7 of the Civil Procedure Code, a prosecutor is entitled to initiate court proceedings, acting on a behalf of a particular person, in any case where the legal system, citizen rights or the public interest must be protected. It is not impossible that these conditions can be fulfilled in some antitrust cases. The Polish ombudsman has the same (as a prosecutor) ability to initiate proceedings in a civil court, even in antitrust cases<sup>25</sup>. Naturally, both solutions bear little resemblance to collective claims. An institution that is indeed quite close to “collective claims”, is a possibility to initiate proceedings in consumer cases, on behalf of consumers, by representative bodies (consumer associations, human rights organisations, scientific and technological bodies, trade unions, and automobile associations, other than those representing commercial transport undertakings).

However, a respective legislative act “on group proceeding” (collective redress) is currently being prepared by the Commission of Civil Law Codification at the Polish Ministry of Justice. The draft follows on an opt-in model. It provides an opportunity for a group of at least 10 individuals to bring a single action provided that their claims are based on the same factual or legal grounds, and that the facts justify common demands for all their claims (see Article 1 of a draft). However, it would be the court that would decide on the admissibility of a collective (group) claim (Article 10 of a draft). The position of a representative of the group, that brings a claim, may be taken by a member of the group or a Consumer Ombudsman<sup>26</sup>. The representative of the group conducts the proceeding on his own behalf, but in the interest of all group members. The group is entitled to bring an action for pecuniary or non-pecuniary claims. In the case of the former, the amount of the claim must be generally equal for each member of the group, although the equalization may be done in a subgroup (see Article 2(1) of a draft). Introducing collective redress is a revolution of sorts for Polish civil procedure; it is a response to the challenges, needs and values that are associated with modern market relations and consumer protection needs, as well as the latest trends in European legal culture – private enforcement of antitrust law remains a part of that reality.

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<sup>23</sup> Act of 17 November 1964 Civil Procedure Code (Journal of Laws 1964 No 43, item 296 with amendments).

<sup>24</sup> See *Study on the conditions of claims for damages in case of infringement of EC competition rules – National Report – Poland*, p. 4 (available at: [http://ec.europa.eu/comm/competition/antitrust/actionsdamages/national\\_reports/poland\\_en.pdf](http://ec.europa.eu/comm/competition/antitrust/actionsdamages/national_reports/poland_en.pdf))

<sup>25</sup> *Ibidem*, p. 5.

<sup>26</sup> Consumer Ombudsmen operate on the basis of Article 39–43 of the Competition Act 2007.

The forthcoming act on collective claims will be the next step not only to compliment, but also to improve the effectiveness of the system of private enforcement of antitrust law in Poland.

## 5. Categories of claims

The Commission's *White Paper* focuses on damage actions. The Polish law, like in many other countries, sets out various forms of compensation. The way damages are compensated greatly depends on what kind of damage was sustained: whether it was material in nature (repaired with redress) or non-material (compensated with injunctive relieves).

Compensation may take the form of pecuniary and non-pecuniary measures. Regarding the latter, in antitrust cases a plaintiff may claim for: 1) a declaration of declaring an infringement of competition law, 2) an abandonment of restrictive practices, 3) a public statement on the breach of antitrust law by an infringer. Regarding pecuniary measures, one can bring an action for 1) "typical" damages, granted pursuant to general rules, and 2) *restitutio in integrum*. There are no specific provisions (or even non-binding guidelines) on methods of calculating damages in antitrust cases. The courts will most likely calculate damages on the same general basis, which they use in other cases relating to business and market activity. Polish courts are likely to accept the principle established by the ECJ in *Manfredi*<sup>27</sup>, whereby compensation in antitrust cases should consist of *damnum emergens*, *lucrum cessans* and interests seeing as such an approach is compatible with basic rules of Polish civil law. However, to the best of the Author's knowledge, that fact has not yet been confirmed in Polish antitrust case law.

In contrast, Polish courts are not likely to grant compensation for non-material damages, as that would be unusual for the Polish civil law system. Nonetheless, the European Commission is not likely to impose a duty to implement such measure in individual Member States, so the status quo should remain – an injunctive relief is theoretically possible in antitrust cases, but would be unusual in practice.

Finally, it is worth mentioning that an exemplary, rather than exhaustive, list of potential forms of compensation is included in Article 18(1) of the Unfair Competition Act<sup>28</sup>.

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<sup>27</sup> See *Manfredi*, para. 79.

<sup>28</sup> See above point II.3.

## 6. Single enforcement procedure for Polish and EC competition law

A process of private enforcement refers either to national or to EC antitrust law that, pursuant to Regulation 1/2003, must be directly applied in Member States. According to the principle of effectiveness and its interpretation by the ECJ, national law is not allowed to deprive EC law of its effectiveness. Therefore, national rules cannot make it impossible, or extraordinarily difficult, to execute an individuals' right to claim damages based on Article 81 and 82 EC<sup>29</sup>. The principle of equivalence in EC law requires the usage, for damage actions based on EC law, national procedural rules not less favourable than those used for equivalent actions deriving from national material law<sup>30</sup>. Polish law does not have a special procedure for enforcing damage actions based on EC law – their legal grounds would also be based on the Civil Code or the Unfair Competition Act. At the moment, there is no risk that Polish procedures would undermine private enforcement of EC antitrust law. Unlike in the *Manfredi* case, actions based on EC law and those based on national law are lodged at the same type of civil courts. All procedural issues, including limitation periods, are applied in the same way to actions based on the Polish Competition Act and those, potentially, based on the EC Treaty. The Supreme Court stated in the resolution of 23 July 2008 (III CZP 52/08), that even if, in a given case, EC law is not applied, national provisions should be interpreted in such a way, as to eliminate procedural discrepancies in the application of Polish and EC law.

Other issues crucial to private enforcement of antitrust law include the prejudicial nature of administrative decision, that is not regulated in legal acts, but that has been dealt with by the Polish judiciary<sup>31</sup>.

## III. Developments in Polish case law on private enforcement of antitrust law

The record of privately enforced antitrust cases in Poland is not impressive. In the recent years their number has, nevertheless, increased. It can be expected that the number of privately enforced antitrust cases will continue to grow due to its further popularisation. Presented below are the most

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<sup>29</sup> See *Manfredi*, para. 62. See M. Szpunar, *Odpowiedzialność podmiotu prywatnego z tytułu naruszenia prawa wspólnotowego*, a Wolters Kluwer business, Warszawa 2008, p. 325–326.

<sup>30</sup> *Manfredi*, para. 71.

<sup>31</sup> See point III. below.

important judgments of the Supreme Court that concern some aspects of private enforcement of antitrust law. The case law analysed here shows two key problems arising in antitrust matters in the context of private enforcement. The first issue is the nullity of contracts constituting practices restricting competition; the second, the prejudicial character of administrative antitrust decisions of Polish competition authorities.

Moreover, there is a number of judgments, either from the Supreme Court or the Appeal Court or the Court of Competition and Consumer Protection (earlier: Antimonopoly Court), that emphasise a possibility to bring an action to civil courts as a result of antitrust breaches. Actually, these judgments explicitly note the existence of two pillars (public and private) of antitrust law enforcement. Within the first pillar the public interest is protected – this being a task of the President of UOKiK and the courts (involved in the appeal and/or cassation procedures). Private interests get their protection in “classical” civil proceedings initiated in civil courts. In the judgment of 29 May 2001 (I CKN 1217/98) the Supreme Court claimed: “[a]n objective of the Act on Combating Anti-monopoly Practices (a predecessor of Competition Act) was not the protection of an individual entrepreneur (...). Individual legal rights of market participants are subject to a protection in a procedure of bringing an action to a civil court or to an administrative court”<sup>32</sup>. The Antimonopoly Court in the judgment of 15 January 2002 (XVII Ama 29/2002) repeated: “[r]egarding a public character of the Competition Act, its objective is not a direct protection of legal rights of market participants touched by activities of other entrepreneurs. Such a protection is a field of activity for civil courts”<sup>33</sup>. In the resolution of 23 July 2008 the Supreme Court stressed that individuals (entrepreneurs, consumers) suffering from a restrictive practice should look for compensation of their damages before civil courts (III CZP 52/08). Dualism in applying the same legal act, reflected in the possibility to execute prohibitions settled by that act in a proceeding either before an administrative body or before a civil court is fully admissible.

Even if private enforcement of antitrust law has always been recognised by Polish judiciary, case law on the interdependence between public and private usage of the competition act has significantly evolved. The first judgments on this issue appeared on the basis of the Act on Combating Anti-Monopoly Practices. In a judgment of 22 February 1994 (I CRN 238/93) the Supreme Court claimed that “regardless of a procedure of affirmation consequences of

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<sup>32</sup> Judgment of the Supreme Court of 29 May 2001, I CKN 1217/98, (2002) 1 *Orzecznictwo Sądu Najwyższego – Izba Cywilna*, item 13.

<sup>33</sup> Judgment of the Antimonopoly Court of 15 January 2003, XVII Ama 29/2002, unpublished. See also: judgment of the Antimonopoly Court of 23 October 2002, XVII Ama 133/01, unpublished.

monopolistic practices, an affirmation that an agreement has been reflecting such a practice and – as a result – it is null and void, may be made in a civil matter between parties of that agreement, as a prerequisite for assessing claims resulting from the agreement”<sup>34</sup>. With this judgment, the Supreme Court confirmed that it is not necessary to gain an administrative decision affirming antitrust practices before bringing an antitrust damages action to a civil court. Considering that Polish antitrust law was seen, at that time, as mainly administrative in nature, the judgment of the Supreme Court was somewhat criticised by the Polish doctrine<sup>35</sup>.

One year later, the Supreme Court changed its attitude towards the character of the decisions taken by the Polish antitrust authority. It stated, in its order of 27 October 1995 (III CZP 135/95)<sup>36</sup>, that it was permissible to bring an action related to an infringement of the prohibition of restrictive agreements, only if a decision confirming an infringement has previously been adopted by the Antimonopoly Office (the predecessor of the President of the UOKiK). This approach, linking private enforcement to administrative intervention, must be considered a factor that built a barrier in developing private enforcement of antitrust law and as such, must be assessed negatively<sup>37</sup>.

It was sustained in the later judgment of 28 April 2004 (III CK 521/02), where the Supreme Court confirmed a prejudicial character of a previous rulings in a competition case made by the President of UOKiK or the Court of Competition and Consumer Protection. The Supreme Court stressed that the nullity of a contract associated with a practice that constitutes an abuse of a dominant position may be a prerequisite in a court proceeding only if an antitrust authority or a competition court stated an infringement of a prohibition of an abuse of dominant position.

However, in the judgment of 2 March 2006, the Supreme Court has finally changed its opinion on that matter. According to the Court, “if proceedings before the President of UOKiK had not been instituted or proceedings were not completed with a decision based on Article 9 or 10 of the Competition Act (decisions affirming an infringement – AJ), a civil court may make its own arrangements referring to a practice restricting competition, by entering into a contract, and those arrangements are a prerequisite of a nullity of

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<sup>34</sup> Judgment of the Supreme Court of 22 February 1994, I CRN 238/93, (1994) 10 *Orzecznictwo Sądu Najwyższego – Izba Cywilna*, item 198.

<sup>35</sup> See T. Ławicki, *op. cit.*

<sup>36</sup> Order of the Supreme Court of 27 October 1995, III CZP 135/95, (1996) 6 *Orzecznictwo Sądów Polskich*, item 112.

<sup>37</sup> S. Gronowski, „Głosa...”; A. Jurkowska, “Perspektywy...”, p. 27; A. Jurkowska, D. Miąsik, T. Skoczny, M. Szydło, “Nowa uokik z 2007 r. – kolejny krok w kierunku doskonalenia publicznoprawnej ochrony konkurencji w Polsce” (2007) 4 *Przegląd Ustawodawstwa Gospodarczego* 5–7.

that contract”<sup>38</sup>. In this judgment, the Court stated that “a decision by the President of UOKiK has a declaratory character and in a sphere of civil law it does not create any new legal situation”. It should be noted that the judgment I CSK 83/05 was adopted under the enforcement system where proceedings before the President of UOKiK could be initiated “on demand” of individuals. Since currently such proceedings are started exclusively on an *ex officio* basis, the value of the statement on the independency of civil sanctions in antitrust law has grown.

Private enforcement of antitrust law has again become independent from administrative decisions of the President of UOKiK as long as a decision affirming an infringement of a prohibition of competition restricting practices is not taken by the President of UOKiK. The judgment I CSK 83/05 – read *a contrario* – points at a prejudicial character of an administrative decision taken by a Polish competition authority (if such a decision exists). That opinion of the Court has been sustained also in other judgments adopted since 2006: the judgment of 5 January 2007 (III SK 17/06)<sup>39</sup> and the judgment of 4 March 2008 (IV CSK 441/07)<sup>40</sup>. A positive opinion on a prejudicial nature of the decision adopted by the President of UOKiK is rather common among the Polish doctrine<sup>41</sup>.

All the aforementioned judgments confirming the prejudicial character of administrative decisions relate only to decisions where infringements of the Competition Act were directly claimed. However, one of the resolutions adopted by the Supreme Court in 2008 referred – for the very first time in Polish judiciary – to a commitment decision admissible on the basis of Article 12 of the Competition Act. The Supreme Court stresses there that making an affirmation of a contract’s nullity by a court dependent on a previous involvement of a competition authority “may remain in incompliance with Community law” (III CZP 52/08, unpublished) as it may not – against the principle of effectiveness – create a barrier to enforce an individual’s right based on the EC Treaty. The Court states further that even if from a point of view of public interest, adopting a commitment decision may be more beneficial than a final arrangement on the existence of practices restricting competition, that fact “should not exclude a possibility to protect individual interest in proceedings before a civil court”. Moreover, the Court states that the limitation period for initiating a proceeding in an antitrust case (Article 93 of the Competition Act) cannot act against individual interests and exclude an admissibility of civil proceeding, in which an

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<sup>38</sup> Judgment of the Supreme Court of 2 March 2006, I CSK 83/05, unpublished. See also: judgment of the Supreme Court of 14 March 2007, I CSK 454/06, unpublished.

<sup>39</sup> Judgment of the Supreme Court of 5 January 2007, III SK 17/06, unpublished.

<sup>40</sup> Judgment of the Supreme Court of 4 March 2008, IV CSK 441/07, unpublished.

<sup>41</sup> See A. Jurkowska, D. Miąsik, T. Skoczny, M. Szydło, “Nowa ustawa...”.

existence of a monopolistic practice is affirmed as a condition for the statement on a plaintiff's claims. Additionally, the Supreme Court recalls EC law and its rules on the prejudicial character of antitrust decisions taken by the European Commission. Article 16(1) of Regulation 1/2003 imposes on national courts a duty not to take judgments contrary to the content of the decisions of the Commission. When both, court and administrative proceedings are being held simultaneously, national courts are obliged to avoid issuing judgments that would be contrary to the decision envisaged by the Commission.

According to the Supreme Court, EC law points directly to a necessity of providing administrative decisions in competition cases with a prejudicial status, as this is the most proper way to achieve a consistency of arrangements within a process of public and private antitrust enforcement. It is worth stressing however, that only a final administrative decision should be treated as binding for a court. A commitment decision is not final because it only declares that an infringement is highly probable, although not definite. That is confirmed by Article 12(4) of the Polish Competition Act stating that a commitment decision excludes the possibility of applying provisions on affirming an infringement (Article 10 and 11) or on imposing a penalty (Article 106(1) point 1 and 2). The Supreme Court concludes that a commitment decision cannot be considered as prejudicial in civil court proceedings. Once more recalling EC law, the Supreme Court stresses point 13 and 22 *in fine* of the preamble to Regulation 1/2003 that suggest that the Commission's commitment decisions (adopted pursuant to Article 9) are not binding for national courts.

Some general conclusions can be drawn on the basis of the analysis of existing Polish case law on private enforcement of antitrust law, even though the number of the relevant judgments is small. Firstly, it seems that the Supreme Court worked out basic rules for a co-existence (in some cases a form of co-operation) between public and private pillar of antitrust law enforcement. It was confirmed that when the President of UOKiK adopts a final antitrust decision, its findings are binding (have a prejudicial character) for civil courts. This rule does not, however, apply to commitment decisions, which are not final. If the President of UOKiK has not yet ruled in a case, a civil court is free to decide for the sake of its plaintiff. The same may happen when the President of UOKiK adopted a commitment decision. The case III CZP 52/08 illustrates the influence of EC law solution on the interpretation of Polish rules in this field.

Secondly, considering private enforcement of antitrust law in Poland, the majority of cases are only using the plea of nullity (resulting from a breach of a prohibition of practices restricting competition) as a defense in litigations based on general rules of civil law; so far, there are only a few cases when private enforcement of antitrust law takes the form of damage actions.

#### IV. Prospects of private enforcement of antitrust law in Poland

Although private enforcement of antitrust law is not completely absent from the Polish legal culture, seeing as the Supreme Court has recently delivered some crucial judgments in this area, it is, like in many European countries, still underdeveloped. However, some indications suggest that private enforcement of antitrust law will accelerate, among other things, due to the revolutionary change in the enforcement model, introduced by the Competition Act of 2007 (see point II.2 above), the currently being drafted act on collective redress (see point II.5 above), and a clear line of the Supreme Court regarding the civil aspects of antitrust cases. The influence of EC law and the initiatives of the European Commission, such as its *White Paper*, can also not be ignored as an important influence on the development of the Polish private enforcement system. In general, the Polish doctrine does not deny the competence of the European Commission to propose measures harmonising procedural aspects of damage actions. Still, some tension remains as private enforcement of antitrust law resembles a battlefield where antitrust (usually public) and civil (private) lawyers act. In order to guarantee an effective private enforcement of antitrust law, a high level of co-operation between the public and private pillars of antitrust enforcement is required. In reality, the Polish competition authority is not likely to strongly engage in legislative initiatives concerning private enforcement, seeing as it is active in the sphere of public protection of competition. The Polish competition authority declares, however, its interest in making competition rules effective in the area of private enforcement. It can be assumed nevertheless, that the UOKiK will support the development of the second pillar of antitrust enforcement, because the actions of private entities filing antitrust claims in civil courts remain in advantageous to public interests. Certainly, UOKiK's contribution to building a 'damage culture' in antitrust enforcement<sup>42</sup> should be considered to be a key factor for the success of private enforcement of the Competition Act. Judging the interest shown in private enforcement by the level of involvement in the public consultation process following the *White Paper*, UOKiK was in fact the only Polish body to engage in promoting private enforcement (no other responds from Poland were submitted to the European Commission!). Concluding, however, that there is little interest in private enforcement of EC law in Poland would be exaggerated.

Considering the legal framework of private enforcement of antitrust law, even if it has no specific procedural mechanism, bringing antitrust damage actions in Poland is possible on the basis of its existing legal rules (the Civil

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<sup>42</sup> A. Jurkowska, "Perspektywy...", p. 25.

Code, the Civil Procedure Code, the Unfair Competition Act). “An action for bringing competition-based damages is no different from any other action for damages and the same principles apply to both” (National Report, Poland, p. 2), but it is not a serious hurdle to private enforcement in Poland. However, one cannot expect that in this state of law, private parties will eagerly and frequently apply for damages in cases of a breach of Polish antitrust law. Antitrust cases are specific in many aspects and thus, they may require specific solutions in either procedural or material terms. Not all issues should be resolved through legal acts, some problems can be dealt with by the judiciary – a prejudicial character of a prior administrative decision, confirmed by the Supreme Court, constitutes a good example for such an approach solution. The prospective EC legal regulation or directive on private enforcement<sup>43</sup> will probably show a direction of the Polish legislation and practice in that field and will become a framework for national provisions. Many potential problems can be avoided if there are no (procedural) differences in the enforcement of Article 81 and 82 EC and Article 6 and 9 of the Polish Competition Act.

There is a list of questions linked to private enforcement of antitrust law that should be answered in a debate on antitrust claims and damage actions in Poland. Among them: what categories of damages can be compensated? Even if Polish law permits material and non-material damage compensation, it seems that the Commission in its *White Paper* limits damage actions to material loss only. This pattern is likely to be followed in Poland considering, in particular, the reluctance of the national legislator and courts to broaden the scope of causes for compensating non-material damages. Questions surround also what form should the compensation take (only damage or/and injunctive relief)? Seeing as damages are the main form of compensation for antitrust breaches, difficulties in calculating their proper amount are often stressed<sup>44</sup>. It seems those doubts are – at least to some extent – exaggerated. Judges have always faced problems with calculating damages, especially while ruling on a pecuniary compensation for a “wrong”, and antitrust proceedings – even if quite specific – do not radically differ from other market-related cases. The support from the Commission deriving from its guidelines on calculating damages in antitrust cases, announced as part of the “private enforcement package”, will additionally improve the situation – the idea of prohibition of competition restricting is the same in EC law and national law, so EC guidelines on calculating damages can be easily applied by Polish courts.

A concept of American-style triple (or multi-) damage may also be an issue in Poland, even if it is not part of its national legal culture – similar measures exist however in Polish copyright law. As the Commission expressed a negative

<sup>43</sup> See M. Szpunar, *Odpowiedzialność...*, p. 330–335.

<sup>44</sup> See *White Paper*, point 2.5.

view of triple damages, the introduction of such a solution in individual Member States is not likely.

Pecuniary damages should not remain the only – except for the nullity *ex lege* – civil sanction for breaches of antitrust law. Generally worth recommending is the application of a broad scope of measures to react to antitrust infringements. For instance, a statement that a breach of antitrust rules has taken place (or an announcement of that breach) published in a popular journal, may constitute a very severe sanction for an infringer as well as satisfy its victims, while simultaneously, all the problems connected with calculating damages would cease to exist. The same applies to a claim to abandon an infringement or remove its results. Private enforcement will play its role when it is helpful and open to the needs and expectations of potential plaintiffs.

Some questions may be raised in the context of ‘delivery of proofs and evidences’ in proceeding before civil courts. The Polish Civil Procedure Code sets out a rule of preclusion in proceedings conducted in economic (market) cases<sup>45</sup>. This is a true impediment for private enforcement of antitrust law, as many of such cases (e.g. tacit collusions) cause a lot of probative problems and requires high standards of proves that cannot always be guaranteed because of a preclusion rule<sup>46</sup>. The abandonment of this rule seems to be an important challenge for facilitating private enforcement of antitrust law. Another measure that can make private enforcement more effective is the introduction of a disclosure *inter partes*<sup>47</sup>. Considering that a reflection of that procedure can be found in the Polish copyright law system (Article 105)<sup>48</sup>, its application here would not constitute a total novelty for the Polish legal system. Certainly, that type of probative procedure requires a well-designed “defense mechanism” that would prevent abusing the notion of disclosure<sup>49</sup>.

The question, which courts are entitled to rule on antitrust damage actions must also be posed in a debate on private enforcement in Poland. Some believe that judging antitrust cases needs specialised knowledge and, as a result, specially qualified judges. That problem could be resolved by choosing just one, or only a few, courts in Poland (probably at regional level) that will

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<sup>45</sup> See T. Szanciło, “Prekluzja w postępowaniu gospodarczym” (2007) 6 *Przegląd Prawa Handlowego*.

<sup>46</sup> See M. Bernatt, “Postępowanie przed sądem krajowym w związku z naruszeniem reguł konkurencji” [in:] E. Piontek (ed.), *Nowe tendencje w prawie konkurencji UE*, Warszawa 2008, p. 339–343.

<sup>47</sup> R. Stürner, “Duties of Disclosure and Burden of Proof in the Private Enforcement of European Competition Law” [in:] J. Basedow (ed.), *Private Enforcement of EC Competition Law*, Kluwer Law International 2007, p. 163–192.

<sup>48</sup> Act of 4 February 1994 on Copyrights and Related Rights (Journal of Laws 1994 No 24, item 83 with amendments).

<sup>49</sup> See *White Paper*, point. 2.2.

have special departments trained and prepared to deal with antitrust cases. This solution seems reasonable, however, a plea of a contract's nullity resulting from a prohibited practice may occur in every claim considered by every civil court in Poland. In such cases, judges will also need specialised knowledge in order to give a ruling on an existence of a practice, with all its prerequisites. Thus, trainings in antitrust law should be delivered to all judges of civil courts in Poland.

The current legal framework of private enforcement of antitrust law in Poland, or rather, a lack of special provisions in this field, does not create a barrier for private actions to be taken to enforce the Competition Act or antitrust provisions of the EC Treaty. In the opinion of the Author, the overall success of private enforcement of antitrust law in Poland is far more dependent on public perception than on a change in the law. The current legal framework of civil law and civil procedures, supported by the existing case law largely attributable to the judgments of the Polish Supreme Court, seems to be sufficient from a legal point of view. An explicit mention of the right to antitrust damage actions and clear instructions concerning the execution of this right would be likely to accelerate a 'psychological' shift towards private enforcement of antitrust law.

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# **Enforceability of Regulatory Decisions and Protection of Rights of Telecommunications Undertakings**

by

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## ***Abstract***

The article discusses problems of enforceability of regulatory decisions issued by the Polish regulatory authority – the President of the Office of Electronic Communications (UKE) in the context of the protection of the rights of electronic undertakings. The author refers to the standards for implementing decisions and provisional protection developed in the law of the Council of Europe and

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Community legislation, including Framework Directive 2002/21/EC. He also analyses Polish legal regulations which introduce European solutions, including regulations implementing Community framework for electronic communications, into the national legal order. Special attention is devoted to the competence of Polish administrative courts and the Court of Competition and Consumer Protection in suspending the enforcement of contested regulatory decisions. The author also points to significant gaps in existing national regulations and postulates the introduction of necessary legislative changes to better protect the rights of telecommunications undertakings.

**Classifications and key words:** telecommunication law, national regulatory authorities; enforceability of regulatory decisions, provisional court protection

## I. Introduction

Enforceability of administrative decisions is among the principal issues of administrative law, since decisions serve administrative authorities as a tool for pursuing the tasks that are set for them by the legislator. It therefore becomes important in this context to ensure the enforcement of the orders and prohibitions contained in a decision<sup>1</sup>. This is particularly meaningful in the case of activities of regulatory bodies, including those in the area of electronic communications. Their aim is to evoke, in the social and economic reality, specific changes, new behaviours or circumstances that, without an intervention of this type would:

- not arise at all,
- arise with a considerable delay, or
- arise in a form that does not sufficiently take into account the demands of the market environment, including consumers<sup>2</sup>.

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<sup>1</sup> Cf. e.g. Z. Leoński, *Egzekucja administracyjna świadczeń niepieniężnych*, Warsaw 1968, pp. 5–8; E. Knosala, *Problemy decyzji wykonawczych w administracji publicznej (szkic z nauki administracji)* [in:] *Administracja publiczna u progu XXI wieku. Prace dedykowane prof. zw. dr hab. Janowi Szreniawskiemu z okazji Jubileuszu 45-lecia pracy naukowej*, Przemyśl 2000, pp. 295–298.

<sup>2</sup> On sectoral regulation, see in particular works by T. Skoczny: “Wspólnotowe prawo regulacji in statu nascendi” [in:] C. Mik (ed.), *Prawo gospodarcze Wspólnoty Europejskiej na progu XXI wieku*, Toruń 2002, pp. 231–247; “Stan i tendencje rozwoju prawa administracji regulacyjnej w Polsce” [in:] H. Bauer, P. Huber, Z. Niewiadomski (eds.), *Ius Publicum Europeum*, Warszawa 2003, pp. 115–164; “Ochrona konkurencji a prokonkurencyjna regulacja sektorowa” (2004) 3(5) *Problemy Zarządzania* 7–34. See also: I. Kawka, *Telekomunikacyjne organy regulacyjne w Unii Europejskiej. Problematyka prawna*, Zakamycze 2006, pp. 27–70; M. Szydło, *Regulacja sektorów infrastrukturalnych jako rodzaj funkcji państwa wobec gospodarki*, Warszawa 2005, pp. 89–182.

Enforcement of an administrative decision (and, in broader terms, an administrative act) is deemed to mean “introducing such a condition in social reality, which is in compliance with the provisions of the administrative act”<sup>3</sup>. Hence, enforceability of a decision equals its capability to have effects in the legal and factual spheres of its addressee<sup>4</sup>. A distinction is made between substantive and formal enforceability. The former means enforceability with regard to the provisions of the decision that has been reached, that is, the actual possibility to exercise the rights or obligations contained therein. Such capability is an attribute, predominantly, of decisions that provide for rights and those imposing obligations. In contrast, negative decisions are not enforceable, as a rule. Formal enforceability, in turn, points to the moment from which the act may and should be enforced.

The purpose of this paper is to discuss the formal enforceability of decisions taken by the Polish regulatory authority in matters of electronic communications – the President of the Office of Electronic Communications (UKE)<sup>5</sup>. The rules that govern this enforceability will be considered, including the appeal stage of the proceedings, emphasising, in particular, the requirements which follow in that regard from Community law. This will lead to formulating proposals *de lege ferenda*, which will improve the effectiveness of judicial review of regulatory administration in Poland. Seeking the right solutions, the standards and models applied in broadly understood European law will be referred to.

## **II. Standards of the Council of Europe concerning the enforceability of administrative decisions**

### **1. Enforcement of a non-final decision**

The problem of the enforceability of an administrative decision may occur as early as the point of taking the decision at first instance, regardless of the available means of appeal against it in the due administrative course of instance. The Council of Europe has not yet developed a comprehensive position on administrative appeals, including the effects of such appeals on

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<sup>3</sup> J. Jendrośka, *Zagadnienia prawne wykonania aktu administracyjnego*, Wrocław 1963, p. 22.

<sup>4</sup> T. Barnat, “Ostateczność i prawomocność decyzji administracyjnych a ich wykonalność” (1984) 9 *Państwo i Prawo* 81–82; L. Klat-Wertelecka, “Wykonanie aktu administracyjnego” [in:] J. Zimmermann (ed.), *Koncepcja systemu prawa administracyjnego*, Warszawa 2007, pp. 545-547.

<sup>5</sup> Hereinafter: “President of UKE”.

the enforceability of decisions<sup>6</sup>. A major step in this direction, however, is the report *on the desirability of preparing a recommendation on administrative appeals*, adopted in Strasbourg on 7 December 2007, by the Council of Europe's Working Party of the Project Group on Administrative Law<sup>7</sup>. In support of the adoption of such a recommendation, the Working Party points to the existence of a broad consensus amongst the member states of the Council of Europe as to the general rules of the administrative appeal procedure. These include the need to ensure the effectiveness of an appeal. This means not only the necessity on the part of the appeal body to act swiftly but also, in certain cases at least, the necessity to suspend the implementation of the impugned decision. If the law of a particular member state does not provide for an automatic suspension of a decision when an administrative appeal was lodged, the possibility to obtain such a suspension should be created upon request from the appellant.

## 2. Suspension of implementation of a final decision

The European Convention for the Protection of Human Rights and Fundamental Freedoms does not refer directly to the necessity of ensuring, in the legal systems of the signatory states, the possibility for courts of law to suspend the implementation of an administrative decision. Article 13 of the Convention, which provides for the right to an effective remedy, stipulates only that “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”. In its judgment of 2001 in the *Jabari* case, the European Court of Human Rights (ECHR) held, in particular, that the notion of effective remedy used in this provision includes, *inter alia*, the possibility of suspending the implementation of the decision impugned in a situation, where such implementation poses a realistic risk for the appellant to be subjected to treatment contrary to Article 3 of the Convention (Prohibition of torture).<sup>8</sup> This issue was later developed by the ECHR in its judgment in the *Čonka* case.<sup>9</sup> The Court held therein that “the notion of an effective remedy under

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<sup>6</sup> Cf. A. Skóra, “Polska procedura administracyjna w świetle standardów europejskich” (1999) 1 *Przegląd Prawa Europejskiego* 67–68.

<sup>7</sup> CJ-DA-GT (2007) 9. The Report is available at: [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/administrative\\_law\\_and\\_justice/Texts\\_&\\_Documents/CJ-DA-GT%20\\_2007\\_%209%20E.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/Texts_&_Documents/CJ-DA-GT%20_2007_%209%20E.pdf).

<sup>8</sup> See ECHR judgment of 11 July 2000 in Case No. 40035/98, *Jabari v. Turkey*, para. 50.

<sup>9</sup> See ECHR judgment of 5 February 2002 in Case No. 51564/99, *Čonka v. Belgium*.

Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible [...]. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision” (Article 13(79)). In the Court’s opinion, even though the interested party can apply for staying the execution of the decision, a procedure where the court uses its discretion as to whether to apply such stay or not, does not meet the requirements of an effective remedy. It can be concluded that the Court opts for essentially automatic staying of the execution of the impugned decision in cases where a realistic risk exists that potentially irreversible consequences will occur, contrary to the provisions of the Convention<sup>10</sup>.

The issue of suspending the execution of final decisions is dealt with in the Recommendation No. R (89) 8 of the Committee of Ministers to member states on provisional court protection in administrative matters<sup>11</sup>. The recitals to this Recommendation point out that “immediate execution in full of administrative acts which have been challenged or are about to be challenged may, in certain circumstances, prejudice the interests of persons irreparably in a way which, for the sake of fairness, should be avoided as far as possible”. Thus, this Recommendation indicates the necessity to create, within the legal systems of each member state, a possibility for the applicant to request the court to take measures of provisional protection against the administrative act (Principle I). Such measures can include “suspending the execution of the administrative act, wholly or partially, ordering wholly or partially the restoration of the situation which existed at the time when the administrative act was taken or at any subsequent time, and imposing on the administration any appropriate obligation in accordance with the powers of the court” (Principle III). The possibility of requesting measures of provisional protection should be available where court proceedings have already been opened to review the

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<sup>10</sup> “It is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination or be part of a collective expulsion. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13.” (para. 82).

<sup>11</sup> See also: J. Chlebny, “Europejskie standardy procedury administracyjnej i sądowo administracyjnej” [in:] Z. Kmieniak (ed.), *Postępowanie administracyjnej w Europie*, Zakamycze 2006, pp. 22–23; Z. Kmieniak, “Ochrona tymczasowa w postępowaniu sądowoadministracyjnym” (2003) 5 *Państwo i Prawo* 20–22.

act in question as well as in cases of urgency, even though the act concerned has not yet been challenged in court. It should also be available when an administrative complaint, the making of which does not have, in itself, any suspensive effect, has been lodged against the administrative act and has not yet been decided upon (Principle I). In accordance with this Recommendation, in deciding whether the applicant should be granted provisional protection, the court shall take account all relevant factors and interests (Principle II). For this reason, the role of the court is to balance the various interests which come into play in a given case, including the ones which are in support of executing the act. Provisional protection should be granted, in particular, if the execution of the administrative act is liable to cause severe damage, which could only be made good with difficulty. This would be the case where the setting aside of the challenged act could not lead to the reinstatement of the applicant's prior legal status. The other situation where, in the light of this Recommendation, a suspension of the execution of an act is justified, is if there are, *prima facie*, serious legal grounds against the administrative act. This concerns serious defects which are identifiable as early as at the stage of the preliminary review of the case, and which will undoubtedly lead to the setting aside of the challenged act<sup>12</sup>. The Recommendation emphasises the necessity for the court to act speedily in cases of provisional protection. This may mean that an oral hearing can be dispensed with but the proceedings must remain adversarial (Principle IV). The proceedings should not only involve the applicant; a representative of the administrative authorities and interested third parties should also have the possibility of presenting their views. Although this Recommendation does not mention the necessity to provide a statement of reasons for the court's judgment on the provisional measure, the Explanatory Memorandum seems nevertheless to support such a solution. The statement of reasons should then briefly but clearly substantiate the issuing of the provisional measure. As already mentioned, there may be circumstances in which the urgency of the case makes it impossible to organise an adversarial court hearing. If, however, the court decides to grant provisional protection without hearing the interested parties, it should examine the case again within a short time, in adversarial proceedings. The court may act here on an *ex officio* basis or at the wish of one of the interested persons who previously could not be heard by the court.

The creation of possibilities to apply provisional measures of protection by a court, which is examining the legality of an administrative act, is also a requirement set by Recommendation Rec(2004)20 of the Committee of Ministers to member states on judicial review of administrative acts adopted

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<sup>12</sup> See Explanatory memorandum attached to Recommendation No. R (89) 8.

on 15 December 2004. The Explanatory memorandum attached to this Recommendation points out, as is the case in relation to Recommendation R (89) 8, that provisional measures may include, in particular, the full or partial suspension of the execution of the disputed administrative act. This is to enable the tribunal to re-establish the *de facto* and *de jure* situation, which would prevail in the absence of the administrative act, or to impose appropriate obligations on the administrative authorities (Paragraph 94 of the Explanatory Memorandum).

### III. Enforceability of decisions under Community law

The problem of enforceability of administrative decisions is also present in Community law. Particular attention should be drawn in this context to the activities of the European Commission. Amongst its various functions, this institution also has the competences of an administrative authority that determines, through its decisions, the rights and obligations of individually specified addressees (an example of such decisive power of the Commission may be the enforcement procedure of Community competition law). The procedure before the Commission is, by its nature, a single-instance one, and the binding character of its decisions follows directly from the Treaty establishing the European Community (Article 249 EC). The Treaty requires that such decisions be notified to their addressees, whereby the date of such notification is of principal importance for determining the moment upon which its addressee becomes bound by the decision. Indeed, the Treaty stipulates that the decision takes effect upon such notification (Article 254(3) EC) and hence, the addressee is obliged to implement it.

The addressee of a decision may institute proceedings against a decision addressed to that person at the European Court of Justice (ECJ) (Article 230 EC)<sup>13</sup>. In the case of individuals, such actions are heard and determined at first instance by the ECJ (Article 225(1) EC). However, in accordance with Article 242 EC, actions brought before the ECJ shall not have suspensory effect. Hence, even though an action is brought, the decision in question continues to be binding upon, and should be fully implemented by, its addressee. It should be emphasised that Community law does not make any distinctions between decisions, for instance, in terms of their subject-matter. Bringing an action to court does not suspend the execution of the challenged decision, even for

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<sup>13</sup> For more detail, see e.g.: A. Arnall, *The European Union and its Court of Justice*, Oxford 2006, pp. 53–94, K. Lenaerts, D. Arts, I. Maselis, *Procedural Law of the European Union*, London 2006, pp. 203–328.

decisions which interfere particularly strongly with the sphere of rights and obligations of their addressees, such as, for instance, Commission decisions imposing financial penalties or imposing behavioural or structural remedies upon an undertaking that violates Community competition law.

Article 242 EC, second sentence, authorises the competent Community court to suspend the application of the contested act. The decision in that regard is left to the discretion of the court (“if it considers ...”), with the sole premise being the necessity to take such an action (“if ... circumstances so require”). The application for suspension of the operation of a measure shall be admissible only if the applicant is challenging the measure in proceedings before the Court<sup>14</sup>. The application must be made by a separate document, filed together with, or immediately after the bringing of the action. For it to be dealt with urgently, it must not exceed 25 pages<sup>15</sup>. It must also state “the subject-matter of the proceedings, the circumstances giving rise to urgency, and the pleas of fact and law establishing a prima-facie case for which the interim measure is to be applied”<sup>16</sup>. The applications are adjudicated upon, usually, by the President of the ECJ or the Court of First Instance (CFI) and, exceptionally, by a judge appointed for this purpose<sup>17</sup>. Community law does not set a time limit during which the application for suspension of the application of a decision should be examined.

The decision on an interim measure should contain a statement of reasons, and Community law indicates that the effect of such a decision is only temporary and does not affect the court’s decision as to the merits of the case (Article 39 of the Statute of the ECJ)<sup>18</sup>. It needs to be emphasised that such a decision may be changed or reversed any time due to a change in circumstances. This means that the dismissal of an application for suspending the application of a decision does not preclude a repeated filing of a corresponding application by the party, as long as that party is capable of demonstrating, in the new proceedings, that new circumstances support the application of the interim measure (suspending the application of the decision).

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<sup>14</sup> Procedural issues relating to the suspension of operation of the Community decisions are specified in detail in Article 83–90 of the Rules of Procedure of the Court of Justice and Article 104–110 of the Rules of Procedure of the Court of First Instance.

<sup>15</sup> See Court of First Instance, Practice Directions to parties, OJ [2007] L 232/7, para. 68–71.

<sup>16</sup> Article 83(2) of the Rules of Procedure of the Court of Justice, Article 104(2) of the Rules of Procedure of the Court of First Instance.

<sup>17</sup> Article 39 of the Statute of the Court of Justice. The CFI appoints such a judge for a period of one year. See OJ [2008] C 171/31.

<sup>18</sup> Article 83(1) of the Rules of Procedure of the Court of Justice, Article 104(1) of the Rules of Procedure of the Court of First Instance.

Having regard to the aforementioned procedural provisions applicable before Community courts as well as the case law of the ECJ and the CFI, three grounds should be mentioned that determine the possibility of applying an interim measure<sup>19</sup>:

- A demonstration, by the applicant, of the existence of pleas of fact and law establishing a *prima facie* case for the interim measures that are being applied for (*fumus boni iuris*).

In the case of an action against a Commission decision, it should be demonstrated that the decision is, *prima facie*, in breach of Community law in a manner which will in the future result in its invalidation by a Community court. The CFI points out, however, that an application must not set out in full the text of the application in the main proceedings<sup>20</sup>. The literature on the subject emphasises that the premise of *fumus boni iuris* is gradually transformed into the premise of *fumus non mali iuris*<sup>21</sup>. Therefore, this is not the conviction that the main action will succeed, as much as the view that it is sufficiently justified.

- A demonstration, by the applicant, of the urgency of the case, and hence that the applicant will suffer serious and irreparable damage if the court does not apply the interim measure.

In such circumstances the damage would not be possible to repair even if the party obtains, in the future, a favourable judgment based on the merits of its case. It follows from the case law that the damage should be certain, or at least established with sufficient probability. The burden of proof in this regard rests fully on the applicant. The damage does not necessarily have to be financial in nature. On the contrary, only in exceptional cases can financial damage be considered to be irreparable or repairable only with difficulty. Indeed, such damage can, as a rule, be covered by future compensation. The occurrence of financial damage justifies, however, the application for an interim measure where, without that measure, the applicant would be in a position that could imperil its existence before the final judgment if the main action is taken<sup>22</sup>. In Community case law, a serious and irreversible change in the market share of the undertaking concerned, which would take place in the absence of the suspension of the application of the contested Community

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<sup>19</sup> See K. Lenaerts, D. Arts, I. Maselis, *Procedural Law...*, p. 433–442; P.K. Rosiak, M. Szpunar, *Postępowanie przed Trybunałem Sprawiedliwości i Sądem Pierwszej Instancji Wspólnot Europejskich. Aspekty praktyczne*, Warszawa 2007, pp. 69–70.

<sup>20</sup> See Court of First Instance, Practice Directions to parties, OJ [2007] L 232/7, para. 70.

<sup>21</sup> K. Lenaerts, D. Arts, I. Maselis, *Procedural Law...*, pp. 434–435.

<sup>22</sup> See e.g. order of the President of the Court of First Instance in Case T-346/06 R *IMS v Commission* [2007] ECR II-1781, paras. 121–123, and the case-law cited.

act, is treated equally to the disappearance from the market. As noted by the President of the CFI, in the order in Case T-326/07 R, *Cheminova*, “it is therefore not sufficient that a market share, however minimal, may be irremediably lost; on the contrary it is necessary for that market share to be sufficiently large. An applicant who invokes the loss of such a market share must demonstrate, furthermore, that regaining a significant proportion of it, in particular by appropriate publicity measures, is impossible by reason of obstacles of a structural or legal nature”<sup>23</sup>.

- The application of the measure is supported by the result of balancing the various interests that come into play, that is, the interests of the parties and the general interest.

This provides an opportunity for the judge to take account the broader context of the case. It may happen that a particularly serious general interest or the interest of third parties support the refusal to allow the application, even if the other two premises for suspending the application of the decision are fulfilled in the case in question<sup>24</sup>.

An appeal against a decision of the CFI concerning an interim measure can be lodged with the ECJ within two weeks of the notification of the first-instance decision. The right to file an appeal concerning interim measures is also held by the other parties within the time limit of two months (Article 57 of the Statute of the ECJ). The appeal is heard by way of a summary procedure (Article 39 of the Statute of the ECJ). It has no suspensory effect (Article 60 of the Statute of the ECJ).

In 2007, the CFI heard 41 cases for the application of interim measures; only in 4 cases were the applications granted<sup>25</sup>.

#### **IV. Enforceability of decisions of national regulatory authorities in the light of the provisions of Framework Directive 2002/21/WE**

The principal act of the new Community regulatory order in the field of electronic communications is the Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory

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<sup>23</sup> Order of the President of the Court of First Instance in Case T-326/07 R *Cheminova and Others v Commission* [2007] ECR II-4877, para. 100, and the case-law cited.

<sup>24</sup> See e.g. Order of the President of the Court of First Instance in Case T-12/93 R *CCE Vitel and CE Pierval v Commission*, [1993] ECR II-785, para. 20; the order of the President of the Court of First Instance of 18 March 2008 in Case T-411/07 R, *Aer Lingus Group Ltd. v Commission*.

<sup>25</sup> See Court of Justice, *Annual Report 2007*, Luxembourg 2008, p. 184.

framework for electronic communications networks and services (Framework Directive)<sup>26</sup>. The Framework Directive transfers the solutions that function with regard to the enforceability of decisions of Community institutions into the electronic communications law in EU member states. Article 4(1) of the Framework Directive, which provides for the right of appeal, stipulates in its final sentence that “pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise”. The expression that the decision ‘shall stand’ should be understood to refer to its enforceability, its addressees being bound by the provisions of the decision made by the national regulatory authority, and hence the necessity to enforce it<sup>27</sup>. A position to the contrary is presented in this context by M. Rogalski, who considers that Article 4(1) of the Framework Directive only provides for the finality of decisions taken by national regulatory authorities and not their immediate enforceability by virtue of law<sup>28</sup>. This position is not accurate. Leaving aside the incorrect identification of the finality of a decision with its effectiveness, the Prof. Rogalski’s interpretation of Article 4(1) of the Framework Directive is, in fact, detached from the stipulations of the provision in question. If, as M. Rogalski wishes, the decision remaining in force were to mean its finality, the power of the appeal body would be hard to understand, which deprives a decision of this very attribute (i.e. finality), while the appeal procedure is still pending (“pending the outcome of any such appeal...”), that is, before the substantive examination of the claims made against the decision. In such a case, a subsequent judgment on the merits of the case concluding the appeal procedure would not, in fact, be necessary if the issue of finality of the contested decision were to be resolved at an earlier stage of the appeal procedure.

It is worth noting that the Framework Directive does not specify the moment from which the addressee is bound by the decision of the regulatory authority. This Directive only mentions that the time continues until the appeal is heard. An absolute requirement to be bound by the decision of the national regulatory authority from the moment the decision is issued, or rather delivered to the party, does not therefore follow from the foregoing. Article 4(1) of the Framework Directive requires only that the decision has, as a rule, the legal

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<sup>26</sup> OJ [2002] L 108/33. For more detail, see e.g. S. Piątek, *Prawo telekomunikacyjne Wspólnoty Europejskiej*, Warszawa 2003, p. 32–38; J. Kolasa, “Krajowe organy regulacyjne” [in:] W. Gromski, J. Kolasa, A. Kozłowski, K. Wójtowicz, *Europejskie i polskie prawo telekomunikacyjne*, Warszawa 2004, pp. 234–247; I. Kawka, *Telekomunikacyjne organy...*, pp. 133–139.

<sup>27</sup> See e.g. S. Piątek, “Prawo telekomunikacyjne w świetle dyrektyw o łączności elektronicznej” (2005) 3 *Prawo i Ekonomia w Telekomunikacji* 8.

<sup>28</sup> M. Rogalski, *Zmiany w prawie telekomunikacyjnym. Komentarz*, Warszawa 2006, pp. 247–248.

effects provided for therein, regardless of the appeal procedure pending with respect to it. The procedure referred to in this provision is a procedure before an appeal body independent of the parties involved (that is, independent from the appellant, the authority and other parties affected by the decision). This may be a court of law, even though this is not an absolute requirement in the light of Article 4(1) of the Framework Directive. The function of an independent appeal body may also be performed by quasi-judicial institutions of various types, as long as the national legislator is able to guarantee their independence, and if they are specialised enough and have the capacity to collect case-law experience (in its Article 4(1), the Framework Directive points to a body that “shall have the appropriate expertise available to it to enable it to carry out its functions”).<sup>29</sup> Administrative bodies, even higher-tier ones, can hardly be referred to as independent of the regulatory authority. The “inter-dependence” and hierarchical relationships between them, as well as the fact that they both belong to administrative structures that usually report to the government, would not let any administrative body, regardless of where it is situated in the administrative structures of a member state, meet the criteria of an appeal body referred to in Article 4(1) of the Framework Directive<sup>30</sup>. The foregoing means that the enforceability of decisions of the national regulatory authority does not necessarily materialise at the stage of the administrative appeal, or quasi-appeal procedure<sup>31</sup>. As a result, if the national legislator provides, in the administrative course of instance, for the possibility of filing an appeal against a decision of the national regulatory authority to a higher level body, or an appeal to the authority, which issued the challenged decision, this Directive does not require that the challenged decision “shall stand” for the duration of such procedures. Hence, it is allowed for the appeals under administrative procedures provided for in national law, to have the suspensory effect, that is, for them to suspend the application of the contested decision. The “suspensory” effect of such an appeal is excluded only where a party can avail itself of the possibility of filing an appeal with an independent appeal body, which is, in practice, most frequently a court of law. It should be emphasised that the decision remaining in force during the appeal procedure, required under Article 4(1) of the Framework

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<sup>29</sup> Cf. S. Piątek, *Prawo telekomunikacyjne Wspólnoty...*, p. 58; N.Th. Nikolinakos, *EU Competition Law and Regulation in the Converging Telecommunications, Media and IT Sectors*, Kluwer Law International, 2006, pp. 211–212.

<sup>30</sup> Certain concerns in that regard were expressed by the European Commission in its report of 2003. See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *European Electronic Communications Regulation and markets 2003, Report on the Implementation of the EU Electronic Communications Regulatory Package*, Brussels, 19.11.2003, COM(2003) 715 final, pp. 26–27.

<sup>31</sup> Cf. S. Piątek, *Prawo telekomunikacyjne w świetle...*, p. 9.

Directive, should have an *ipso iure* effect, and should not be made dependent on the activities of the regulatory authority.<sup>32</sup> For due implementation of this Directive, it is thus not sufficient for the national regulatory authority to be competent to recognise the enforceability of the challenged decision and put it into force at the stage of the appeal procedure. Hence, the very possibility for this authority to make the contested decision enforceable immediately at this stage would not be an appropriate method for the performance of the implementation obligations of an EU member state.

It should also be emphasised that the principle of a decision of the national regulatory authority remaining in force for the duration of the appeal procedure, referred to in Article 4(1) of the Framework Directive, is not absolute in its nature. The foregoing provision clearly points to the possibility for this principle to be overturned by a decision of the appeal body. It means that it is the obligation of the national legislator to create, for the appeal body, the possibility of temporarily (that is for the duration of the appeal procedure) suspending the application of the contested decision. The Community legislator thus puts the effective decision, concerning the enforceability of the decision of the national regulatory authority, in the hands of the appeal body, that is, in practice, a court of law. It then assumes that situations may occur in the application of national legislations that implement the package of Directives on electronic communications, whereby the independent appeal body should suspend the application of the contested decision, even though the decision is essentially enforceable by virtue of law itself. The Framework Directive does not specify what grounds should determine such suspension.

## V. Enforceability of decisions by the President of UKE

### 1. Introductory remarks

The basic act of law, which implements the package of Community Directives on electronic communications in Poland, is the Act of 16 July 2004 on Telecommunications Law (PT)<sup>33</sup>. However, issues of enforceability of the decisions taken by the President of UKE are also governed by the Code

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<sup>32</sup> Such a position was taken by the Commission in the abovementioned *Report on the Implementation of the EU Electronic Communications Regulatory Package* of 2003 (p. 26). Differently: M. Rogalski, who considers that immediate enforceability should follow in this case from a decision by the national regulatory authority and not by virtue of law itself. See. M. Rogalski, *Zmiany w prawie...*, p. 250.

<sup>33</sup> Dz.U. 2004, No. 171, item 1800, with further amendments.

of Administrative Procedure (KPA) containing the principal set of rules on the proceedings before all public administration bodies in matters resolved through administrative decisions within their competence (Article 1 point 1 KPA). From this point of view, the provision of Article 206(1) PT is of an organisational nature only and does not, in fact, introduce any new content<sup>34</sup>. It needs to be emphasized that the KPA applies to proceedings before the President of UKE directly and not, for instance, by analogy. It is clear at the same time that the provisions of the PT, which is a special statute, may introduce certain modifications with respect to the solutions contained in the Code. In such a case, the provisions of the PT should prevail, in line with the commonly adopted method of legal interpretation of *lex specialis derogat legi generali*. Due to the nature of the derogations introduced by the PT with respect to the KPA, special rules of this type may not be interpreted broadly and hence, where in doubt, a presumption should support the adoption of the concepts contained in the Code.

Having regard to the issues relating to the enforceability of decisions taken by the President of UKE, it seems reasonable to divide them into two groups: decisions that may be appealed to an administrative court and decisions that may be appealed to the Court of Competition and Consumer Protection (SOKiK). It is only in the latter case that the decisions are clearly enumerated in the PT. These are decisions on the designation of significant market power, the imposition of regulatory obligations, the imposition of penalties, and decisions issued in disputes (Article 206(2) PT)<sup>35</sup>. The foregoing means that decisions, which are not listed as appellable to the Court of Competition and Consumer Protection in the provisions of Article 206(2) PT, may be appealed, on general terms, to an administrative court<sup>36</sup>. This division is the more justifiable in that only with regard to decisions that can be appealed to the Court of Competition and Consumer Protection (except for decisions on the imposition of penalties) that the legislator has decided that they shall be enforceable immediately (Article 206(2a) PT).

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<sup>34</sup> In accordance with this provision, "Proceedings before the President of UKE shall be governed by the Code of Administrative Procedure with the amendments hereunder". See also: S. Piątek, *Prawo telekomunikacyjne. Komentarz*, Warszawa 2005, p. 1120.

<sup>35</sup> Except for decisions on general exclusive frequency licences following a tender or a contest and decisions that deem the tender or a contest unresolved.

<sup>36</sup> In accordance with Article 184 of the Polish Constitution and Article 3 of the Act of 30 August 2002 – Law of Procedure before Administrative Courts (Journal of Laws 2002, No. 153, item 1270, with further amendments), in the Polish legal system, the presumption of competence of administrative courts applies in cases of review of administrative activities.

## 2. Decisions which may be appealed to the administrative court

As regards this group of decisions of the President of UKE, in the absence of special rules, they are governed in full by the provisions of the KPA and the Act on the Law of Procedure before Administrative Courts (PPSA). This sets a clear situation whereby a party to the procedure has the right to file an application for re-examining the case (Article 127(3) KPA), with regard to a decision taken by the President of UKE, as the central authority of government administration whose process position, for the purposes of the administrative procedure, is made equal to that of a minister (Article 190(3) PT, Article 5(2) point 4 KPA). Such an application is not transferred the case to the superior authority and hence, the case is re-heard by the body that issued the decision being challenged in the application. Since the legislator requires that such an application be governed by the provisions on appeals against decisions, the decision shall not be enforceable before the expiry of the time limit for filing the said application (Article 130(1) KPA). Filing of the application within the time limit suspends its enforcement (Article 130(2) KPA).

However, the principle of non-enforcement of a decision during the course of the proceedings opened upon an application for having the case heard again does not apply absolutely. Exceptions to this rule are provided for in Article 130(3) and (4) KPA. Leaving aside the issue of immediate enforceability of a decision by virtue of law (which will be presented below), a particular place is occupied by the possibility of making the decision enforceable immediately following the procedure provided for under Article 108 KPA (Article 130(3) point 2 KPA). In accordance with this provision, the order of immediate enforceability may be given in four situations. Situations are included where it is necessary:

- to protect human health or life,
- to protect the national economy against heavy losses,
- to protect another social interest,
- to protect an exceptionally important interest of a party<sup>37</sup>.

There is consensus in the doctrine and the case-law of administrative courts that the above grounds may not be interpreted broadly<sup>38</sup>. The notion of necessity seems to be of key importance in this regard. The possibility of

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<sup>37</sup> In the latter case, the authority may demand the appropriate security from the party.

<sup>38</sup> See e.g. Z Janowicz, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 1996, p. 281; W. Chróścielewski [in:] W. Chróścielewski, J.P. Tarno, *Postępowanie administracyjne. Zagadnienia podstawowe*, Warszawa 2002, p. 124.; Cz. Martysz [in:] G. Łaszczycza, Cz. Martysz, A. Matan, *Postępowanie administracyjne ogólne*, Warszawa 2003, p. 676; J. Borkowski [in:] B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2005, p. 519.

invoking, for instance, a social interest pursued by the decision in question is not sufficient. If the entire activities of state administration are aimed at pursuing this interest, its existence in a specific case does not distinguish it amongst other cases in a manner that would support the departure from the general rules of the procedure concerning the possibility to suspend the appeal and the application for re-examining the case concerned. The need to protect social interest should, therefore, be such that it requires, beyond any doubt, not only the decision itself to be issued, but also its immediate application. Consequently, social interest could suffer material damage if the decision was enforced only after it gets the status of an effective decision (Article 16(1) KPA). As the Supreme Administrative Court (NSA) holds in its judgment of 19 February 1998, V SA 686/97, “[r]eferring to the notion of “necessity” for immediate action, the legislator finds that it may be the case, where, in the particular time and particular situation, it is not possible to do without the exercise of the rights and obligations that are established in the decision, because a delay endangers the protected values specified in Article 108 § 1 KPA. Such a threat must be realistic rather than just probable, and the circumstance must be demonstrated in the statement of reasons for the order of immediate enforceability”<sup>39</sup>.

The PT specifies also the cases where a decision of the President of UKE can be made immediately enforceable. This applies to the decisions mentioned in Article 98(3)<sup>40</sup>, Article 178(1)<sup>41</sup>, Article 201(9)<sup>42</sup>, Article 202(2)<sup>43</sup> and Article 203(1)<sup>44</sup> PT. The PT stipulates that the decision concerned “shall be enforceable immediately”. The foregoing means that the said decisions are not enforceable immediately by virtue of law, in the meaning of Article 130(3) point 2 KPA. Instead, it is the authority that is obliged to provide the decision with the order of immediate enforceability. Thus, the foregoing provisions of the PT complement the grounds for making a decision enforceable immediately, as set out in Article 108(1) KPA. In contrast, however, to the aforementioned provision of the KPA, they do not offer the authority a choice of whether to attach an order of immediate enforceability. In each case of

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<sup>39</sup> ONSA 1998, No 4, item 147.

<sup>40</sup> Decision on the amount of the participation in financing the subsidy for a telecommunications undertaking.

<sup>41</sup> Decision imposing certain obligations in the event of a particular threat.

<sup>42</sup> Decision to prohibit the performance of telecommunications operations, modify or withdraw a general exclusive frequency licence or orbital resources licence, or a numbering assignment.

<sup>43</sup> Decision to order the inspected entity to take steps aiming at eliminating the threat referred to in Article 202 para. 1 PT.

<sup>44</sup> Decision to order discontinuation to use or operate radio equipment by unauthorised person.

issuing a decision based on the PT, the authority is, in fact, obliged to give it such an order. Essentially, the order of enforceability should be set out in the decision itself even though, if the authority does not do so for any reason, it should have the possibility to issue a decision on giving such an order at a later date. The legal basis for such a decision would be Article 108(2) KPA. Since the order of immediate enforceability is required to be given in such cases by PT itself, when hearing appeals the President of UKE could annul it only if the case concerned did not refer to one of the decisions specified in Article 98(3), Article 178(1), Article 201(9), Article 202(2) or Article 203(1) PT. The party's position to the effect that, for instance, the order is unnecessary to perform the obligations imposed in the situation concerned, or too onerous, or its consequences could only be alleviated with difficulty, etc., could not be accepted.

The determination of the moment from which the order of immediate enforcement applies, remains controversial<sup>45</sup>. The literature on the subject refers in this regard to both the moment the decision or ruling referred to in Article 108(2) KPA<sup>46</sup> is issued, and the moment it is delivered<sup>47</sup>. It seems that the latter is better supported by the provisions of the Code, since the legislator links the effect in the form of the authority being bound by the decision or the ruling issued with the moment of its delivery (Article 110 in conjunction with Article 126 KPA). Even if immediate enforcement of a decision upon its issuance, or upon the issuance of a ruling on giving the decision the order of immediate enforceability, were accepted (Article 108(2) KPA), this should not apply to decisions imposing obligations upon a party. Indeed, it would be contrary to the principles of the rule of law, including the principle of the citizen's trust in state authorities, to impose obligations upon a party, which such party stands no chance to fulfil, if it has not been notified in the form provided by the law.

The order of immediate enforceability given pursuant to Article 108 KPA expires upon the issue of the decision changing or annulling the prior decision (as a result of the filing of an application for re-examination of the case) by the President of UKE. The order of immediate enforceability provided for in the decision itself also expires upon the issue by the President of UKE of a decision annulling such an order. Where the order is given after the decision

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<sup>45</sup> Doubts arise not only where a decision is pronounced orally (the order would then apply from such pronouncement). This form of communicating the decision to its addressee(s) is exceptional though (cf. Article 14 and Article 109 KPA) and is of no major importance in practice.

<sup>46</sup> A. Wróbel [in:] M. Jaśkowska, A. Wróbel, *Kodeks postępowania administracyjnego. Komentarz*, Zakamycze 2005, p. 677.

<sup>47</sup> Cz. Martysz [in:] *Postępowanie administracyjne...*, p. 678.

is issued, in a separate ruling (Article 108(2) KPA), subsequently challenged in an application for re-examining the case, the order loses effect upon the issuance by the President of UKE of a ruling that annuls the ruling on making the decision enforceable immediately.

With respect to this group of decisions by the President of UKE, a party has the possibility of opening the procedure for review of their legality by administrative courts (Regional Administrative Court (*Wojewódzki Sąd Administracyjny*, WSA) in Warsaw and, further, the Supreme Administrative Court (*Naczelny Sąd Administracyjny*, NSA).

The filing of an appeal with the WSA does not have an automatic suspensory effect<sup>48</sup>. This is indicated in the provisions of Article 61(1) PPSA, under which the filing of an appeal does not suspend the enforcement of the contested act or activity. Therefore, the decision can be enforced. A party has, however, the right to apply in the first place to the authority that issued the decision (in this case the President of UKE), and, as a next step, to the court, to suspend the enforcement of the contested decision. As pointed out in by the doctrine, the provisions of the PPSA concerning these issues are designed with reference to the rules of the aforementioned Recommendation No. R (89) 8 of the Committee of Ministers<sup>49</sup>. Both the literature on the subject and the case law of the NSA present a view pointing to the necessity to observe “far-reaching prudence” in the enforcement of effective decisions before the expiry of the time limit for appealing against them, due to the risk of the occurrence of irremediable consequences<sup>50</sup>. What is meant here is to keep the necessary compromise between the effectiveness of administrative acts and the effectiveness of their review as exercised by administrative courts.

The PPSA does not set out positive grounds that could support the suspension of the enforcement of decisions taken by the administrative authority. Article 61(2) point 1 PPSA specifies only the negative grounds, the occurrence of which excludes the possibility of suspending enforcement. Therefore the authority may suspend the enforcement of the decision unless there are grounds which in administrative proceedings makes the decision

<sup>48</sup> For more detail, see: R. Sawuła, “Suspensywność skargi sądowo administracyjnej” (2000) 1–2 *Samorząd Terytorialny* 197–206.

<sup>49</sup> W. Chróścielewski, Z. Kmiecik, J.P. Tarno, “Reforma sądownictwa administracyjnego a standardy ochrony praw jednostki” (2002) 12 *Państwo i Prawo* 39.

<sup>50</sup> NSA judgment of 21 August 1981, II SA 108/81 (1983) 1 *Orzecznictwo Sądów Polskich*, item 19; J. Borkowski, “Wstrzymanie wykonania aktu zaskarżonego do Naczelnego Sądu Administracyjnego” [in:] *Institucje współczesnego prawa administracyjnego. Księga jubileuszowa Profesora zw. dra hab. Józefa Filipka*, ed. I. Skrzydło-Niżnik, P. Dobosch, D. Dąbek, M. Smaga, Kraków 2001, pp. 70–71; T. Woś [in:] *Postępowanie sądowoadministracyjne*, ed. T. Woś, Warszawa 2004, p. 217; same [in:] *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, ed. T. Woś, Warszawa 2005, p. 294.

or order immediately enforceable or where specific statute excludes staying of their enforceability. This solution is criticised in the legal literature as excessively restrictive from the viewpoint of the authority. T. Woś assumes in this context that, when refusing to suspend the enforcement of a decision, the authority has to demonstrate that one of the grounds for making the decision enforceable immediately has been fulfilled (Article 108(1) KPA). Then, in practice, it will be rare for the authority to deny enforcement<sup>51</sup>. These concerns do not seem to be fully justified. Indeed, even where the grounds contained in Article 108(1) KPA do not hold, the authority is not obliged to suspend the enforcement of the decision but can only use this possibility. Indeed, if the rule is the absence of a suspensory effect of an appeal filed with the administrative court, suspending the enforcement of the contested decision should always be regarded as an exception, rather than be commonly applied.

The authority decides on an application for suspension in a ruling. Even though such a ruling is unappealable, it may, as a next step, be changed or annulled by the court of law (Article 61(4) PPSA). Refusal on the part of the authority to suspend the enforcement of a decision or a ruling does not deprive the applicant of the right to file a corresponding application with the court.

Suspending the enforcement of a decision by the authority pursuant to Article 61(2) point 1 PPSA should not apply at all with respect to the decisions specified in Article 98(3), Article 178(1), Article 201(9), Article 202(2) and Article 203(1) PT. As far as these decisions are concerned, “grounds hold which condition, in administrative proceedings, the making of a decision [...] enforceable immediately” in the meaning of Article 61(2) point 1 PPSA.

If, as already demonstrated, the legislator requires that the authority gives these decisions the order of immediate enforcement, it is hard to conclude that the same authority could subsequently waive that order. Such competence should be vested solely with the administrative court.

A view is expressed in the legal literature that due to the wording of Article 4(1) of the Framework Directive, the possibility to suspend the enforcement of a decision of the President of UKE should be excluded after an appeal is filed with the administrative court<sup>52</sup>. This opinion should be considered correct with regard to the decisions taken by the President of UKE, which are based on the rules of Polish law implementing the provisions of the electronic communications package of 2002. Even though Article 4(1) of the Framework Directive refers to the possibility of suspending the enforcement of decisions of the national regulatory authority, this competence is, nevertheless,

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<sup>51</sup> T. Woś [in:] *Postępowanie sądowo administracyjne...*, s. 220; same [in:] *Prawo o postępowaniu...*, p. 298.

<sup>52</sup> S. Piątek, *Prawo telekomunikacyjne w świetle...*, p. 9.

reserved for the appeal body and not the authority itself. This indicates the necessity to provide in the PT for a clear exemption from Article 61(2) point 1 PPSA. Having regard to the principle of superiority and the principle of direct applicability of Community law, it should be concluded that even in the absence of a clear national rule, the President of UKE is obliged to refuse to suspend the enforcement of any decision that is challenged in the court and that pursues, in the case concerned, the objectives of Community electronic communications Directives. In any event, the competence concerning the suspension of a contested decision expires once the appeal is passed on to the administrative court. From that moment on, it is only the court that can decide on the suspension of the enforcement of the decision or ruling (in part or in whole) (Article 61(3) PPSA).

A view has been established in the case law of the administrative courts that “the analysis of the grounds for providing the appellant with provisional protection leads to the conclusion that the principal objective behind the procedure is, above all, to ensure maximum judicial effectiveness of administrative review, through the creation of conditions warranting effective enforcement of a court judgment... This objective, which is fundamental for the exercise of justice, and which is pursued by administrative courts, converges with the interest of the appellant: to keep the status quo until the case is heard by the court. From this point of view, provisional protection is an extremely important procedural guarantee of the party’s right because, in a considerable proportion of cases, it is the only way to protect the party against the consequences of defective acts and activities of public administration bodies”<sup>53</sup>.

An application for suspending a contested decision, filed with the administrative court, may be accompanied by an appeal, or may follow at a later date. Unlike in proceedings before an administrative authority, the PPSA sets out the positive grounds for suspending the enforcement of a decision, or a ruling, by the administrative court. This is a situation “where there is a risk of causing material damage or consequences that are difficult to repair”. The list of these grounds is exhaustive. It makes reference to future events that can, however, be anticipated on the basis of a reasonable assessment of the situation, as a consequence of the issuance of the decision<sup>54</sup>. The case law of the NSA assumes that it is a damage (financial as well as non-financial), which cannot be compensated by a subsequent return of a performance or the

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<sup>53</sup> NSA resolution of 16 April 2007, I GPS 1/07, (2007) 4 *Orzecznictwo Naczelnego Sądu Administracyjnego i Wojewódzkich Sądów Administracyjnych*, item 77. See also the comment to the resolution by R. Sawuła, in: (2008) 1–2 *Samorząd Terytorialny* 162–166.

<sup>54</sup> J. Borkowski, “Wstrzymanie wykonania decyzji w postępowaniu kasacyjnym” (2005) 14 *Monitor Prawniczy* 677.

situation when it is not possible to restore original position. This is the case where there is a risk of losing the subject of the performance that, due to its properties, cannot be replaced with any other item, and its pecuniary value would be insignificant for the complaining party, or where there is a risk of loss of life or damage to health<sup>55</sup>.

In its aforementioned resolution of 16 April 2007, I GPS 1/07, the NSA held that the legislator does not co-relate, even in the smallest degree, the grounds for granting of provisional protection with the likelihood/probability of the appeal against the decision being, eventually, succeeded. Hearing the application for the suspension of the enforcement of a decision, the court cannot thus consider, even preliminarily, whether the decision is defective in any way.

The court cannot suspend the enforcement of the challenged acts where “the special statute excludes the suspension of their performance” (Article 61(3) PPSA). It should be concluded that both, in the procedure before the authority and in the administrative court, this ground should be understood narrowly. This is a situation where the legislator clearly excludes the possibility of suspending the enforcement of certain decisions or rulings by the court. As a result, such an exclusion may not be implicit, as it constitutes an exception to the principle of effective judicial review of administrative acts. It is worth noting that the PT does not provide for the exclusion of the possibility of suspending the enforcement of a decision by the regulatory authority.

A court ruling on suspending the enforcement of a challenged decision does not bear the attribute of permanence, as it can be changed or annulled at any time ‘where circumstances change’ (this also applies to final rulings)<sup>56</sup>. The foregoing means that the complaining party may re-submit its application for suspension, even if it was rejected previously, provided that the party demonstrates that the change in circumstances justifies a change in the court’s position concerning the suspension of enforcement of the challenged decision or ruling.

A complaint can be filed with the NSA against the ruling of the regional administrative court concerning the suspension, or refusal to suspend, of the enforcement of a decision or ruling (Article 194(1) point 2 PPSA). The foregoing means that the ruling of the regional administrative court concerning suspension is not final, until the expiry of the time limit for filing the appeal, or until the NSA dismisses the complaint (Article 168(1) PPSA). This brings about uncertainty as to the rights and obligations of the complainant, and

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<sup>55</sup> NSA ruling of 20 December 2004, GZ 138/04, unpublished. See also B. Dauter [in:] B. Dauter, B. Gruszczyński, A. Kabat, M. Niezgódka-Medek, *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, Zakamycze 2006, pp. 161–163.

<sup>56</sup> The ruling may be issued on an in-camera session (Article 61 § 5 PPSA).

is contrary to the requirement of speediness of court decisions on interim measures<sup>57</sup>.

In any event, the suspension of the enforcement of a decision or ruling no longer holds where the court issues a judgment that concludes the procedure at first instance (Article 61(6) PPSA). Where the judgment accepts the complaint, the court finds ‘whether and to what extent the contested act or activity cannot be performed’. This decision applies until the judgment becomes final (Article 152 PPSA).

Suspension of the enforcement of a decision is also possible at the stage of the procedure before the NSA in the case of a cassation complaint. This has recently been confirmed by the aforementioned resolution of the NSA of 16 April 2007 under which: “[f]or provisional protection to yield the desired result, it must be possible to apply it at any stage of the judicial and administrative procedure, including in the proceedings before the Supreme Administrative Court”.

### **3. Decisions that may be appealed to the Court of Competition and Consumer Protection**

The decisions in cases for the designation of significant market power listed in Article 206(2) PT, for the imposition of regulatory obligations, for the imposition of penalties and decisions issued in disputes (except decisions on general exclusive frequency licences), may be appealed to the SOKiK<sup>58</sup>. This Court is part of the state court system in Poland and operates within the structures of the Regional Court (*Sąd Okręgowy*) in Warsaw. The proceedings before the SOKiK are governed by the provisions of the Code of Civil Procedure (KPC); appeals against its judgments are heard by the Appellate Court in Warsaw.

The possibility of filing an appeal with the SOKiK applies to situations, where the party is not entitled to use the means of appeal typical for the review of the functioning of central administrative authorities in Poland, such as an application for the re-examination of a case, or a complaint to the administrative court. The legislator has decided that the said decisions are enforceable immediately by virtue of law itself (Article 206(2a) PT). It means that in such cases Article 108 KPA or another special procedure does not apply, and the party is obliged to proceed with implementing the decision upon its delivery. However, the authority should inform the party of its immediate

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<sup>57</sup> Cf. T. Woś [in:] *Postępowanie sądowno administracyjne...*, p. 220

<sup>58</sup> As rightly pointed out by S. Piątek, these are any decisions issued in such cases, both positive and negative, annulling, changing, declaring invalidity. See. S. Piątek, *Prawo telekomunikacyjne...*, *op.cit.* p. 1122.

enforceability by virtue of law in the content of the decision itself (Article 9, Article 11 and Article 107(3) KPA).

The effect of the immediate enforceability of a decision by virtue of law is excluded, however, with respect to decisions on the imposition of financial penalties. Furthermore, in the case of penalties, the legislator excludes even the possibility of making the decision enforceable immediately by the authority pursuant to Article 108 KPA. Article 210(1) second sentence PT directly stipulates that “[t]he decision to impose a financial penalty shall not be enforceable immediately”. The foregoing means that where an appeal is filed with the SOKiK on the imposition of a financial penalty, such a decision will become enforceable only when the judgment of the court, provided it is unfavourable to the appellant, becomes final (Article 363 KPC). This usually means a situation where the SOKiK has dismissed the appeal of the punished entity, and the Appellate Court has subsequently dismissed the appeal against such a judgment of the SOKiK.

The KPC gives the SOKiK the possibility to decide to suspend the enforcement of a challenged decision of the President of UKE until the case is resolved (Article 479<sup>63</sup> KPC). This possibility undoubtedly applies also to decisions, which are enforceable immediately by virtue of law. Contrary to the concerns voiced in the legal literature<sup>59</sup>, suspending the enforcement of the latter decisions, the court does not change the provisions of the legal norm under Article 206(2a) PT. In such cases, the operation by the SOKiK has a clear legislative basis (Article 479<sup>63</sup> KPC). In other words, even though the legislator considers the above decisions to be enforceable immediately by virtue of law, it provides, at the same time, for such enforceability to be suspended in specific cases if the competent court so decides. Additionally, the competence of the appeal body (in this case the SOKiK) to suspend the enforcement of a decision of the regulatory authority is expressly provided for in Article 4(1) of the Framework Directive. This means that Article 206(2a) PT may not be interpreted in a way that would be contrary to the said Community act.

In cases for the suspension of the enforcement of a decision of the President of UKE, the SOKiK acts solely upon an application from a party. The possibility of filing an application has been closely linked to the filing of an appeal. An application may be filed only “[in] case of filing of an appeal...” (and hence, it would be inadmissible to file an application without appealing the contested decision of the regulatory authority), and only by the party that has filed the appeal (Article 479<sup>63</sup> KPC). The request for suspending the decision of the President of UKE may be submitted to the SOKiK together with the appeal or after it is filed.<sup>60</sup> By analogy to the proceedings before

<sup>59</sup> Cf. M. Rogalski, *Zmiany w prawie...*, pp. 250–251.

<sup>60</sup> The SOKiK may hear an application on an in-camera session.

the NSA, the additional creation of the possibility to file an application for suspending the enforcement of a regulatory decision at the stage of the appeal proceedings should be supported. This is dictated by reasons of effectiveness of judicial review of administration, taken into account by the NSA in its resolution of 16 April 2007, I GPS 1/07.

Even though it does not follow directly from the provisions of the KPC, it should be concluded that an application to suspend the enforcement of a decision can be filed again if justified in the light of new circumstances. A change in circumstances may also lead to the modification, or annulment, of the ruling already issued, on suspending the enforcement of a decision<sup>61</sup>.

The KPC does not set out the premises to be followed by the SOKiK adjudicating on an application for suspending the enforcement of a decision of the President of UKE. A view is expressed by the legal doctrine on this subject that it may be helpful to invoke the case law developed under Article 108 KPA, seen *a contrario*, or the grounds for suspending the enforcement of a decision of the administrative court specified in Article 61(3) PPSA.<sup>62</sup> It seems that the latter solution is more correct. The procedural guarantees under both types of proceedings (i.e. before administrative court and SOKiK) should be approximated to the greatest degree possible.

Hence the SOKiK should also consider whether in the case in question there is a risk of doing significant damage, or causing effects that may be difficult to reverse, whereas the ruling of the SOKiK should not be affected by the very issue of the defectiveness of the decision.

What is of considerable importance for the effectiveness of court protection is, amongst other things, the time that elapses between the filing of the application for suspending the enforcement of a decision and the issuance of the judgment by the SOKiK. Too long a delay in hearing the application may make it pointless for the party, due to the prior full enforcement (voluntarily or through administrative enforcement) of the challenged decision. Hence, the SOKiK should aim to hear the application in as short a period of time as possible. By analogy to the application for securing a claim (Article 737 KPC), the Court should act without delay, not later than within a week of the date it receives the application. This issue should be expressly defined in the provisions of the KPC on the proceedings before the SOKiK.

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<sup>61</sup> Article 359 § 1 KPC stipulates that “Rulings which do not conclude the proceedings in the case may be annulled and changed as a result of a change in the circumstances of the case, even though they were challenged, and even final.”

<sup>62</sup> S. Gronowski, *Ustawa antymonopolowa. Komentarz*, Warszawa 1999, p. 302; I. Gabrysiak, “Upadek ryguru natychmiastowej wykonalności decyzji uchylonej nieprawomocnym wyrokiem SOKiK” (2008) 2 *Prawo Teleinformatyczne* 20.

A judgment of the SOKiK that suspends the enforcement of the contested decision taken by the President of UKE is effective when pronounced, or when the conclusion thereof is signed (Article 360 KPC). However, the legislator does not require for the ruling to be provided with a statement of reasons (cf. Article 357(1) and (2) KPC). This gap should also be filled through an intervention from the legislator (modelled on the solutions, which are in place in proceedings before administrative courts). The foregoing is strictly connected with the necessity to create, in the Polish legal system, the possibility of appealing to the Appellate Court against judgments of the SOKiK on suspending the enforceability of decisions taken by the President of UKE. The rules currently in place do not offer such a possibility, which considerably limits procedural guarantees of the appellant, and discriminates between the proceedings before the SOKiK and those before administrative courts, to the disadvantage of the former.

Legal doctrine also considers the consequences of a non-final judgment by the SOKiK annulling the decision of the President of UKE for immediate enforceability of such a decision under Article 206(2a) PT. It is asserted that such a judgment (before it becomes final) should automatically result in the decision to which it pertains being deprived of the attribute of immediate enforceability<sup>63</sup>. This position does not seem convincing. Even though Article 4(1) of the Framework Directive offers the possibility of suspending the enforcement of a decision of the national regulatory authority, nevertheless, the Directive reserves the competence to determine this matter for the appeal body. Hence, until the judgment by the SOKiK becomes final, the effect in the form of suspending the enforcement of the challenged decision cannot occur by virtue of law itself. One can only propose for the legislator to decide, also in this context, to amend the provisions of the KPC modelled on Article 152 PPSA. Annulling a decision of the President of UKE, the SOKiK should therefore have a possibility to expressly decide whether and, if so, to what extent, a decision not yet finally annulled, may continue to be enforced.

## VI. Conclusions

The Polish legal system protects, in part, only the rights of telecommunications undertakings in connection with the enforcement of regulatory decisions on electronic communications. It is worth praising the administrative procedure rules concerning the proceedings held before the President of UKE, and the rules that govern the proceedings before administrative courts to the extent

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<sup>63</sup> I. Gabrysiak, *Upadek rygoru...*, pp. 20–21.

to which these courts are competent to hear appeals against decisions of the President of UKE. The only more significant suggestion *de lege ferenda* in this respect concerns the recognition of the full effectiveness of rulings of the regional administrative court (WSA) to suspend the enforcement of a decision of the regulatory authority.

The procedural guarantees relating to the suspension of the enforcement of decisions taken by the President of UKE by the SOKiK, on the other hand, should be viewed rather critically. Although the possibility of suspending the enforcement of such decisions also exists under the latter procedure, contrary to the aforementioned standards set out by the Council of Europe and the models taken from Community law, judgments of the SOKiK in such cases, do not require to be provided with a statement of reason and are not subject to review by the court of second instance. Neither does the law expressly set the premises to be followed by the court in such cases. This means that Polish law does not fully guarantee effective legal protection to Polish telecommunications undertakings, and by doing so, it limits their right of appeal referred to in Article 4(1) of the Framework Directive. This situation requires urgent legislative amendments, the closest model for which can be the rules concerning the proceedings before administrative courts.

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# Investment and Regulation in Telecommunications

by

Stanisław Piątek\*

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### *Abstract*

This article presents the difficulties associated with the implementation of the regulatory goal of promoting investment and innovation within the area of sector specific regulation in telecoms. The encouragement of efficient investment is one of the major goals reflected in the EC and domestic legal rules on telecoms access as well as price- and rate of return regulation. The law and the interplay of the interests of incumbents and alternative operators create a fertile soil for the emergence of various regulatory concepts of stimulating investment and facility-based competition. Considered here are the concepts most frequently referred to in this context including: the notion of new and emerging markets, the ladder of investment theory, sunset clauses and dynamic pricing policies. However, most of these concepts had little influence on regulatory practice so far, seeing

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as telecoms regulation is mostly directed at service competition and effective utilisation of existing infrastructures. This fact is the result of national regulators balancing their various regulatory goals in the existing technical and economic environment of the sector. The approach of the Polish regulatory authority towards these concepts constitutes an example of this reality. The urgent need to establish a new policy for next generation networks and access, bringing new technologies and business models to the sector, will have to induce more recognition for some concepts presented in this article.

**Classifications and key words:** telecommunication, regulation, investment, regulatory holidays, ladder of investment, sunset clause, price regulation, telecommunications access.

## I. Introduction

Investments are inseparably linked to economic risk. The high level of risk associated with the telecoms sector is associated with a capital-intensive profile of investment and the considerable size of necessary sunk costs. Large financial commitments are normally required to start an infrastructure-based telecoms business, and a significant part of that investment is impossible to recover in case of market exit.

Market activities of major infrastructure operators are regulated. Regulation of wholesale and retail services provided by operators having significant market power (SMP) directly influences the ability to recover the costs of their investments. If regulatory control reduces the rate of return below the level achieved in un-regulated businesses then it weakens an operator's readiness to invest. Regulation may induce or restrain investment incentives even though regulators normally assume that an operator's drive to reduce costs, or to gain another competitive advantage, is a constant stimulus to invest. The expected level of return and the risk and uncertainty associated with these returns are generally recognised as the primary drivers of investment<sup>1</sup>.

Regulatory effects are important to SMP operators using their own network to provide retail services as well as to alternative operators entering retail markets. SMP operators of fixed networks face the need of huge investments related to the construction of new generation networks (NGN) based on optical fibre. The main dilemma of alternative operators in the fixed sector, and virtual network operators in the mobile sector, is whether to engage in the construction of their

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<sup>1</sup> *An Assessment of the Regulatory Framework for Electronic Communications – Growth and Investment in the EU e-Communications Sector* – report to the European Commission by London Economics in association with PricewaterhouseCoopers, July 2006, p. 72.

own infrastructure or, alternatively, whether to use the incumbent's network, access to which is made available to competitors by regulatory decisions.

The telecoms sector in Poland requires significant investments, in particular, fixed networks providing broadband access necessary for the creation of the information society. Reports and studies published recently show the weakness of fixed broadband infrastructure in Poland and the low level of investments *per capita* in the telecoms sector<sup>2</sup>.

The literature indicates various factors influencing the level of investment in telecoms. Many studies consider the regulatory environment to be a significant factor in this context<sup>3</sup>. The core regulatory effects result from sector specific regulation that co-exists with general legal rules applicable to businesses, particularly competition law. This article analyses the regulatory effects of *ex ante* regulation based on the EC electronic communications directives of 2002, implemented into the Polish legal system by the Telecommunications Law of 2004. Provisions of these legal acts authorise extensive regulation of wholesale access to networks and services as well as the regulation of price and other conditions of retail services of SMP operators. Regulatory decisions issued by national regulatory bodies (NRA), represented in Poland by the decisions of the President of the Electronic Communications Office (UKE), directly affect investment decisions taken by the incumbent operator in the fixed sector and by major operators of mobile services. Regulation creates strong impulses influencing policies of alternative operators of fixed networks and new entrants into the mobile sector.

## II. The EC electronic communications directives on investment

The 2002 EC directives on electronic communications contain a series of provisions directly related to investment and innovation in the telecommunications sector. They are to be found mostly in the Framework Directive and in the Access Directive. Article 8 of the Framework Directive declares "encouraging efficient investment in infrastructure, and promoting innovation" to be one of major regulatory objectives of the Directive. The ultimate effect of Article 8

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<sup>2</sup> R. Cadman, *Regulation and Investment in European Telecoms Markets* – report for the European Competitive Telecoms Association, November 2007, p. 6.

<sup>3</sup> D. Flacher, H. Jennequin, J.-H. Lorenzi, "Innovation, Investment and Regulation: What are the Options for Regulation in the Near Future?" (2006) 64(4) *Communications & Strategies* 105–123; P. Baakea, U. Kamecke, Ch. Wey, "Regulatory Framework for New and Emerging Markets" (2005) 60(4) *Communications & Strategies* 123–146; J. Gans, S. King, *Access Holidays and the Timing of Infrastructure Investment*, available at: [www.mbs.edu/home/jgans/research.htm](http://www.mbs.edu/home/jgans/research.htm).

should be significant since NRAs are obliged to take all reasonable measures aimed at achieving the objectives specified in the directives. The goal of encouraging efficient investment in infrastructure is linked in Article 8(2) to the promotion of competition; that fact supports the differentiation of infrastructure competition, seen as a distinct regulatory outcome, from service competition. Article 8 is referred to in many other provisions of the directives which intensify the impact of the somehow broad language of this obligation. Limited influence on regulatory practice is attributed to a recital of the Framework Directive referring to “emerging markets, where de facto the market leader is likely to have a substantial market share but should not be subjected to inappropriate obligations”<sup>4</sup>. Market leadership resulting from investment and innovation should not be subject to premature regulation.

The Access Directive seems to be more specific on the expected influence of regulatory decisions on investment in telecoms. Recital 19 of this Directive states that “the imposition by national regulatory authorities of mandated access that increases competition in the short-term should not reduce incentives for competitors to invest in alternative facilities that will secure more competition in the long-term”. This provision advises regulatory bodies not to reduce the motivation of alternative operators to invest in new infrastructure which should be beneficial for competition long term. The provisions of Article 12 of the Access Directive show strictly normative features determining the conditions of access to networks and services of SMP operators. The provisions of Article 12(1) are of crucial importance for the determination of access conditions to services and network elements having significant influence on the development of competition. Access services, like among others, the access to the unbundled local loop (LLU), wholesale line rental (WLR), wholesale bitstream broadband services (BSA), co-location services and other forms of co-usage of ducts, building and masts showed to be critical for the development of competition. While determining the access obligations and assessing the proportionality of regulatory obligations, the Access Directive requires NRAs to take account of “the initial investment by the facility owner, bearing in mind the risks involved in making the investment”. Article 12 of this Directive grants alternative operators access to existing infrastructure, the non-replicable part of which is needed for the provision of their own services or for the construction of their own infrastructure. At the same time, the Access Directive promises SMP operators to take into account the initial risk associated with their investment. The price setting policy of the regulatory body should take into consideration the risk’s influence on the expected return on the capital employed. The EC rules on the creation of the conditions for long-term competition should induce regulatory

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<sup>4</sup> Recital 27, Framework Directive.

bodies to keep the right proportion of regulatory obligations stimulating service competition (based on the exploitation of existing infrastructure belonging to SMP operators) and obligations reinforcing infrastructure competition (based on the creation of alternative technical assets).

The impact that regulatory decisions have on the investment inclination of SMP operators is associated not only with the obligations to grant access to specific services and network elements, but most of all with price setting policies pursued by regulators. The Access Directive permits various models of cost calculation and price control. However, according to Article 13(1) of this Directive “national regulatory authorities shall take into account the investment made by the operator and allow him a reasonable rate of return on adequate capital employed, taking into account the risks involved”. This provision is directly applicable to regulatory decisions setting wholesale prices of SMP operators within the process of dispute resolution and approval or determination of reference offers (eg. Reference Interconnection Offer – RIO, Reference Unbundling Offer – RUO).

The above short review of the EC provisions on investment makes it possible to conclude that community law requires Member States and regulatory bodies to take account of the influence that regulation (in particular, the imposition on SMP operators of regulatory obligations) exerts on investment in telecoms. This should generally lead to the balancing of short term interests of alternative operators and end users, connected with an increase of service competition, and the long term objective of promoting infrastructure competition based on new facilities.

### **III. Polish Telecommunications Law on investment**

Regulatory decisions base on national legislation. The Polish Telecommunications Law of 2004 (hereinafter: PT) transposes into the national legal system all of the regulatory instruments contained in the EC directives on electronic communications. The provisions of the TL reflect also fairly accurately EC rules on investment. Article 1(2)(2) PT determines that the purpose of the Act is to create the conditions “for the development and usage of a modern telecommunications infrastructure”. This is one of its main goals aside of “the support of equal and effective competition within the scope of telecommunications services provision”. Article 189(2) obliges the President of UKE to carry out regulatory policy aimed at “efficient investment in infrastructure and promoting innovative technologies”. The PT does not prioritise statutory goals and aims of regulatory policy leaving the task of their practical achievement

to the regulatory body. Where regulatory goals are concerned, investment is treated in accordance with the EC regulatory model.

No fault can be found concerning the level of specific statutory premises determining the content of regulatory decisions on obligations imposed on SMP operators. Article 35(2) PT requires that, while determining the scope of the telecoms access obligation, “the President of UKE will take into consideration the preliminary investments made by the owner of the equipment or associate facilities, having taken into account the investment risk” and “the necessity to ensure long term competitiveness”. It reflects all guidelines that can be derived from the EC directives on electronic communications as regards long term interests connected with the development of new infrastructure.

However, the wording of the respective provisions in the EC and national law does not impose any specific obligations of the national regulator to promote investment. The provisions of the TL merely specify the various factors influencing regulatory decisions; it is the responsibility of the regulatory body to strike the right balance between service- and infrastructure competition while determining access obligations and setting prices<sup>5</sup>.

The vague impact of the rules concerning investment on regulatory practice, both in EC and national law, raises an issue of regulatory policies pursued at the Community and national level. Various policy concepts concerning the promotion of investments in telecoms are being developed. On the basis of the provisions of the directives, an attempt is made to transpose its broad and vague provisions on investment, new markets and investment risk into policy concepts stimulating regulatory decisions. They are reflected in documents and reports of the European Commission, the European Regulators Group (ERG), organisations and associations of telecoms operators, in national regulatory strategies as well as in literature.

## **IV. The concepts of regulatory promotion of investments in telecoms**

### **1. The concept of new and emerging markets (regulatory holidays)**

The concept of new and emerging markets is promoted mainly by incumbent operators and their associations. It is based on recital 27 of the Framework Directive forewarning against a premature imposition of regulation upon emerging markets. A similar approach appears in the European Commission’s

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<sup>5</sup> See: F. Kamiński, “Oddziaływanie regulacji konkurencji na nowe inwestycje oraz strukturę rynku komunikacji elektronicznej” (2006) 2–4 *Telekomunikacja i Techniki Informacyjne* 24.

guidelines on market analysis<sup>6</sup> where, with reference to recital 27 of this Directive, it is stated that emerging markets where the market leader is *de facto* likely to have a substantial market share should not be subject to inappropriate *ex ante* regulation. Premature *ex ante* regulation may unduly influence the competitive conditions taking shape on such markets. Incumbents explored this concept trying to exclude some new investment projects from access regulation, in particular, in relation to the construction of broadband access networks using optical fibre technologies. The practical attempts to use this legal basis as a foundation of regulatory policy are called “regulatory holidays” or “access holidays”<sup>7</sup>.

From the start the idea of regulatory holidays stumbled over the vagueness of the notion of “new and emerging markets”. In the light of the European Commission’s Recommendation on relevant markets<sup>8</sup>, new and emerging markets seem to be perceived as “innovation-driven markets characterized by ongoing technological progress”. However, in the initial phase of the application of the Framework Directive, the Commission did not clarify this notion. This fact was criticised by some incumbents within the review of the EC legislation on electronic communications that took place in 2006. According to major European incumbents, the vagueness of this notion limits its suitability for shaping regulatory policy. At the same time, alternative operators claimed that attributing too much attention to the notion of new and emerging markets creates more confusion than useful guidance for the regulatory process. They asserted that applying this concept is to likely to result in re-monopolisation of access markets relying on modernised or newly constructed access infrastructure.

The ERG cast some light on this concept by stating that “there is no generally accepted definition of an “emerging market”. But in the view of ERG, the distinguishing feature of such a market is that it is immature which implies that there is high degree of demand uncertainty and entrants to the market bear higher risk. Where these characteristics are present, it will not be possible to make definitive findings on whether or not the three criteria are met in relation to the emerging market”<sup>9</sup>. According to the ERG, close

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<sup>6</sup> Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ [2002] C 165/03.

<sup>7</sup> J. S. Gans, S.P. King, “Access Holidays and the Timing of Infrastructure Investment” (2002) 14 *Melbourne Business School Working Paper*.

<sup>8</sup> Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, OJ [2002] L 114/45.

<sup>9</sup> Revised ERG Common Position on the approach to Appropriate remedies in the ECNS regulatory framework, Final Version May 2006, p. 20.

monitoring of the situation is necessary where emerging markets are in some way linked to established, traditional markets on which a SMP operator controls non-replicable inputs required to enter an emerging market. Even a large investment does not necessarily create an emerging market. ERG insisted that SMP operators take into consideration the previously established access obligations while considering new infrastructure investments. The ERG is rather inclined towards a critical assessment of the emerging markets concept, as far as regulatory practice is concerned, and formulates mostly warnings as far as its practical implementation is concerned. This critical approach cumulated in the assessment of the “regulatory holidays” concept, which reflects a practical attempt to apply the notion of new and emerging markets on the national level of telecoms regulation.

The difficulty of defining emerging markets and identifying such markets in practice is generally recognised in the literature<sup>10</sup>. The task of making this notion more operational was pursued by the European Commission in its Recommendation on Relevant Markets of 2007<sup>11</sup>. It reflects the standpoint of the Commission which was established following the proposal of the German regulator to protect some investments made by Deutsche Telecom. According to the Commission, incremental upgrades to existing network infrastructure rarely lead to the creation of a new or emerging market. The emergence of new retail services may lead to the creation of a new, derived wholesale market to the extent that such retail services cannot be provided using existing wholesale products. This Recommendation states clearly that new infrastructure and, in particular, the most expensive passive infrastructure (ducts, optical fibres) does not determine by itself the creation of a new market. It is a service product, and not a technology, that creates a new market. Only the evident lack of substitutability of a new product, proven from the demand, as well as the supply-side perspective, gives grounds to conclude that this product is not part of an existing market. The demarcation of new and existing markets in most disputed broadband services requires thorough examination of user behaviours concerning the extent to which they confirm the substitutability of successive broadband services.

A practical attempt to apply the new market concept was made by the German regulator (BNetzA) in its draft decision concerning the wholesale broad-

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<sup>10</sup> P. Baake, U. Kamecke, Ch. Wey, “A Regulatory Framework for New and Emerging Markets” (2005) 60(4) *Communications & Strategies* 131.

<sup>11</sup> Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, 2007/879/EC, OJ [2007] L 344/65.

band access market. The decision declared that the VDSL bitstream service is not part of the bitstream market services. BNetzA considered that the existing bitstream service based on hybrid networks (mixed copper/fibre networks) was a separate area compared to new bitstream services using fully optical fibre network. BNetzA regarded connections on VDSL networks as a previously non-existing new product that was priced significantly higher for end-users. The proposal to exempt this wholesale market from regulation for a 2 year period was contested by the European Commission seeing as these products should not differ significantly from other broadband products. The next attempt of the German authorities to exempt from regulation broadband markets based on optical fibre technologies relied on legislative instrument. The rule concerning 'new markets' contained in the German Telecommunications Law excluded from regulation markets for products and services that, taking into consideration their functionality, scope, availability for broader users' groups (mass accessibility), price and quality for a rational user, differ significantly from, rather than merely replace, previously existing products and services. The Commission decided to refer the German solution called the "regulatory holiday law" to the European Court of Justice claiming that it grants an exemption to the German telecoms incumbent from the EC directives on electronic communications<sup>12</sup>. In a similar case, the Romanian regulator, in a market analysis carried out before Romania's accession to the EU, declared that the wholesale broadband access market is an emerging market and did not designate SMP operators; as a result, no bitstream access offer is available.

The concept of new and emerging markets didn't influence the regulatory practice to a significant extent. The attempts to use this concept for the purpose of exempting large scale investment projects in upgrading access networks were questioned at the EC level. In light of the clear position expressed by the European Commission in the German case, proposals of national incumbents that made large scale investments in fibre networks dependant on the granting of "regulatory holidays" for services delivered via such networks were blocked at the national level.

The Polish telecoms incumbent, Telekomunikacja Polska (TP), offered to make large scale investment in optical fibre access networks on the condition that the regulator grants it, in advance, an exemption of access obligations regarding the newly developed optical network. The proposal was rejected by the President of UKE on the grounds of incompatibility with the EC regulatory framework as well as the Polish PT.

The concept of new and emerging markets remains part of the regulatory framework for the sake of argument that market is protected from overregulation

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<sup>12</sup> IP/07/595, IP/07/888, MEMO/07/255.

and impediment of innovations. Past discussion helped to solidify the position that markets can be considered to be new and emerging if, because of their lack of maturity, they do not pass the three-criteria test. No list of such markets was established; only VoIP and IPTV service markets are occasionally mentioned in this context. The sole implementation of new technology (eg. optical fibre networks) does not create a new or emerging market. Until it is confirmed from both, the supply and the demand perspective that services provided over new infrastructure are not substitutable to the existing offer, an exemption from regulation of new infrastructure is not permitted. This however makes it difficult to gain a guarantee of exemption before the investment is made.

## 2. Sunset clauses

The regulatory framework applied to the telecommunications sector encompasses the goal of effective competition which allows desisting from *ex ante* regulation and relying on general competition law instead. Thus, one of the concepts supporting investment in telecoms is related to the fact that regulatory obligations are imposed only for a period of time specified in a regulatory decision. The clauses providing for the expiration of such obligations are known as the “sunset clauses”. Sunset clauses could provide some predictability and legal certainty concerning the regulatory environment in which investment decisions are being made. They could prove to an incumbent that *ex ante* regulation is, as a rule, a transitory phenomenon; they could also stimulate alternative operators to investment by showing that long-term business models based on regulatory obligations placed on the incumbents may turn out to be risky. It could help avoiding rent-seeking activities by the beneficiaries of regulation addressing pure service competition<sup>13</sup>.

Sunset clauses have only intermediate legal grounds. According to Article 16(3) of the Framework Directive, where a national regulatory authority concludes that a market is effectively competitive, it shall not impose or maintain any regulatory obligations. In cases where such obligations already exist, it shall withdraw such obligations giving an appropriate period of notice to the affected parties. Accordingly, Article 7(3) of the Access Directive imposes an obligation on regulators to periodically undertake a market analysis to determine whether it is necessary to maintain, amend or withdraw existing regulatory obligations.

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<sup>13</sup> Y. Chou, K-Ch. Liu, “Paradoxical impact of asymmetric regulation in Taiwan’s telecommunications industry: Restriction and rent seeking” (2006) 30 *Telecommunications Policy* 180.

Different kinds of sunset clauses are considered. Their basic type is related to the attainment of the main regulatory goal of effective competition. Such clauses result directly from the law which obliges NRAs to periodically review regulated markets. Associating the withdrawal of regulatory obligations with the attainment of the general objective of regulation reduces somewhat investment uncertainty, retaining at the same time the high level of administrative discretion. Sunset clauses based on the success of general regulatory policy, rather than on measurable criteria, risk to delay the switch-off of *ex ante* regulation. The fact is recognised that credible commitment to sunset regulation is difficult<sup>14</sup>.

Sunset clauses could also be related to more explicit and measurable indicators such as: the quantity of wholesale sales, the penetration of retail services, the number of competitors on specific markets or the passage of time.

This concept underpins a decision taken by Ofcom following the review of the wholesale broadband access market announced in May 2008. The regulatory decision states the conditions on which regulatory obligations are being withdrawn or reduced. Exempted from regulation are markets of asymmetric broadband access where consumers have access to at least four wholesale broadband providers and where the exchange serves 10,000 or more premises. Ofcom requires a 12 month notice period for customers who had contracts with BT, so that they can continue to operate while making necessary alternative arrangements. Besides exempting specific areas of service delivery from *ex ante* regulatory obligations, Ofcom formulates clear cut conditions of withdrawal of such obligations as a result of future reviews.

The concept of sunset clauses attracted the attention of the ERG considering that regulatory authority may actively support investment of alternative operators by signalling, through the use of sunset clauses, that regulation will be removed<sup>15</sup>. More detailed examination brought the ERG to the conclusion that, at least in the case of broadband markets, it is too early to anticipate when sunset clauses can be introduced in practice by national regulators without risking to disrupt competition<sup>16</sup>.

During the initial phase of drafting of the telecoms regulatory framework (the 1999 Review), sunset clauses were broadly advertised by the European Commission as the main instrument guaranteeing a transitory character of *ex*

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<sup>14</sup> J. A. Hausman, J. G. Sidak, "Did mandatory unbundling achieve its purpose? Empirical evidence from five countries" (2005) 1(1) *Journal of Competition Law and Economics* 244.

<sup>15</sup> *Broadband market competition report*, ERG (05) 23. European Regulatory Group, available at: [www.erg.eu.int](http://www.erg.eu.int), p. 24.

<sup>16</sup> Revised ERG Common Position on the approach to Appropriate remedies in the ECNS regulatory framework, Final Version May 2006, p. 84.

*ante* regulation<sup>17</sup>. This concept was never developed in subsequent documents. Recent attempts of some national regulators to incorporate sunset clauses in regulatory decisions on dynamic and territorially differentiated markets gives hope that this concept is not forgotten.

Polish regulatory practice did not use any kind of sunset clauses seeing as it was already difficult to finalise, by the end of 2008, the first round of the required market analyses. Even the finding of effective competition on some markets (transit in fixed networks, wholesale trunk segments of leased lines) did not result in an immediate withdrawal of regulatory obligations but rather, required separate administrative actions. In order to exempt service areas saturated with competitive infrastructure offerings from regulation, the incumbent PT proposed the segmentation of markets depending on the existing level of competition. This proposal was however rejected by the Polish regulatory authority<sup>18</sup>.

### 3. The ladder of investment

The concept of “the ladder of investment” is the best known theory linking regulatory goals with the creation of investment incentives. The concept encompasses regulatory stimulation of investments in network assets that are less and less easily replicable. It mostly relates to investments made by alternative operators effecting indirectly also the modernisation of the networks belonging to the incumbent. This concept has no explicit legal grounds in EC directives on electronic communications resembling instead policy guidance concerning the usage of the set of regulatory instruments provided in the directives for national regulators. The ladder of investment finds recognition in the documents of the European Commission on electronic communications, in opinions expressed and statements made by the ERG; it is also widely analysed in literature.

This concept was mentioned in the ERG’s statement on remedies in 2003. According to the ERG, the promotion of infrastructure-based competition makes it necessary for national regulators to set investment incentives in order for the dominant undertaking’s infrastructure to be replicated wherever this is technically feasible and economically efficient, within a reasonable period of time. The “approach, where two or more access products at different levels of the network hierarchy are simultaneously available to alternative operators has

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<sup>17</sup> A. de Stree, *A New Regulatory Paradigm for European Electronic Communications: On the Fallacy of the ‘Less Regulation’ Rhetoric*, ITS-Europe Regional Conference, Berlin, September 2004, p. 23.

<sup>18</sup> *Strategia wsparcia rozwoju inwestycji telekomunikacyjnych w Polsce w latach 2008–2011* – report by Telekomunikacja Polska, August 2008, p. 18.

been called the “ladder of investment”<sup>19</sup>. The European Commission referred to this concept in some of its comments to the notifications made by national regulatory bodies concerning market analyses<sup>20</sup>. The broader theory of the ladder of investment was discussed by M. Cave<sup>21</sup>.

This concept relies on the assumption that regulation should motivate alternative operators to invest in infrastructure in order to take advantage of less complex, and therefore cheaper, access products of the incumbent. In the initial period of competition-creation, regulatory obligations enabling new providers to access wholesale services and to resale them are justified by the goal of attracting new service providers to the market, reducing retail prices, increasing immediate consumer benefit and the utilisation of existing infrastructure. Therefore, the initial phase of service competition requires obligations enabling the purchase of wholesale line rental and bitstream services in addition to carrier selection and pre-selection. On the basis of these products, alternative operators may extend their client base, market position and revenue. In the next step they should use the unbundled elements of the incumbent’s network, in particular, the local loop or sub-loop. On the final rung of the ladder of investment an alternative operator gets its own access network where, and when it turns out to be the efficient way to reach the subscriber. It is assumed that regulation should motivate alternative operators to move up the ladder and deeper into the value chain, adding more and more of their own infrastructure elements, which normally requires new investments. It is assumed that this should result in the development of infrastructure competition as well as in the reduction of regulation.

In order to achieve a functioning ladder of investment, the regulator should send the right signals to alternative operators. Pricing of service elements located on the initial rungs of the ladder should stimulate alternative operators to move up. Thus, the pricing policy of the regulator should create the right signals as to whether to build, or whether to buy successive elements of the value chain. The timing of price regulation is therefore of key here. In the initial phase of market de-monopolisation, regulatory policy should encourage alternative operators to buy service-products of the incumbent. Later, as alternative providers establish themselves on the market, the incentives to

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<sup>19</sup> ERG Common Position on the approach to Appropriate remedies in the new regulatory framework, ERG (03) 30 rev1, p.13.

<sup>20</sup> SG-Grefe (2006) D/204559, SG-Grefe (2006) D/202659, SG-Grefe (2006) D/204818.

<sup>21</sup> M. Cave, I. Vogelsang, “How Access Pricing and Entry Interact” (2003) 27 *Telecommunications Policy* 717–727; M. Cave, “Encouraging infrastructure competition via the ladder of investment” (2006) 30 *Telecommunications Policy* 223–237; M. Cave, *Regulation and Competition Law in European Telecommunications*, June 2006, 24, report prepared for Post-och Telestyrelsen.

buy complex service products should decline and finally vanish. Facility-based competition should be progressively promoted. This type of policy may result in a duplication of alternative infrastructure. It may as well encourage the incumbent to invest in infrastructure exempted from *ex ante* regulation.

Defining the replicable and non-replicable parts of the infrastructure constitutes a precondition for a practical application of the ladder of investment. Regulatory policy may address only the replicable parts. The methods for assessing the level of replicability of different assets were presented in the literature that shows that replicability is not a simple binary variable and may depend upon a range of variables<sup>22</sup>. The assessment of network replicability differs in the context of narrowband and broadband networks, services provided for institutional and individual customers as well as in light of other technical and economic factors. For the concept to be applied, basic rungs in the investment ladder need to be clearly identified as well as the economic and operational conditions of moving the business up the ladder and the regulatory instruments needed to stimulate such move.

M. Cave speaks of 6 steps of implementing the ladder of investment: deciding which of the products in the value chain are clearly non-replicable; ranking the replicable components of the value chain for relevant products by their level of replicability; identifying the location of the incumbents and the entrants on the ladder; assessing the potential progression over the period of the regulatory intervention (app. 2-3 years); choosing the regulatory instruments (mode of intervention) and calibrating the strength of the intervention; and finally, making credible commitment to this policy<sup>23</sup>. The success of such policy depends on the credibility of regulator's communications warning market players of the changing conditions of access to the incumbent's infrastructure.

In regulatory practice the concept of the ladder of investment performs mostly an explanatory, rather than a normative, function. In official documents of the European Commission the ladder of investment is used to explain the development options of alternative operators. The concept is useful to describe the relationship between various access services that require differentiated investment engagement of the operators seeking access. This kind of approach appears in the 12<sup>th</sup> and 13<sup>th</sup> Implementation Reports and in documents accompanying the proposals for amendment of the directives on electronic communication published in November 2007. The ladder of investment is used mostly to show the future road facing the incumbents as well as alternative operators. To what extent and how regulation should and could motivate alternative operators to follow this road remains a separate

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<sup>22</sup> M. Cave, "Encouraging...", p. 226.

<sup>23</sup> M. Cave, *Making the ladder of investment operational*, available at: <http://www.ictregulationtoolkit.org/en/Publication.2916.html>, pp. 22–28.

question. This aspect of the ladder of investment theory is less developed and rarely utilised.

ERG documents concerning various aspects of the regulatory approach to new infrastructures show more practical orientation. In the ERG's opinion on regulatory principles of New Generation Access, an attempt is made to determine what new rungs of the ladder would have to be considered by alternative operators if the incumbent decides to construct an optical fibre access network<sup>24</sup>. The guidance of the ERG is concentrated on the identification and the reciprocal relationships between new rungs in the investment ladder, that is, rungs required by new networks technology. The migration process may be disrupted by the lack of necessary rungs and if the distance between successive rungs is too great. It is therefore vital for the ladder of investment to be a complete structure from the economical, technical and operational point of view. The ERG is determined to identify the competitive options related to all necessary rungs and the functional migration to higher rungs without disrupting services. The ERG stresses that access products should be implemented in a logical manner, starting with the lowest rungs. New products must be announced in advance to give alternative operators a chance to adapt their investment strategy to the new opportunities. In the light of this proposal, it is however less important to create impulses inducing alternative operators to climb up the ladder.

The ERG indicates that the prices of products of the incumbent located on consecutive rungs should reflect the scope of investment needed to take the advantage of a specific product<sup>25</sup>. This is difficult to achieve if various pricing methodologies are applied at different rungs (eg. cost orientation and retail minus).

The approach of the ERG towards the ladder of investment resembles the position of alternative operators who insist on the neutrality of this concept. The freedom to enter the market on different levels of value chain and the possibility of using various products at the same time are important demands of alternative operators. The choice of the appropriate access product should therefore rest with alternative operators and not with the regulator or the incumbent. On the other hand, the incumbents consider that regulatory policy implementing this concept should motivate alternative operators to move up the ladder. Incumbents criticise the neutral approach saying that, instead of a ladder, NRA create a chessboard which allows moves in various directions and pricing arbitrage for alternative operators.

The ladder of investment has a very limited impact on the regulatory practice in Poland considering that access products are only in the initial phase

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<sup>24</sup> ERG Opinion on Regulatory Principles of NGA, ERG (07) 16rev2, p. XIII.

<sup>25</sup> ERG Common Position Bitstream Access, 2 April 2004, ERG (03) 33rev1, s. 10.

of their development. During the first round of market analyses, regulatory obligations focused on basic access products such as: wholesale line rental, bitstream access, flat rate interconnection etc. The next regulatory goal is to create further products and secure safe migration from basic resale services to unbundled access line or products based on optical fibre infrastructure. The major obstacle to be identified here is the lack of a stable pricing policy based on cost calculations verified by a competent auditor. In practice the ladder of investment is considered by the President of UKE to be a theoretical model able to create developmental opportunities rather than an instrument for forced infrastructure investments.

#### **4. The rate of return and price regulation**

Rate of return regulation is based on explicit provisions of the Access Directive. Its Article 12(2)(c) calls on the regulator to take account, while imposing regulatory obligations, of the initial investment by the facility owner, bearing in mind the risks involved in making the investment. Article 13(1) requires that while regulating prices “national regulatory authorities shall take into account the investment made by the operator and allow him a reasonable rate of return on adequate capital employed, taking into account the risks involved”.

The Access Directive does not impose a specific method of price control. In general, it is required that prices are based on costs. However, different types of costs are allowed to be considered while various methods of cost determination are applied by an operator and the regulatory body. In practice three methods of regulatory price control are being applied: based on cost orientation, based on the “retail minus” approach and based on benchmarking against prices of similar services in other countries<sup>26</sup>. Each of these methods produces different regulatory effects – each has different effects in terms of regulatory certainty for the incumbent and for alternative operators.

Cost oriented price setting methods prevent the incumbent from fixing the price above the cost level in situations where the creation of an alternative infrastructure is not possible or is rather unlikely. Since the main version of cost orientation (LRIC) reflects the avoidable costs of providing the service, it is by itself not the best instrument to stimulate investments. The regulatory body may, to some extent, stimulate the calculation of the cost base by setting accounting principles and rules of cost calculation. The main instrument of influence in this context is connected to the setting of WACC (Weighted Average Cost of Capital). By determining WACC, the regulatory body decides

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<sup>26</sup> Revised ERG Common Position, p. 75

what constitutes a reasonable rate of return on the capital employed in the provision of services by the regulated company. Normally WACC is set by the regulatory body at one particular level by calculating a single rate of return for the whole company. Investments in new generation broadband networks are associated with a higher level of risk as compared to the traditional business of voice and data transmission. In order to stimulate investments, it is attempted to adopt a differentiated WACC that takes into account different levels of risk associated with each project. The Independent Regulatory Group (IRG) made an assessment of the potential to adopt a differentiated WACC that shows that this is in theory reasonable from a regulatory point of view. However, lack of information makes it difficult to determine the level of risk associated with various assets (projects) relative to the market risk<sup>27</sup>. IRG presented Oftel's experiences in applying a differentiated WACC in order to reflect various levels of systematic risk faced by different parts of BT's business<sup>28</sup>. Ofcom adopted a separate WACC for BT's copper access network business and for the rest of BT's business.

Price determination based on "the retail minus" approach prevents incumbents from performing a price squeeze; this method is however not suitable to stimulate investment. This is particularly true in Poland where the wholesale price is calculated on basis of the alternative operator's retail costs and disregards the incumbent's level of production costs. Although the retail minus approach is a recognised in EC law, it is being questioned by Polish courts seeing as it was not properly legalised in the PT. Four years of exercise in regulatory accounting and efficient cost calculation, supported by examinations of independent auditors, did not produce cost data for the determination of wholesale prices that could be used by the President of UKE and the incumbent.

The benchmarking method suits only the initial phase of market de-monopolisation when no reliable data on costs is available to the regulatory body.

Long term stimulation of investment on the part of alternative operators would require a dynamic pricing policy starting with relatively "low" prices, enabling new entrants to start operation, that would be systematically raised in order to abandon the incumbent's complex service products and to move towards unbundled elements of its infrastructure. However, difficult must preconditions must be met to apply a dynamic pricing policy. First, the regulatory body must have precise knowledge of the replicable parts of the infrastructure and of the necessary time frame for replication. Second, the regulator should predict the market relationships and meet high requirements

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<sup>27</sup> IRG – *Regulatory Accounting Principles of Implementation and Best Practice for WACC calculation*, February 2007, pp. 25–29.

<sup>28</sup> *Ibidem*, p. 30.

concerning its own regulatory strategy. Third, the level of wholesale prices would have to be determined significantly in advance and with a high degree of certainty in terms of its tendency to change. This kind of a dynamic pricing policy could most of all influence the investment decisions of alternative operators. The incumbent's investments could benefit mostly from a higher level of regulatory certainty and predictability.

There are only few examples of the application of a dynamic pricing policy (Canada, Holland). Referring to the Italian experience, the ERG stated that cost oriented prices serve better the investment engagement of alternative operators than the retail minus approach. However, there is no broader consent in this regard.

The case of price control is one of the most discussed issues in Polish regulatory practice. The proposal to use a differentiated WACC was put forward by the incumbent TP<sup>29</sup> but considered to be impossible to implement in a report published by the regulatory authority<sup>30</sup>. Price regulation during the transitory period, moving away from the regulatory framework of 1998 to the regulatory mechanism based on the 2002 directives on electronic communications, was based mostly on benchmarks and on the retail minus approach in case of wholesale services related directly to retail services of the incumbent. Benchmarking effectively ended with the completion of the first cycle of 18 markets analyses and the retail minus approach was successfully challenged in courts. The only way forward seems to be the recognition by the regulatory body of cost calculations positively verified by an independent auditor. So far the positive opinions expressed by the auditor concerning cost levels calculated by the incumbent TP were called into question by the President of UKE who claimed that the cost levels submitted by TP may lead to burdening alternative operators with its inefficiencies.

## 5. Regulatory approach to Next Generation Networks

The roll-out of NGN and, in particular, of the access part of such networks (Next Generation Access) requires substantial investment and therefore needs an appropriate regulatory response. The recent recommendations and positions of the European Commission<sup>31</sup>, the ERG<sup>32</sup> and the President

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<sup>29</sup> *Strategia wsparcia rozwoju inwestycji...*, p. 16.

<sup>30</sup> A. Piotrowski, *Opinia o dokumencie pt. „Strategia wsparcia rozwoju inwestycji telekomunikacyjnych w Polsce w latach 2008–2011”*, p. 25, available at: [www.uke.gov.pl](http://www.uke.gov.pl).

<sup>31</sup> Draft Commission Recommendation on regulated access to Next Generation Access Networks (NGA), 2008.

<sup>32</sup> ERG Common Position on Regulatory Principles of NGA, ERG (07) 16 Rev 2.

of UKE<sup>33</sup> introduce some new elements to the current set of regulatory instruments. The main features of the new approach include: clear focus on facility based competition, reorientation towards passive elements of the infrastructure, dependence of regulation on network architecture, and a more symmetrical approach concerning access to newly built passive elements of the infrastructure.

The prospect of NGN/NGA deployment changes the regulatory perspective. New access networks have not been directly linked to the concept of new markets. It is expected however that they will be capable of delivering broadband services with bandwidths much above the present level. It is recognised that clear indications of a break in the chain of substitution, as compared to current products, prove the existence of a newly emerging market.

The fact is acknowledged that the facilitation of infrastructure competition should constitute the preferred regulatory option bearing in mind the necessity to protect the existing level of service competition. New prioritisation of remedies should reflect this approach. Regulatory obligations supporting investment should be applied to the lowest level of network architecture. Most relevant are regulatory obligations concerning access to passive infrastructure elements, in particular, to telecommunication ducts. The new approach entails access to existing as well as to new ducts. The same goes for access to civil engineering works and other passive infrastructure elements (dark optical fibre, street cabinets).

The regulation of SMP operators' and alternative operators' investment activity gains slightly in symmetry. The present regulatory framework is, in principle, restricted to regulatory authorities encouraging the sharing of passive infrastructure. Currently, the imposition on non-SMP operators of an obligation to share ducts, and other infrastructure elements, is only permissible when other operators are deprived of viable alternatives because of the need to protect the environment, public health or security, or to meet town and country planning objectives. Now the sharing of infrastructure necessary for NGN/NGA should constitute the main regulatory goal. The encouragement of infrastructure sharing between SMP and alternative operators should be complemented by build-and-share projects. The sharing of infrastructure within a building (in-building wiring) may be mandated. The regulatory body could even allow SMP operators to refuse access to new investments for alternative operators who, without due reason, refuse to grant reciprocal sharing of their own passive assets. If there are no existing ducts, access to civil engineering works (trenching and ducting) or other passive elements (dark fibre) should be mandated which would enable entry for operators willing to

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<sup>33</sup> Opinia regulatora dotycząca procesu budowania i eksploatacji infrastruktury NGA w Polsce, 17 December 2008.

invest. It is recommended here that sufficient space for other operators should be guaranteed in newly built ducts not only by SMP operators.

The various speeds of NGN/NGA roll-out in urbanised and rural areas justifies the definition of geographic markets at sub-national level – taking into account that specific competitive conditions may lead to the withdrawal of regulatory control in some areas with developed infrastructure competition. Substantial cost differences in the creation of infrastructure in various areas should at least justify the abandonment of the geographic averaging of wholesale prices.

The selection of regulatory instruments must recognise the architecture of the NGA. Regulation must take into account how close is the optical fibre brought to the termination point of the network – to the home of the end-user (FTTH), to the building (FTTB), to the street cabinet (FTTC) or to the network node (FTTN). Decisions in this regard are made by the investing operator depending on his investment and business scenario. It is recognised here that the competitive result may vary depending on the form of future network architecture. Therefore, a different set of regulatory instruments is recommended for each of its forms in addition to general principles of the imposition of remedies in case of NGN/NGA investments.

The pricing methods applied to new ducts (Greenfield projects) need to incorporate a project-specific risk premium to reflect the investment risk incurred by the operator. The methods of calculating the rate of return and WACC should strike the right balance between investment stimulation and the promotion of efficiency and sustainable competition.

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# **The Defense of Monopoly as a Determinant of the Process of Transformation of State-owned Infrastructure Sectors in Poland**

by

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### ***Abstract***

This paper aims to prove that during the transformation process in Poland of the sectors of general economic interests due to specific economic characteristics of those sectors and the fact that interests of three groups participating in the decision making in this process: government, management and employees turned out being non controversial prevented loosing the monopoly status they initially enjoyed. The method used was the analysis of the stages of negotiation illustrated by subsequent documents of official strategies chosen for three sectors: railway, electricity and the final result illustrated by the structure of the market. Preventing the monopoly status permitted those groups seeking the rent, the monopoly status created or even demand that rent in the form of subsidy from the public authorities budgets by the threat of the strike which is the grave threat in the sectors delivering the service of general economic interest.

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**Classifications and key words:** infrastructure, public capital, public service obligations.

## I. Introduction

The main purpose of this paper is to prove that during the transformation process of the Polish sectors of general economic interest<sup>1</sup> a wide range of actions were undertaken by a number of interest groups in an effort to maintain their monopolistic or quasi-monopolistic positions. It will also be shown that the following two factors played a major role in this process: (1) specific economic characteristics of the sectors, and (2) the undisputed interests of three major players who shaped the transformation process.

The thesis of this article will be presented by analysing the transformation process of two selected sectors: railways and electricity. A comparison will be made between subsequent strategic plans applied by public authorities in each sector. The selection of these particular industries was intentional because, at the outset, they significantly differed in their organisational structure. This paper is intended to prove that the initial structure of the monopolistic enterprises had no influence on the outcome of the transformation process which, for both sectors, was the preservation of their monopoly status. It will be shown that the analogies in the transformation processes of these industries have brought them, step by step, to become comparable oligopolistic structures.

Initially, the electricity sector was structured to be quasi-competitive, under regulatory induced competition, while the railway industry was from the outset designed to be an unquestionable monopoly. However, to explain their transformation process, the real interests of the parties involved in it will need to be identified. To do so, this paper will present an analysis of the reasons behind the transformation steps progressively taken by public authorities, but subsequently withdrawn. This way, the degree will be shown, to which the influence of special interest groups shaped, or changed public initiatives that were unacceptable to them. Judging by the results and theoretical analyses, similar phenomena are quite likely to be occurring in other European countries. Nevertheless, the documents that are used here in an attempt to prove the paper's hypothesis, relate to Poland only.

The basic theoretical assumptions that frame the aforementioned arguments are easy to understand. A monopoly (a dominant position) allows an enterprise enjoying it to extract the so-called "monopolistic rent". In economic theory,

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<sup>1</sup> The term introduced by the ECC in: *Green Paper on Services of General Interest*, Brussels, 21.5.2003, COM (2003) 270 final.

a company is treated as a unit and is personified. That means that the enterprise “acts” in the market and “makes” its own decisions and also, that something “lies in the interest of the enterprise” and so on. However, according to the theory of organisation, in reality only people can have interests and make decisions. There are groups of people that have either the same – sometimes merely non-conflicting – or contrary interests. In this paper, a company will be considered to be an organisation. The main interest groups acting within that organisation will be analysed. The paper will consider the competence of each group to make decisions in the name of the enterprise and the power of other groups to influence such decisions.

Within a company, three interest groups can be identified: the owners, that is, the representatives of the government; the management; and the employees. This approach calls for one more party to be considered, namely, the state seen here as a law constituent and deemed to be the representative of the interest group formed by consumers of monopoly products or services. In the following discussion, the term “state” will be used when discussing its actions as a law constituent. When casting the state in the role of an owner, the term “government” will be used. If both the state and the government act as law constituents, they will be referred to as “public authorities”.

At the beginning of the transformation process, the government was the only legal owner of the two sectors in question, that is, their monopoly was guaranteed by law. A state enterprise was an organisationally independent unit, administered by an executive board. The first step in the transformation of both sectors came with the withdrawal of their legal monopoly status. This step constituted a formal change from a monopolistic, to a dominant position. That notion will be noted later in the discussion in the context of “defending the monopolistic position”.

## **II. Infrastructure as a distinct, although not distinguished, economic and legal group of sectors**

Even though services of general economic interest have a clearly defined place in the national economy<sup>2</sup>, they do not appear under a separate heading in the “services” section of the national statistics. Furthermore, services of general economic interest have been controlled and their activities regulated by various state authorities, but they have never been legally recognised as a single entity and, as such, have not held any particular place in economic theory.

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<sup>2</sup> Legally defined recently in: *Green Paper on Services of General Interest*, Brussels, 21.5.2003, COM (2003) 270 final.

In most economic papers, services of general economic interest are usually defined by itemising<sup>3</sup>, a good example of which is a division into the following broad categories: transport, energy, communication and communal utilities (water etc.).

These infrastructure services share many key characteristics. The most significant of them is the natural monopoly phenomenon that continues to prevail even after their legal monopoly has been withdrawn. The natural monopoly present in these sectors is closely related to a distribution network. Each network, dedicated to a specific kind of goods, is essential for connecting suppliers to consumers. An interchange of networks is technically impossible (oil or gas pipelines cannot supply electricity) while it is economically irrational to install two parallel electric (telephone, etc.) cables in one house or factory. Similarly, no person would ever consider building parallel rail tracks.

Establishing a network system always requires a substantial initial investment. Once the specific structure is in place, the cost of adding a new end-user is minimal. All networks have a similar cost structures that differs from the one adopted in micro economic theory. Its main features are: extremely high initial investments; a long wait for the return on these investments; very high maintenance costs that are irrespective of the level of exploitation which, in turn, leads to high fixed costs and low variable costs; a high risk of loss on these investments (in case of business failure, the assets are rarely transferable). As a result, new entry into a market where another enterprise is already operating involves a high level of risk. These features have caused, at a certain stage of the history of economic development, the nationalisation of these particular sectors.

At the outset of the transformation process in Poland, services of general economic interest were purposely excluded from privatisation by legislation<sup>4</sup>. The Act of 1996<sup>5</sup> repealed the Act of 1990, but created a delegation for the government to issue a regulation which should define the companies of special interest to the state and economy the privatisation of which will require government approval.

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<sup>3</sup> See K. Bobińska, "Ekonomiczna racjonalność finansowania usług użyteczności publicznej" (2005) 4 *Studia Ekonomiczne*; the article contains examples of the various approaches to itemising applied by different authors.

<sup>4</sup> See Act of 13 July 1990 on privatisation of state-owned companies (Journal of Laws No. 51, item 298). It was the first legal act that allowed transfer of public enterprises to private ownership. The Regulation of the Council of Ministers of 1991 listed the enterprises of special importance: among them, power plants, power stations, the railways, telecommunications industry, transmission networks, the water boards, gas and oil pipelines, as well as distilleries and refineries.

<sup>5</sup> The Act of 30 August 1996 on commercialisation and privatisation of state enterprises (Journal of Laws No. 118, item 561).

One of the goals of the Act of 1996 on commercialisation and privatisation of state enterprises was to introduce the relativity of the notion of ownership change. The Act of 1990 had underlined that the privatisation of public enterprises was the principal objective of the reforms and that only privatisation meant ownership change. Unlike the Act of 1990, the Act of 1996 spoke about a transformation of a state enterprises into a single state-owned shareholding company that represents another legal form of state ownership.

The Regulation of the Council of Ministers of 1997, implementing the Act of 1996, identified which entities hold special importance to the national economy. It adopted a more liberal approach to privatisation in general. However, privatisation as such is not the subject of this paper (a public monopoly can easily become a privately owned one); the issue considered here is a comprehensive de-monopolisation of the market.

The Act of 1996 on commercialisation and privatisation of state enterprises has unexpectedly proven to obstruct the process of dividing the previously monopolised sectors of general economic interest because it included a clause that entitled workers to a 15% share of the monopolist, free of charge, provided the company became a public company. The vertically integrated, huge state monopolists encompassed, however, varied elements, some of which were worth a significant amount, while some, next to nothing. Furthermore, some elements were released for quick privatisation, some were to stay public. The workers of the state monopolists wanted shares of equal value. The company could then start any operations (divisions of property), using its shares but not its assets, as it was allowed to do under the previous law. It soon became evident that before the employees agreed to divide the entity, the method of division of its shares had to be agreed on first.

Such legislative prerequisites opened the door to all sorts of pressurising by various interest groups within the company to be privatised. The manoeuvrings in the sectors of general economic interest started when the Polish government was getting ready to incorporate a series of Community directives that defined the process of liberalisation of sectors of general economic interest. The analysis of those factors that influenced the shape of those rules will be the subject of further discussion in this paper.

“If the form and realisation of political economy were based on a unidirectional influence on the systems, structures, and divisions it deals with, most decisions, with respect to production, allocation, or other values, would be favourably made (by “ I mean here “close to perfection”) (...). However, in the real world interactions exist, and economic politics is not some external element unrelated to its subjects”<sup>6</sup>. Neither the shaping nor

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<sup>6</sup> See A. Walczykowska, “Koncentracja a aktywność polityczna korporacji” [in:] M. Raczyński i inni, *W pogoni za rentą*, Warszawa 1998.

the realisation of regulatory or anti-monopolistic strategies is an activity that is free from external influences. Any analysis of the transformation process occurring within the sectors of general economic interests should bear this in mind.

### III. Tactics of interest groups during the transformation process

Niskanen (1971), one of the precursors of the approach presented in this paper, wrote: “[a]mong the several arguments that may enter the bureaucrat’s utility function are the following: salary, perquisites (...), public reputation, power, patronage, output of the bureau, ease making changes, and ease of managing the bureau. All of these variables except the last two, I contend, are a positive monotonic function of the total budget of the bureau during the bureaucrat’s tenure in office”<sup>7</sup>.

In a monopolistic environment, rent seeking – an activity where firms are trying to achieve or secure a favourable position on their markets – has been an integral part of modern economics for a long time. The first economic theories concerning this issue were discussed by Tullock (1967)<sup>8</sup>. Early commentators showed, in various scenarios, that the social cost of legally guaranteed monopoly was much higher than an average cost of market failure because a monopoly, seen as an organisation, was able to wrest for itself more privileges.

According to Krueger (1974)<sup>9</sup>, the term “rent capture” generally means swapping market mechanisms for governmental interference in the allocation of both labour and capital resources. The result is that subjects concentrate their activities on competing for, or securing the transfer of the rent, instead of generating profits. It has often been pointed out that such actions are only possible in a specific, legally institutionalised environment that favours the distribution of wealth and profits to a select group<sup>10</sup>.

Many argue that the term “rent seeking” should only refer to activities of firms in such economies where various forms of state regulation exist

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<sup>7</sup> W.A. Niskanen, *Bureaucracy and Representative Government*, Chicago 1971, p. 38.

<sup>8</sup> G. Tullock, “The welfare costs of tariffs, monopolies, and theft” (1974) 5 *Western Economic Journal* 224–232; A.O. Krueger, “Government Failures in Development” (1990) 3 *Journal of Economic Perspectives* 4.

<sup>9</sup> A.O. Krueger, “The political economy of the rent-seeking” (1974) 91 *American Economic Review* 291-303; A.O. Krueger, “Government Failures...”.

<sup>10</sup> See M. Raczyński, “Monopol w teorii pogoni za rentą” [in:] M. Raczyński, *W pogoni...*, p. 8 and 11.

as well as protectionist foreign trade practices, direct governmental transfers, and all other forms of preferential treatment. This is the case in this analysis.

Rent seeking attracts various special-interest groups whose actions strongly influence the way in which privatisation is carried out. In this analysis, the following basic interest groups need to be identified:

- A. Three groups within each enterprise: the owners, the executive board, and the employees among whom the monopoly rent can be appropriately divided between the groups. If the state acts as an owner (sometimes merely the majority owner) its role is carried out by the government, ministers and their representatives that act in the company's supervisory board; this is why they are being placed within the enterprise.
- B. The state representing national interests, i.e., consumer interests. In this role we may see the Parliament and the Regulator.

In the first category, all three interest groups within an enterprise push for such a form of privatisation which would guarantee them sustainable gain. The game is also played for how these benefits would be shared among these three actors. Let us try to define the interests of the group within the enterprise. The first group is the government. The objectives of the government (the owner) are determined by the fact that it acts in its own short-term interest – it wishes to secure such conditions which would guarantee it peaceful reign, at least for the duration of the relevant term in office.

The most important of these conditions – not necessarily in this order, as the pattern depends on the situation – are:

- to maintain stability in the key monopolised industry sectors where labour unrest<sup>11</sup> would paralyse the country;
- to raise national revenues;
- to fill key positions in state-owned enterprises with figures “stabilising” their administration; consequently, to have influence over the decisions taken by these companies, not quite privatising the sectors<sup>12</sup>.

Furthermore, it would be hard to ignore that “the public administration, otherwise called bureaucracy – another player among the main characters performing on the economic stage”<sup>13</sup> – consisting of central, regional, and

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<sup>11</sup> A note, *Applied Economics Letters*, 2001, 8, 273–277, says “labour protection, forced through both by the management and the employees, was given as a justification for competition protection”. Strike is one of the forms of pressure, whose costs can be easily measured.

<sup>12</sup> Owning shares or company stocks (even minority) in a privatised institution, the government can subsidise other public enterprises without cutting the national budget, which the failure of these enterprises would inevitably bring.

<sup>13</sup> See L. Gilejko, “Aktorzy sfery ekonomicznej i ich strategie” [in:] *Socjologia gospodarki. Część II: Rynek i otoczenie instytucjonalne*, Warszawa 2005.

local public officials and employees in all modern societies, wields enormous power<sup>14</sup> (determined by the government's role in the economy) and pursues its own interests. Of course, not all administrators are elite, but the upper echelons make for a large segment of the elite group. The size of this segment depends on the scale and character of the government's stake in the economy. According to Raczyński, this group is an important player in the "interest game". Its involvement seriously politicises the economy which in turn fosters strong ties between several elite groups, especially between the political and economic elites<sup>15</sup>.

The second interest group whose actions affect the transformation process from within the company is the executive board. Government ownership guarantees the upholding of high office positions which, apart from other benefits, gives the executive board the freedom to hire others onto posts lower in the company's hierarchy. It also allows its members to participate in the "office shuffle", to seek promotion to a ministerial position, to the board of directors, or even presidency of the company.

Gilejko suggests that in post-socialist countries, the struggle for power in the economic arena has not ceased. It mostly occurs in the relationships between the state (government, state bureaucracy) and other participants in the game (like the management of state enterprises which supports bureaucracy in the struggle for rent). This situation is not exclusive to post-socialist nations, but it is here where it is most noticeable. Various options based on monopolisation create favourable conditions for the alliance between the government and various interest groups. Gilejko suggests that bureaucracy, acting in its own interest, strengthens the short-term benefits of the government. It is also in the interest of the executive board to maintain the monopolistic position of their enterprise. Moreover, the board favours limited owner interference in the actual administration of the company with prospects of easy access to public subsidies. In other words, it would prefer its enterprise to be state-owned but with a corporate structure or, ideally, the structure of a holding company. If, however, privatisation was to occur, the most attractive option for the executive team would be to sell the company's minority shares, preferably on a stock exchange.

Surprisingly, the workers unions support the position of the management. Although most analyses suggest that the interests of the unions stand in direct

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<sup>14</sup> Ibidem.

<sup>15</sup> "In most capitalist countries, over 40% of workforce in public administration and nationalized industries are employed directly by the government". A. Giddens, *Socjologia*, Poznań 1998, p. 83 (cited after L. Gilejko, "Aktorzy sfery..."). The situation has changed since then.

opposition to those of the management<sup>16</sup>, in the case of rent-seeking, says Strumme, or to retain a monopoly *status quo*, the situation appears to be totally different. Both interest groups share the same objective, some of the forms of behaviour (in the process of realisation of these interests) turned out to be uniform<sup>17</sup>.

Concerning the legal conditions of the monopolised industry sectors in the Polish economy, job security is clearly a prime objective for all employees. But the workers also want to preserve the financial benefits (such as the legally guaranteed 15% share in the company's stock) gained during the process of the commercialisation and privatisation of state-owned enterprises. There are other benefits such as the fact that salaries and promotions are not determined by work output or efficiency. As a result, employees support privatisation but to a very limited extent. In consequence, only a minority stake in the company is sold on the stock market – as long as the state remains the company's main owner, employees can maintain their privileges. The government's symbolic sale of one share of the company not only guarantees employee *status quo*, but also brings them a financial reward in the form of a "privatisation bonus". At the same time, the price of the employee-owned shares (usually sold on soon after they have been obtained) depends on the extent to which the monopoly can be preserved.

Accordingly, the interests of the workforce coincide (or, at least, they are not in conflict) with those of the management, as the welfare of the management greatly depends on the extent of the "contentment" of its employees. Only the workers can go on strike. They can successfully block any changes that would limit a monopoly status of their firm with threats of industrial action that could cause stoppages in the delivery of products or services in the entire country – a major fear of public officials. Although strikes are usually initiated at the grass-roots, they are often encouraged at the top. This happens when the management decides it is also in their interest to demand from the owner – the government – some concessions.

There is little research in Poland that deals with specific (different to other sectors) configuration of interests occurring in the sectors of general economic interests. For this reason, it is all the more important to refer to the work of Gadowska<sup>18</sup> on "clientelism" and activities of interest groups within the coal-mining industry, a sector whose basic features resemble services of general economic interest and which, in Poland at least, up to now had never been

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<sup>16</sup> See O. R. Straume, "Rent-seeking in a unionized monopoly" (2002) 3 *Economics of Governance* 117–134.

<sup>17</sup> See S.N. Eisenstadt and L. Roniger [in:] *Patrons, Clients and Friends*, p. 28 (cited after L. Gilejko, "Aktorzy sfery...").

<sup>18</sup> See K. Gadowska, *Zjawisko klientelizmu polityczno-ekonomicznego*, Kraków 2002, p. 19.

earmarked for privatisation. She writes: “(...) the goal of a system analysis of the network interactions in the coal-mining industry, and its influence on the sector’s restructuring, is to shed light on the way politics infiltrates economic life at the expense of public interest and the common good of the society”.

According to this author, no clear distinction has been made in the post-communist countries between their economic and political system. Therefore, on the one hand, today’s difficulties to separate them have their roots in the past; on the other, the change from a centralised economy to the free-market, often requires political involvement. Any decisions directly affecting the economy are made at the political level. This is particularly true in the case of actions taken by state-owned commercial units because the course of the restructuring of their sectors is controlled by government bodies.

Long before the post-socialist transformation, Rowley<sup>19</sup> wrote that rent-seeking is not really an action initiated by individual players for their own sake – as it is often portrayed in economic models – but rather, an action taken by large companies operating under the management of executive boards<sup>20</sup>. Because of the principal–agent conflict in these cases (managers use the company’s money instead of their own in rent-seeking activities), there is a tendency to take higher risks which, in turn, lead to excessive costs associated with the pursuit of the monopolistic rent<sup>21</sup>.

#### **IV. The analysis of transformations occurring within the chosen sectors**

Since Poland signed the EU Accession Treaty in 1994, all of its existing legislation had to comply with European law in general and, in the context of the two infrastructure sectors analysed in this paper, to sector-specific directives in particular. The liberalisation of the energy field started first. “In 1992, the European Commission’s proposed the directive liberalising the sector that would gradually lead to the formation of a single European energy market”. The key objectives of the proposed directive were: to increase competition in the generation of energy; to foster third-party

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<sup>19</sup> Ch. Rowley (ed.), *The Political Economy of Rent-Seeking. Introduction*, London 1989.

<sup>20</sup> R.L. Faith, R.S. Higgins, R.D. Tollison, *Managerial Rents and Outside Recruitment in the Coasian Firm, The Political Economy of Rent-Seeking* in: Ch. Rowley (ed.), *The Political Economy...*

<sup>21</sup> In Poland, a significant increase in costs occurred during the mutual exchange of posts between ministries and large industry corporations.

access (TPA) to networks; and, to separate the internal concentration of the generation, transmission, distribution, and supply of energy. Although many interest groups met the proposed reforms with suspicion<sup>22</sup>, the draft was not rejected outright. In view of the reform process occurring in the, broadly understood, energy sector, it is useful to consider its market structure. Are energy generation and supply functions competitive? Are distribution networks of the primary energy resources the only natural monopoly? One of the hypotheses is that since energy cannot be transmitted to consumers without a network, the whole chain becomes a natural monopoly. During the transformation process, the interested parties have been pressing towards such a market structure; what was achieved is a market structure where a few big companies hold power stations and distribution networks. The third-party access (TPA) rule is the method to introduce competition to an oligopolistic market structure.

Several Member States were in conflict with the Commission, wanting to support the monopoly status of their energy enterprises<sup>23</sup>. That fact only confirmed how widely popular the phenomenon of state monopoly protection was – together with its numerous prerogatives – considering the short-term interest of public officials. As a result, the Commission submitted a new proposal suggesting an even more gradual process for the formation of a single energy market within the European Union. The 96/93/EC Directive was the final document regulating electricity markets. To conform to the EU directive, the Polish government prepared the Energy Act of 1997, which regulated open-market procedures, price policies, and the energy tariff system. The changes in the organisational structure of the energy sector to which this Act refers were introduced<sup>24</sup> at the beginning of the 1990s and were based, in most part, on the British model<sup>25</sup>. However, not one decision on privatisation was made at that time<sup>26</sup>. In other words, no competition existed because the government, as a single owner, could not compete with itself. As the owner, the government was unlikely to act contrary to its own interests even if the state (as a law

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<sup>22</sup> P. Jasiński, “Światowe trendy w przemyśle energetycznym” [in:] A. Szablewski (ed.), *Mechanizmy rynkowe w energetyce i telekomunikacji. Monografie, No. 8*, INE PAN, Warszawa 1996.

<sup>23</sup> It is worth noting that the question of common energy policy had not been raised until 2007, mainly under pressure from Poland.

<sup>24</sup> The Act of 5 February 1993 on ownership restructuring certain state-owned enterprises of special importance for the national economy (Journal of Laws No. 16 item 69).

<sup>25</sup> See J. Popczyk, “Od monopolu do rynku” [in:] P. Jasiński, T. Skoczny (eds.), *Elektroenergetyka*, Warszawa, 1996.

<sup>26</sup> A. Lipowski, “Procesy restrukturyzacji w przedsiębiorstwach przemysłowych okresu transformacji systemowej (wprowadzenie do problematyki)” [in:] E. Mączyńska (ed.), *Restrukturyzacja przedsiębiorstw w procesie transformacji gospodarki polskiej*, Warszawa 2001.

constituent) tried to create favourable conditions for competition within the sector. It appeared, however, that the legislators had ignored one obvious principle of the free market: that in order to compete, more than one market player is needed.

The legislation also established a chronology of transmission rights granted to each consumer group and gradually lowered the threshold enabling access to the market so that by 2007 all consumers, large and small, would be free to choose their electricity supplier from a range of functioning businesses.

However, enterprises were strongly motivated to include distribution units, which are natural monopolies, within their wider organisational structure and the law did not exactly disallow grass-roots consolidation activities (initiated by the management of small enterprises not by the government). They rightly assumed that the bigger the corporation and fewer the choices, the greater the possibility of price control and the lesser the chance for the end user to change a supplier. The energy distribution networks were the first to start consolidating; for example, the creation of the Southern Electric Power Corporation, ENEA or BOT was decided by the executive boards of each of the participating companies. Accordingly, seven large distribution and three mixed (with both generation and distribution) corporations were created as a result of grass-roots actions. The energy generation segment of the sector, which included several dozen electric-power stations and heat and power plants, was not included in the original consolidation efforts.

The government's approach to Polish energy markets was not coherent after 1996. It was unclear which concentrations should take place before, and which after the privatisation of the subjects in question. No general strategic plans existed and no rules concerning vertical integration within the process of privatisation were defined, not even in relation to international investors who already had such links.

The 2006 government "Programme for the Electricity Industry"<sup>27</sup> revealed a conflict of interests by including goals that were inconsistent in their principles (they excluded each other). For instance, one of the main objectives of the programme was to reduce the costs of electric-power generation, transmission, and distribution by increasing productivity through effective management of network activities and improving efficiency in electricity generation companies. These objectives were in direct conflict with the very principle of the programme which aimed to divide the market among a few consolidated, powerful corporations with the ability to dictate terms to consumers and to block any new market entry. Such corporations would have

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<sup>27</sup> Program dla Elektroenergetyki, Ministerstwo Gospodarki, March 2006.

enough leveraging power to remain ineffectively managed and not to induce economic efficiency.

The Programme for the Electricity Industry created favourable conditions for the emergence of large energy conglomerates. A dominant position in the market was attained by Polskie Sieci Energetyczne [Polish Electricity Grid] S.A. (PSE), a former transmission system operator, that, through the acquisition of several electric-power stations, formed the Polska Grupa Energetyczna [Polish Energy Group] S.A. (PGE) structured as a holding company. The next biggest market players were the Southern Energy Group TAURON, as well as the ENEA and ENERGA distribution companies.

The birth of these powerful energy groups, with vertically integrated holding structures, formed a so-called oligopolistic competition. Thus, the implementation of the government 2006 programme was nothing but an expansion of the monopolistic system. This trend was foreseen by Popczyk<sup>28</sup> who pointed out the danger of establishing an unhealthy market structure in the Polish electricity industry that can hinder competition. In addition, large power plants (the dominant segment of the consolidated holding companies) get direct access to consumers via the distribution units (with which they now form one enterprise) and thus can dictate the price without being afraid that other power stations will offer lower price. Using this method to prove their credit solvency, power plants are able to secure new loans for “old-fashioned investments”. It is important to note that no money changed hands during the acquisition process. The acquisition of distributors occurred merely through a shuffle of government ownership. J. Popczyk also noted that a transformation process where “a political-corporate system changes into a corporate-only system”, gives corporations so much influence that it renders the government powerless. In 2008, one of the largest quasi-monopolies, ENEA, abandoned an earlier plan to sell the majority of its shares to a strategic investor, and instead decided to use the stock exchange to privatise (despite falling stock indices) its minority stock. With the privatisation on the stock market concluded, the government continues to retain the majority of its shares and thus remains its “decisive” owner. That means that the *status quo* is preserved according to the best interests of all interested parties.

The railway industry, which is the second example of services of general interest sector discussed in this paper, has only two segments: (1) the rail-track network that forms a natural monopoly, and (2) the passenger and freight transportation systems which is completely ready to be de-monopolised and opened for competition. The natural monopoly structure of rail-tracks differs,

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<sup>28</sup> J. Popczyk, “Elektroenergetyka – prywatyzacja po polsku” [in:] K. Bobińska, *Prywatyzacja infrastruktury*, *Zeszyty TEP*, No. 9, May 2005.

however, from the electricity sector as it has long been exposed to inter-modal<sup>29</sup> competition.

The EU has taken a long time to formulate guidelines for the liberalisation of railways<sup>30</sup>. The 2001/12/EU directive on the European rail system replaced Directive 91/440/EEC which only mandated the financial separation of networks. The 2001 Directive set out the dates for the liberalisation of each type of transportation.

The discussions on restructuring of the Polskie Koleje Państwowe [Polish National Railways] (PKP) started in 1998 and followed the EU legislation which was already under discussion for several years. The 2001/12/EU Directive that was finally issued demanded financial independence for rail-tracks as well as a total separation of passenger lines from freight. The first Polish transformation plan was to divide PKP into several independent entities. However, the suggested structural changes met with firm opposition from its workforce leading to a general strike<sup>31</sup>. The Act on the Commercialisation, Restructuring, and Privatisation of PKP, based on different principles, was finally passed more than a year later (on 1<sup>st</sup> January 2001).

As a result, PKP was divided into about a dozen interdependent companies<sup>32</sup> organised under the umbrella of a holding company. Each firm was headed by a president, executive officers and a supervisory board. The parent company, PKP S.A., became the owner of all assets of the transformed enterprises and a major shareholder in each of its subsidiaries. The most important companies in the group include: PKP Polskie Linie Kolejowe [Polish Rail Lines] S.A. which manages the rail-track infrastructure; the PKP Cargo S.A. which operates freight lines; and two passenger lines – PKP Intercity and PKP Regionalne Linie Kolejowe [Regional Rail Lines] S.A. The subsidiaries do not compete with each other seeing as each has a defined area of operation while their size and economic power allow them to maintain their monopoly status.

The transformation of the railway sector into a single holding company has created multiple opportunities for various forms of covert activities including cross-subsidies and guarantees of equal employee participation in receiving shares the value of which has been based on all assets of the holding. The functionality of the structural set up and sole state ownership eliminates the possibility of competition and, *eo ipso*, does not demand increased

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<sup>29</sup> Such as other transportation systems: ground (car, bus) and air (airplane).

<sup>30</sup> Liberalisation process at the European Union level began in early 1990s (with the 91/440 Directive on the common rail development).

<sup>31</sup> Which ended with the resignation of the minister.

<sup>32</sup> All PKP services were organised into separate businesses, e.g., PKP Telecommunications, PKP Energy etc.

productivity. The only method of improving profitability introduced by the new management was to reduce the number of operating rail lines. This action was presented by PKP as part of its reorganisation plan<sup>33</sup> and diligently executed ever since.

One method, among many, used to strengthen the monopolistic position of PKP, was to introduce the law on licences for railway operation. The PKP granted these licences *ex lege* and forever. Its all competitors had to reapply for them without any guarantee of renewal. It is important that the other, then PKP, companies were cargo companies with about a few percent of PKP Cargo's capacity. As these provisions were introduced retrospectively, the bias in the treatment of similar companies was all the more visible. Only pressures from two interest PKP groups – the management and the workforce – could have explained such unfair business practices.

At the same time, the deficit of the group has grown to non-repayable proportions, and it became clear that the situation would not be resolved without a heavy subsidy. The subsequent strategic plan for 2003–2006<sup>34</sup> made the government responsible for all public debts of the PKP group<sup>35</sup>. According to this plan, two types of companies could function within the national transportation system – commercial ones, and those remaining in the public domain (PKP Regional Rail Lines). The Authors of the plan hoped that the organisation of the persistently unprofitable Regional Rail Lines would be subsidised by the State budget. The government remained, however, a major shareholder of PKP Intercity and the PKP Cargo which were granted the option of being privatised. The 2003–2006 strategic plan proposed, at the same time, that the State should be responsible for the financing and development of the rail infrastructure<sup>36</sup>.

The 2003–2006 strategic plan did not succeed probably for two reasons: the likely opposition of public authorities to the scale of such flagrant subsidy; and the obvious bias in the division of the monopolised sector: the network – a government-financed natural monopoly; national rail lines – earmarked for privatisation, with the potential to remain competitive on a freed rail-transport market; and regional lines – partially subsidised by local authorities but with its ownership structure left unchanged, that is, one regional company for the whole country expected to be subsidised by all local governments without, however, giving them any influence on its behaviour. Although the strategy

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<sup>33</sup> A 2001 expert report for the Ministry of Transportation. Where it is shown that it improves only the passenger per km. efficiency but dramatically lowers the passenger per employee efficiency.

<sup>34</sup> Accepted by the government in 2003.

<sup>35</sup> And a total debt suspension or payment deferral until after 2010.

<sup>36</sup> See K. Bobińska, *Ekonomiczna racjonalność...*

was in line with EU guidelines<sup>37</sup> on the financing of public services, it limited employee benefits, usually gained in the course of privatisation, on one hand, and deprived the local governments of any control over the running of the company, on the other. Local governments wanted to own the freestanding regional lines and, consequently, refused to cooperate. In the mean time, the deficit deepened as the regional lines accounted for most of the PKP Group's external debt<sup>38</sup>.

The threat of a general strike brought about a new strategic plan for 2006–2009. While it kept the *status quo* in general, it provided for two, albeit significant, changes: it permitted a division of the PKP Regional Rail Lines, but with the agreement of both interested parties – local governments and PKP. Moreover, PKP Polish Rail Lines, responsible for rail-track infrastructure, would rejoin the parent company. This was exactly the kind of monopoly which the workers had been waiting for. The plan was, therefore, accepted and put into effect. It intentionally allowed for the rail-line operators within the holding company to be separated along the lines of their functionality to avoid internal competition. In other words, each was given monopoly in the area of its capacity<sup>39</sup>. Moreover, PKP's movable property (PKP transport sources) was deliberately divided inadequately to the needs of individual operators; for example, all PKP locomotives were reserved for the PKP Cargo, giving a purely commercial operator an unfair advantage<sup>40</sup>, and putting an unjustified financial burden on those, who might be entitled to ask for public subsidy.

The 2006–2009 strategic plan did not cut the budgetary aids, neither does it account for the loss of tax revenue from the newly created group. However, it would be prudent to assume that the authors anticipate the financial aid needed to by far exceed the level of the financial losses incurred by the PKP Group. As often stressed in the plan, the profitability of the PKP Group depends on the government's financial support which – on the other hand – should contribute to social stability. This represents an open threat to the state that, if it refuses the appropriate amount of money, the PKP will go on strike.

The size and form of the expected “support” do not follow the criteria precisely defined by the European Court of Justice<sup>41</sup> for subsidies to services of general economic interest. Such aid would be considered by the EU as

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<sup>37</sup> White Paper on services of general interest, Brussels, 12.5.2004, COM (2004) 374 final.

<sup>38</sup> It amounted to PLN 5.8 billion at the end of 2006.

<sup>39</sup> For example, Mazovia Rail Lines (Koleje Mazowieckie).

<sup>40</sup> CARGO leases out locomotives to regional lines, a public service institution financed by a local government, and, in reality, covertly subsidises CARGO.

<sup>41</sup> Judgment of 24 July 2003 in the case C–280/00 *Altmark Trans* [2003] ECR 7747.

an illegal subsidy which the government could not guarantee. Therefore, the realisation of the strategic plan for 2006–2009 is in doubt. This ambiguity could have been the reason for the creation of a new programme, published in 2007, concerning the period of time between 2007–2013.

The 2007–2013 strategic plan does not change any of the pre-existing principles. It does, however, put the state in the role of a coordinator of the development of the rail network leaving the actual supervision and maintenance of the national rail infrastructure<sup>42</sup> in the hands of Polish Rail Lines. It expects operational costs to be covered jointly by the national and local budgets, European Union funds, bank loans, and own resources. It leaves the entire company stock in the hands of the government. The newest plan considers the stabilisation of the financial situation of, first, PKP S.A. as the corporation's parent company, and then, of the rest of the group. To strengthen the group's overall administrative system, members of the PKP S.A. Board of Directors will serve as the presidents of the supervisory boards of its subsidiaries. As the head company, PKP S.A. is now the main party responsible for improving of the group's finances.

The problems of PKP Regional Lines have also been dealt with. By 2009, the company is expected to regain solvency<sup>43</sup>. It is to be split "equally" and handed over to the 16 Polish regional governments. In line with the strategic plan, the transition of the regional lines to the jurisdiction of local authorities will "maintain the national character of the regional rail transport, improve the quality of services, and strengthen the unity of the transportation system in the region". As a result, the unprofitable regional rail lines will no longer strain the PKP's financial health while the lucrative interregional transportation system will remain under the governance of the group. In a typical monopolistic manner, this approach will preserve high-level jobs in a separate, profitable business and limit the financial losses of the group as a whole while making the local authorities take over all of the responsibilities associated with running and maintaining of the unprofitable regional rail lines.

The government will retain its position as a major shareholder of PKP Cargo which will assume the role of "a national rail freight company" and is expected to start selling its minority stock by 2010. Similarly, the majority of shares of PKP Intercity will remain state-owned, and the PKP S.A. outstanding debt will be fully covered by the national reserves. When the ideas of restructuring PKP

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<sup>42</sup> The strategy for the rail transportation sector assumes the infrastructure maintenance to be the responsibility of the state.

<sup>43</sup> At the end of 2006, the company's deficit amounted to more than PLN 2.1 billion and exceeded the value of its assets. In 2008-2009, the company is expected to receive PLN 1,860 million in government loans.

were first formulated, public authorities refrained from openly subsidising services of general economic interest which, while allowed by European rules, demands accountability in return. The only possible solution for the government appeared to be to consolidate inefficient, but socially-needed, operators with efficient units to cover up an illegal appropriation of public funds for commercial businesses. The necessity of subsidising the public service obligations had been accepted later.

The newest strategic plan appeases the interests of the government and executive groups by keeping the organisational structure of the PKP Group in the form of a holding company creating a suitable number of executive jobs. On the other hand, the limited privatisation, included in this plan, that is, the public sale of a minority share of PKP stock, gives the employees a 15% share of the company. In addition, the position of the workforce is strengthened by the compelling, strategic principle that “the government guarantees social stability” for all firms part of the holding company, and that no persons from outside the sector will be nominated to the supervisory bodies of the PKP Group companies. There really is nothing that could be added to the latest strategic plan for the Polish rail sector that would better preserve the objectives pursued by its three interest groups.

## **V. Conclusions: The scale of the preservation monopolistic market in the sectors after the transformation**

Before the transformation, both of the analysed industries (the electricity and the railway sector) had two distinct market structures. After fifteen years of organisational reforms and property transfers from one form of state ownership to another, they both eventually adopted a comparable, though slightly different, structure of a holding company. While the energy sector encompasses several holding companies that have created an oligopolistic form of market structure, the rail industry has converted into a single holding company that incorporates one enterprise considered to be a natural monopoly as well as several others that retains dominance in each of their market segments. Inevitably, in both cases some form of monopolistic competition has developed which is, however, very difficult to monitor.

In addition, during the long legislative process when many Polish laws had to be revised to comply with European Union directives, the various interest groups within the discussed sectors managed to gain a maximum number of government guarantees: the executives had their positions secured, the employees not only escaped job cuts but also received company shares as

a result of privatisation. Such a situation can only exist in a monopolistic environment, as only then can a monopoly rent be discounted (the interested groups can profit from the monopoly rent) – no matter whether the rent is collected directly from the consumer (the energy sector) or from the state, i.e., from taxpayers (the railways).

In the course of market privatisation, the government has retained the majority of the shares in question, guaranteeing the preservation of the monopolistic *status quo* that benefits other interested groups, including private shareholders. Who, considering the initial interest groups, benefits most from privatisation? The government enjoys a short-term benefit resulting from the sale of a part of its shares while still retaining a majority stake in the companies. The corporation remains a monopoly and the government, as a majority shareholder, is interested in its profits. Therefore, it lies in the interest of the government to keep the *status quo* for as long as possible. At the same time, board members can hold on to their executives jobs, and the employees receive, a legally due, company share package as well as secured employment and the power to exert considerable pressure on the government (major share owner) and demand ever-increasing privileges.

In short, it has been to the advantage of all three interest groups to secure the monopoly status for their enterprise. As economic theory points out, only the enterprises that act on a monopolistic (or oligopolistic) market can enjoy monopoly profits which permits the pursuit of various forms of rent, the goal of all three analysed groups.

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# Antitrust and Copyright Collectives – an Economic Analysis

by

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### *Abstract*

The activity of the copyright collecting societies had been scrutinized by many antitrust authorities. The paper presents the decision taken by the President of the Office of Competition and Consumer Protection (UOKiK), which deals with abusing practices of Polish copyright collective society – ZAiKS. The paper concentrates on the economic aspects of the decision from the President of UOKiK.

**Classifications and key words:** collecting societies, copyright, antitrust, transaction costs, welfare.

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## I. Introduction

On the 6<sup>th</sup> of December 2007 the Polish Supreme Court dismissed the Polish Society of Authors (ZAiKS) appeal<sup>1</sup> concerning the decision taken by the President of the Office of Competition and Consumer Protection (UOKiK) on the 16<sup>th</sup> of July 2004, which found that ZAiKS had infringed competition law by abusing its dominant position on the market of collective management of copyrights.

The decision of the President of UOKiK was taken after a complaint by the music group Brathanki concerned the mechanical reproduction rights to Brathanki's musical works licensed by ZAiKS, on the group's behalf to the DIGI PRES company. According to Brathanki, the license infringed its rights as the owners of the copyright because it permitted DIGI PRES to reproduce works, the management of which was entrusted by Brathanki to ZAiKS, without granting individual permission by the copyright owners. Brathanki claimed that the main reason for this situation was that ZAiKS was abusing its position by demanding that its members assign their copyrights rights exclusively to ZAiKS, ruling out direct and independent licensing by ZAiKS's members of the same rights. The President of UOKiK in its decision ordered ZAiKS to put an end to their abusive conduct; ZAiKS was forced to acquire or deal with copyright (performing and mechanical rights) on a nonexclusive basis and accept to administer a specific right not only on condition that right holders hand over other rights (either performing or mechanical) pertaining to the same works<sup>2</sup>.

Dealing with the *Brathanki v. ZAiKS* decision has some economic points of interest. Firstly, the collective management in mechanical rights is hardly explored in economics. Therefore it seems interesting to analyze whether the economic literature suggests that greater competition in the provision of mechanical rights management, as ruled in the decision, would be beneficial to society and for creators managing their own rights.

The paper is organized as follows. Section 2. deals with the economic function of CCS within the music industry. Section 3. overviews literature devoted to the economies of collective management of performance and mechanical rights. The part 4. presents some findings concerning welfare analysis of CCS. The final parts of the paper offer some remarks on the economic analysis of the *Brathanki v. ZAiKS* decision.

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<sup>1</sup> The judgment of the Supreme Court of 6 December 2007, III SK 16/07, unpublished – the cassation of ZAIKS collapsed.

<sup>2</sup> Decision of the President of UOKiK of 16 July 2004 No RWA-21/2004, unpublished.

## II. Music industry and copyrights

National copyright collecting societies (CCS), like ZAiKS, are a common feature of the world music industry. Their existence is not only explained by the complex copyright provisions which cover music, but also by a very special production process of musical works. The basic characteristic of the process of bringing music to the market is the existence of many intermediaries, which usually need some assignment of copyrights to take their actions. In essence copyright protection is a way to control the use as well as a source of income associated with creative works. Figure 1. presents traditional revenue flows in the music industry and is also helpful in describing a location of rights to musical works.

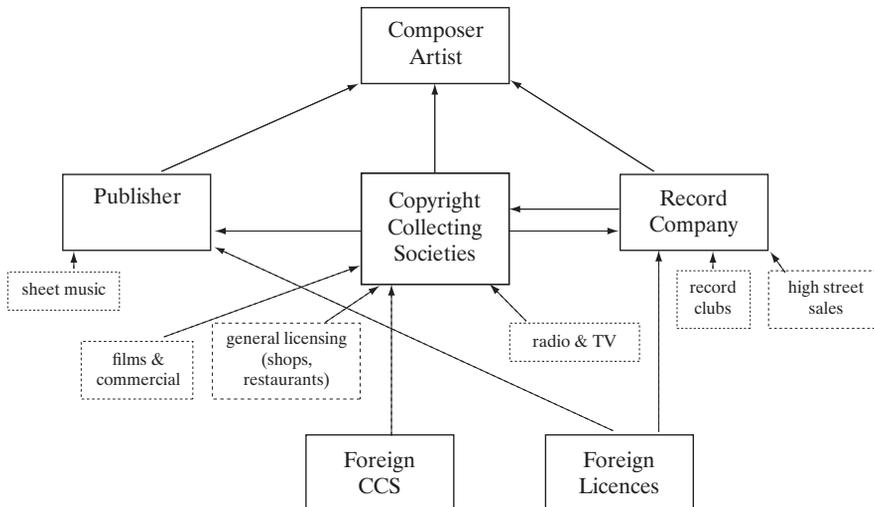


Figure 1. Music intellectual property revenue flows in the entertainment field (Kretschmer et al. 1999:174)

As indicated in Figure 1. the chain of value creation in musical works begins with the author (the lyricist and/or the composer) when he gives his original music idea a fixed expression. At that moment the rights to musical works arise, which initially are located with the author (the rights owner) giving him the exclusive right to the use the creation in all exploitation areas<sup>3</sup>.

<sup>3</sup> *Prawo autorskie i prawa pokrewne* (wprowadzenie J. Barta, R. Markiewicz), Warszawa 2007, p. 50.

On economic grounds, the need to protect creative works is supported by its very special production process, which typically displays very high fixed costs of creation (especially at the stage of bringing the music to the market (the so called “commodification phase”)<sup>4</sup>) and very low marginal costs of reproduction. Such a production process makes it very unlikely that a price close to marginal costs will generate sufficient revenue to cover the fixed costs of creation in a competitive market. It means that copyrightable property would likely not exist in a competitive market. Therefore, the incentive to create (so called *ex ante* efficiency) must be fostered by the introduction of some market power in the form of a monopoly over how the creation is to be exploited<sup>5</sup>.

However, in order to bring the work to the market, in such a form as CD, the primary owner of rights to the creative work might assign the rights to intermediaries (traditionally to the publisher or to a management or production company and then to the record company (copyright holders)) against some specific competences (music production; market knowledge; global and multipurpose competences)<sup>6</sup>. A CD gives rise to mechanical copyrights that entitle copyright owners and holders to a fee. Another potential income source is created when a recording is performed on the media or in public places. These public performances entitle the same copyright owners and holders to a performance fee. Mechanical and performance rights are described in literature as the primary rights which secure ownership of original work of music to the authors. These rights are stronger in legal terms to so-called neighboring rights, which secure ownership of sound recording to the producing company and the performing artists<sup>7</sup>.

But, in order to benefit from the entire range of rights that protect music works, its owners have to be able to actually administer them. Ernest Bourget, a French composer of popular chansons was the first individual who realized that he would never be able to monitor usage of his music. After he refused to pay a bill at the fashionable Paris café where one of his pieces was being played (arguing “You consume my music, I consume your beverages”) he was

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<sup>4</sup> For more on the process of bringing music to the market and the current music industry structure see: M. Kretschmer, M.G. Klimis, R. Wallis, “Music in Electronic Markets: An Empirical Study” (2001) 3–4 *New Media & Society*.

<sup>5</sup> R.Watt, “The Past and the Future of The Economics of Copyright” (2004) 1(1) *Review of Economic Research on Copyright Issues* 156.

<sup>6</sup> M. Kretschmer, G.M. Klimis, R. Wallis, “The Changing Location of Intellectual Property Rights in Music: A Study of Music Publishers, Collecting Societies and Media Conglomerates” (1999) 17(2) *Prometheus* 170.

<sup>7</sup> R. Wallis, Ch. Baden-Fuller, M. Kretschmer, M. Klimis, “Contested Collective Administration of Intellectual Property Rights in Music. The Challenge to the Principles of Reciprocity and Solidarity” (1999) 14(1) *European Journal Of Communication* 9.

summoned before the *Tribunal de Commerce de la Seine*. The court case of 1847 (decided in favour of the author) confirmed that the composer could not contact directly all users of his music to get due payment and so, with the help of a publisher, Bourget set up a collective that become in 1851 the *Société des Auteurs, Compositeurs et Editeurs de Musique* (SACEM) – the first modern copyright collecting society in the world<sup>8</sup>.

Nowadays, CCS act on behalf of a range of rights owner and holders – authors and publishers, as well as performers and production companies. Its economic function is to license the use of copyrighted works (by negotiating a license fee), to collect and distribute royalties and to monitor the use of copyrighted works. Many national CCS administers both performance and mechanical reproduction rights. However, in some countries there are separate collective agencies to administer each type of rights<sup>9</sup>. But despite these variations, it is possible to generalize that the main economic function of CCS is to enable a market to function for the use of copyright works in a situation, in which the copyright owners and holders cannot enter into contract directly with users (e.g. broadcasters, owners of pubs, clubs, shops, aircrafts). These societies operate on the principle of reciprocity, linking monopolistic national societies.

We must mention that the traditional structure of the music industry presented by Figure 1. has been changing over recent years. These changes are being stimulated by digital communication and distribution technologies. For example, the development of MIDI (musical instrument digital interface) has significantly reduced costs of record production giving rise to digital home studios. As well as a cheaper and more flexible server infrastructure which is changing the distribution network. It allows artists to retain their rights to their works by setting up their own commodification intermediary, such as a publishing company or a record label. In addition, new monitoring technologies (DRM – a digital right management) have an effect on the current ways of administrating copyrights. Big multinational media groups, which dominate the global music market, are now in a technological position to monitor music usage and collect mechanical and performance royalties themselves, diminishing the position of CCS at the music market<sup>10</sup>.

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<sup>8</sup> Ibidem, p. 11.

<sup>9</sup> R. Towse, Ch. Handke, *Economics of Collective Management of Copyright*, Ediciones Autor, Datautor, 2007, p. 13.

<sup>10</sup> M. Kretschmer, M.G. Klimis, R. Wallis, “Music in Electronic Markets...”, p. 13, 22, 26.

### III. Economic function of copyright collective societies

From the economic perspective, the basic rationale of CCS is to overcome the problem of high transaction costs of administering copyrights. The best way to identify sources of high transaction costs in music licensing is to recall Coase's description of transaction costs: "in order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed and so on. These operations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost" (Coase 1960).

Following the theoretical characteristic of transaction costs, their main categories in music licensing can be identified. The first one is the "search and information" cost concerning potential contracting partners (e.g. radio stations, broadcasters, record labels). Collecting and processing information about them and their needs and conditions is time consuming and generates costs (the use of telephone and/or Internet). Moreover, additional costs must be incurred to inform potential partners that one is ready for the conclusion of the contract (e.g. costs of advertising or of website creation). Search and information costs reflect also actions taken to detect illegal use of copyrighted works. The second group of transaction costs in music licensing are "bargaining and decision" costs incurred during the process of negotiation and conclusion of the contract<sup>11</sup>. Usually, the negotiation process is time consuming and sometimes necessitates cost-intensive legal advice. Successful conclusion of the contract creates 'enforcement' costs of monitoring the compliance with the terms of the contract. Finally, long term contracts may need a periodical review, which generates 'adjustment' costs. It can happen, for example, when a copyright owner or holder tries to renegotiate with the licensee (for example with a record label) to participate in an unexpectedly successful commercial exploitation of his/her music work.

The transaction costs of music licensing can be so high that they can make it difficult or even impossible for copyright owners to enforce their own rights. For example, the variety of possible parallel uses of musical work (e.g. public performance, reproduction) makes tracking every individual use of such work

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<sup>11</sup> G. Hansen, A. Schmidt-Bischoffshausen, *Economic functions of collecting societies – collective rights management in the light of transaction cost and information economics* – a conference paper for Society for Economic Research on Copyright Issues Annual Congress 2007, Draft Version, 18.10.2007, p. 5–6.

unfeasible for an individual copyright holder. Furthermore, a problem of significant transaction costs arises when each individual use of copyrighted works has a relatively small value to users. If only a small license fee is to be expected in individual cases, then the individual enforcement of rights would simply not be economically feasible. In these circumstances, no copyright owner will find it economical to collect fees and pursue infringements unless one can cooperate with other rights owners to economize on transaction costs<sup>12</sup>.

Thus, copyright collective societies reduce transaction costs, in order to guarantee creators the income that encourage them to continue producing additional works and, at the same time, to facilitate access to creative works for its users.

A reduction in transaction costs when incurred by CCS results from substantial economies of scale and scope in the administration, licensing and enforcement of copyrights. For example, the reduction of “search and information” costs is achieved by the creation of central contact and information agencies. Most CCS exist as national, natural monopolies as they lower costs for users as well as for right owners and holders. To use copyrighted works, potential users need to approach only one CCS. Thus creators, who granted an exclusive right to their work to a CCS, do not need to search for people interested in using their creative works. The search by users just substitutes the search by right owners and holders<sup>13</sup>.

By using standardised contractual terms and tariff rates, CCS can also reduce “bargaining and decision” costs of licensing agreements and confer greater legal certainty upon all involved parties. A further reduction of those costs is achieved by offering a single product (a bundle of copyrights; so-called “blanket licenses”<sup>14</sup>) – the administration of one specific bundle of copyrights (usually public performance rights) on behalf of all rights holders<sup>15</sup>.

Furthermore, CCS reduce costs of record keeping, payment collection, and royalty disbursement (“enforcement” costs) by administrative facilitation of handling of payments. On the basis of their experience of repetitive activities, CCS are able to reduce not only detection costs of illegal use of copyrighted

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<sup>12</sup> S. M. Besen, S. N. Kirby, *Compensating Creators of Intellectual Property. Collectives That Collect*, The RAND Publication Series, March 1989, p. 6.

<sup>13</sup> G. Hansen, A. Schmidt-Bischoffshausen, *Economic Functions...*, p. 9.

<sup>14</sup> More on economic aspects of blanket licenses see: R. Towse, Ch. Handke, *Economics...*; A. Hollander, “Market Structures and Performance in Intellectual Property. The Case of Copyright Collectives” (1984) 2 *International Journal of Industrial Organization*; S. M. Besen, S. N. Kirby, *Compensating Creators...*; R. Watt, “The Past and the Future of The Economics of Copyright” (2004) 1(1) *Review of Economic Research on Copyright Issues*.

<sup>15</sup> R. Towse, Ch. Handke, *Economics...*, p. 25–26.

work but also costs of the adjustment of existing contracts (“adjustment” costs)<sup>16</sup>.

As mentioned above, a reduction in transaction costs associated with CCS can also result from economies of scope. It happens when CCS manage several rights at once within their field of activity. For example, ZAiKS administers a combination of performing, reproduction and synchronization rights to music. Such a combination constitutes an additional source of income for CCS profiting from specialization and learning curve advantages. It is also attractive for users who are interested in purchasing licenses to rights in complimentary relations at the same time (*one-stop-shop*).

Due to the mentioned reduction of transaction costs copyright collective societies are often regarded as an indispensable mechanism for the licensing, administration and enforcement of public performance rights in music. When one realizes that a single radio station may use over 6.000 works per year airing them around a 100 times each<sup>17</sup>, the costs of gaining authorization from their individual owners seem to be enormous in comparison to the value of each individual work. When additionally one considers that in many cases the copyright in one work is shared by several different right owners and holders (e.g. lyricist, composer, publisher), then collective licensing of public performance rights not only generates substantial cost savings but also overcomes potential hold-ups that might occur in negotiations with several parties.

The latter problem is also overcome by collective licensing where mechanical reproduction rights are at stake. However, there is no common agreement in the literature on the economic rationale of collective licensing of mechanical rights. On the one hand, a CCS dealing with mechanical rights is more effective than an individual right owner in the monitoring of reproduction or other uses of creative works (lower enforcement costs). Furthermore, users of music (record labels, broadcasters) prefer to have one agreement covering all repertoire of a CCS, rather than several agreements with different copyright owners and holders<sup>18</sup>. By reducing in particular the “search and information” costs, a CCS facilitates an access for users to licenses<sup>19</sup>.

On the other hand some authors perceive collective licensing of mechanical rights as not feasible due to low transactional cost for individual owners associated with the exercise of their copyright in the case of reproduction, publication and adaptation<sup>20</sup>. Lack of economies of scale in collective licensing

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<sup>16</sup> G. Hansen, A. Schmidt-Bischoffshausen, *Economic Functions...*, p. 6.

<sup>17</sup> A. Hollander, “Market Structures...”, p. 203.

<sup>18</sup> M. Kretschmer, G. M. Klimis, R. Wallis, “The Changing Location...”, p. 170.

<sup>19</sup> G. Hansen, A. Schmidt-Bischoffshausen, *Economic Functions...*, p. 18.

<sup>20</sup> A. Hollander, “Market Structures...”, p. 200.

and its monitoring, due to the absence of large volumes (in transactions with users) is a basic feature of so called “major rights”, like opera performances. Therefore the easily controllable rights should be administrated on an individual basis<sup>21</sup>. There is a common agreement in literature that so-called “small” performing rights should be administrated by a CCS. However it is hard to establish a common view on mechanical right management due to the lack of empirical economic studies on the topic.

The complex nature of potential economies associated with the activity of CCS definitely makes its economic analysis challenging. However, when a competitive relation between collective and individual right management is verified, it is important to determine if a competitive option is viable i.e. if it is attractive to some users and to owners of the music. If so, if it has lower total transaction costs than CCS, then individual right management can be an alternative to CCS, as it can exert competitive pressure.

#### IV. CCS and overall social welfare

The total savings in transaction costs are an important part of the welfare analysis of CCS. If they are higher than the monopoly price charged by CCS, then there is an overall welfare gain<sup>22</sup>. However, sometimes scrutiny of economic efficiencies within a welfare analysis is unnecessary as CCS power to set a monopoly price can be limited. For example, in some jurisdictions CCS rates are regulated and could be set below the monopoly level<sup>23</sup>. Besides, the price level is also determined by the structure of the users’ market. If users also act collectively on the buying side of the market (countervailing buying power), they can reduce CCS monopoly power and approximate prices to a socially efficient level<sup>24</sup>.

An interesting example on diminishing CCS market power by the fact that users (being right holders at the same time)<sup>25</sup> mostly bargain collectively with

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<sup>21</sup> G. Hansen, A. Schmidt-Bischoffshausen, *Economic Functions...*, p. 8. Performances of operas and ballets, as well as live performances are commonly classified as the major (grand) rights, see: C. Crampes, D. Encaoua, A. Hollander, *Competition and Intellectual Property in the European Union*, unpublished revised version, February 2005; H. C. Jehoram, “The Future of Copyright Collecting Societies” (2001) 23 *E.I.P.R.*

<sup>22</sup> R. Towse, Ch. Handke, *Economics...*, p. 52.

<sup>23</sup> *Ibidem*, p. 53.

<sup>24</sup> A. Hollander, “Market Structures...”, p. 201.

<sup>25</sup> It refers to multinational companies, such as Bertelsmann, Sony, Universal and Warner, which have integrated most intermediating activities in the music industry under one corporate roof; for more see: M. Kretschmer, M. G. Klimis, R. Wallis, “Music in Electronic...”.

CCS to set the price was presented by Kretschmer et al.<sup>26</sup>. They draw attention to an increasing power of the multinational companies in the global music industry. As these companies account for 80% of global record sales and publishing revenue, thus they pay royalties for the use of mechanical rights mainly to themselves – from the recording to the publishing arm of the same company. In these circumstances, they have economic incentives to by-pass existing copyright society structures<sup>27</sup>. At the end of 90ies they threatened CCS in Europe with a withdrawal of their repertoire in order to obtain better terms. Final agreement offered multinationals a reduction in commission, which was previously set at 8% of received royalties, to 6%, when at the same time smaller right holders were charged a handling fee of 12% and more<sup>28</sup>.

One should note that countervailing buying power of multinationals *vis-à-vis* CCS has its foundation in the transaction costs of mechanical right licensing, which are rather low for these companies as the royalties are quite easy to identify and to collect. This raises a question whether small right holders can also be better off if they attempt to engage in individualized transactions concerning mechanical rights. Besen and Kirby<sup>29</sup> specified two reasons why non-collective pricing may not be suitable. Firstly, users may not find it attractive to deal with a system in which they face different prices for each of the licenses that they might acquire. Secondly, the profit of right holders can often be increased if license fees are set collectively. Under individual licensing right owners and holders just compete to have their work licensed, which pushes the license fees down. Therefore, individual licensing seems attractive only to multinationals and the very top superstars who would benefit from using their relatively strong bargaining position<sup>30</sup>. Moreover, the existence of a trade-off in royalties paid to gain access to complementary rights pertaining to the same work<sup>31</sup> can make an increase in a license fee for a single right unfeasible. For example, when a broadcaster, as the user of the music, is concerned about the sum of payment for all the rights he must clear, then an increase in the price of an individually set license to reproduce the work (needed to copy a song on hard disk in order to perform it in public) should

<sup>26</sup> M. Kretschmer, G. M. Klimis, R. Wallis, “The Changing Location...”, p. 170.

<sup>27</sup> Polygram estimated its potential annual savings of \$US 2.5 million in Europe alone, see *ibidem*.

<sup>28</sup> M. Kretschmer, G. M. Klimis, R. Wallis, “The Changing Location...”, p. 171.

<sup>29</sup> S. M. Besen, S. N. Kirby, *Compensating Creators...*, p. 5.

<sup>30</sup> Ch. Handke, R. Towse, *Economics...*, p. 55.

<sup>31</sup> For example, a public performance sometimes requires clearing a right to a complementary reproduction right or a synchronization right, for more see: C. Crampes, D. Encaoua, A. Hollander, *Competition...*; M. A. Einhorn, “Transaction costs and administered markets: license contracts for music performance rights” (2006) 3(1) *Review of Economic Research on Copyright Issues*.

be accompanied by some decrease in the price of complementary, collectively set licenses to public performance<sup>32</sup>.

From the competition point of view, one has to ask what effect individual licensing will have on welfare. It seems that competition between right owners and holders will decrease the level of license fees and will offer welfare benefits. However, it is hard to predict if a lower license fee will affect consumer price or will just benefit multinationals.

Furthermore, consumer price level loses its importance in the case of a welfare analysis of creative works. In that case more important is if the consumers' marginal valuation of the product variety guarantees the income that encourages the creation of additional works<sup>33</sup>. Thus, the antitrust analysis of CCS should not focus narrowly on monopoly power, as it risks dissipating the expected rewards that are essential to provide adequate creative incentives (*ex-ante* efficiencies). As Régibeau and Rockett pointed out each individual competition law decision on CCS might seem to have only a small effect on expectations of reward but their combined effect can be devastating<sup>34</sup>.

## V. The *Brathanki v. ZAiKS* decision and economic function of CCS

The Polish Society of Authors (ZAiKS) is the nation's major copyright collecting society<sup>35</sup>. It was spontaneously founded by a group of Polish lyricists and composers of popular music in 1918. The creators were not receiving any material remunerations even though their well known songs were illegally copied and performed all over the whole country.

Nowadays, ZAiKS collectively administers copyrights to literary, musical, choreographic and pantomime works in areas such as recording, reproduction, digitization and public performance. It manages copyrights of more than 8000 Polish artists and music producers. Moreover, within the Polish territory it administers a worldwide repertoire (more than 14 mln works) made up of works assigned to them under reciprocal representation agreements with foreign copyright collectives ZAiKS, like most copyright collecting societies, operates as *de facto* natural monopoly in Poland, which sometimes results in

<sup>32</sup> C. Crampes, D. Encaoua, A. Hollander, *Competition...*, p. 30–31.

<sup>33</sup> A. Hollander, "Market Structures...", p. 201.

<sup>34</sup> P. Régibeau, K. Rockett, "The relationship between intellectual property law and competition law" [in:] S.D. Anderman (ed.), *The Interface between Intellectual Property Rights and Competition Policy*, Cambridge University Press, 2007.

<sup>35</sup> The collective management of rights to musical works in Poland is also held by the Folk Creators Society in Lublin and the Independent Radio- and TV- Authors Society in Warsaw.

antitrust scrutiny. ZAiKS' activity has been the subject of an antitrust action undertaken by the President of UOKiK in 2002. The case dealt with the strong position of ZAiKS *vis-à-vis* users, i.e. music producers. In the *Brathanki v. ZAiKS* decision the President of UOKiK for the first time scrutinized the abusing practices of ZAiKS towards its members.

The investigation conducted by the President of UOKiK revealed that ZAiKS had abused its dominant position by demanding on its members that public performance and mechanical rights will be managed by ZAiKS on an exclusive basis and by administering a specific right only on condition that right holders hand over other rights (either performing or mechanical) pertaining to the same works.

According to the President of the UOKiK the collective management of rights to creative works is reasonable only when one specific bundle of rights (a single product, so-called "blanket license") is offered to the users. As the common feature of agreements on mechanical rights is giving permission to users to exploit specified works of specified authors, thus it is possible to replace CCS by individual management carried out by an artist. Therefore collective management of phonographic reproduction of music works is not justified, because authors can efficiently manage these rights individually.

When the above line of reasoning is confronted with the economic function of CCS it looks as if approach to mechanical right management presented in the *Brathanki v. ZAiKS* decision concentrates on the process of negotiation between users and individual right holders. Thus, it disregards other important tasks of CCS, i.e. monitoring of the use of works in its repertoire and taking legal actions against those who infringe copyrights.

Generally, the economic analysis of potential savings in "transaction costs" in the collective enforcement of reproduction rights to music was disregarded in the *Brathanki v. ZAiKS* decision. It looks like the President of UOKiK in the decision neglected to analyze if all characteristics of reproduction rights management make economies of scale rather impossible, what would exclude the need for collective activity.

Some explanation of the approach of the President of UOKiK can be found in the statement made by ZAiKS, which basically concentrates on the process of negotiation between users and individual right holders. According to ZAiKS the huge repertoire, that it manages, makes individual consulting with authors of a license terms unviable. Furthermore, it would cause a huge increase in ZAiKS' costs. Besides, there is very little room for changes in the license fee and terms of licensing as there are set by collective bargaining between international associations of societies representing authors (BIEM) and phonographic producers (ZPAV).

Unfortunately, neither the ZAiKS' statement nor the decision taken by the President of UOKiK had been supported by some economic analysis verifying if a competitive option is viable, i.e. if it is or is not attractive to some users and to owners of the music.

The approach to copyright management in the *Brathanki v. ZAiKS* decision also ignores some other features of ZAiKS i.e. economies of scope and reduction in 'search and information' costs. Although, according to ZAiKS, the administration of a specific right only on condition that right holders hand over other rights (either performing or mechanical) pertaining to the same works is justified by the need of reducing costs of collecting royalties and its distribution. But again the ZAiKS' statement did not demonstrate any economic analysis on the issue.

Besides, economic literature suggests that the importance of the reduction on these transaction costs by CCS is determined mainly by its users. If, for example, the complementary relationship between performance and reproduction rights is not attractive to them, then this kind of economies of scope cannot be achieved by CCS. In contrast, if users are interested in removal of bargaining costs of direct negotiation with music right owners and holders, then the potential economies of scale of collective negotiation can be significant. Thus, direct licensing of a right may be appealing only to a user who needs limited and planned access to specific repertoire of copyrighted works<sup>36</sup>. Unfortunately, a proper economic analysis on transaction costs is hardly found in the *Brathanki v. ZAiKS* decision.

## VI. The *Brathanki v. ZAiKS* decision and welfare analysis

As already mentioned in the part 4 of the paper the analysis of the costs savings (so-called "productive efficiency") is important, but not the only one part of the welfare analysis of CCS. The second part should investigate if the expected rewards of individual licensing provide better creative incentives than collective licensing, resulting in a wider product variety. Unfortunately, neither ZAiKS nor the President of UOKiK verified the issue. Although the President of UOKiK shortly mentioned that the collective management of copyrights is justified only if individual licensing is uneconomical.

Certainly, the welfare analysis of individual *versus* collective licensing of copyrights is challenging as it should also consider conflicting interest between different members of CCS (creators and intermediaries; young creators and

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<sup>36</sup> C. Crampes, D. Encaoua, A. Hollander, *Competition...*, p. 30.

top stars) and a bargaining power of users. But all these questions seem relevant when effects of the *Brathanki v. ZAiKS* decision are considered and the challenge should be taken by the President of UOKiK.

## VII. Concluding remarks

Copyright collective societies have always raised challenging questions from an antitrust perspective. The near monopolistic position of CCS, collective pricing, blanket licensing and requirements that authors assign all their rights to the collective or stay out of it altogether certainly seem to have an anti-competitive potential. Therefore, the market practices of CCS have repeatedly come under scrutiny of antitrust authorities. However, because of the specifics of the markets in which CCS operate, they have often been allowed to engage in conduct that would otherwise infringe competition rules.

Certainly, the existence of CCS creates many dilemmas. But some of them seem to arise from *an agency problem*, i.e. from the divergence of the interests of managers of CCS and members of CCS<sup>37</sup>. In this case, steps to improve the governance systems of copyright collecting societies<sup>38</sup> seem to be the proper way forward rather than antitrust actions.

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<sup>37</sup> More on an agency problem within CCS: F. Rochelandet, *Are copyright collecting societies efficient? An evaluation of collective administration of copyright in Europe*, Preliminary version, The Society for Economic Research on Copyright Issues, Inaugural Annual Congress Universidad Autónoma de Madrid 2002, p. 6–7.

<sup>38</sup> Even by establishing legal supervision, see *ibidem*.

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# LEGISLATION AND JURISDICTION REVIEWS

## 2007 EC Competition Law and Sector-specific Regulatory Case Law Developments with a Nexus to Poland

by

Krzysztof Kuik\*

### Introduction

To the best of the author's knowledge, YARS is the first English language publication, which aims to systematically present the developments in competition law and sector-specific regulatory case law with direct relevance to Poland. This paper, devoted to EC antitrust and regulatory case law, will be divided into separate sections covering competition law *sensu stricto* (antitrust and merger control), State aid and sector-specific regulation. The reviews presented reflect the development of each case, so both administrative decisions and judgments (where available) are addressed under the same heading.

This contribution aims to present an overview of significant cases decided by, or pending before, European Community institutions since Poland's accession to the European Union (EU). This approach imposes constraints on the level of detail in the case summaries presented. It is the author's intention to focus on a narrower selection of decisions and developments allowing Polish readers to place the decisions related to Poland in a broader context.

### Summary

Poland joined the EU on 1 May 2004. The initial "honeymoon" period has, generally speaking, been a happy one and there have been few prominent cases

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decided at the administrative level (i.e. the European Commission) or brought before the judiciary (i.e. the European Community Courts). That said, usually following notifications by Polish authorities, the Commission has taken a number of important individual decisions in the field of State aid (including the misuse of aid decisions in the steel sector and the Power Purchase Agreements decision), which have led to litigation before the Community Courts. The Commission's decisions in Polish cases have already provided important clarifications (e.g. regarding the application of alternative State aid exemptions to pre-accession restructuring cases in *Technologie Buczek*) and raised significant new legal issues (e.g. the application of the EC State aid rules to pre-accession aid under Protocol No. 8 of the Accession Treaty in *Huta Częstochowa* or an agent's actions triggering pre-accession cartel liability in *BR/ESBR*). Pending actions in these cases can and lead to further case law developments, especially with regard to Protocol No. 8 the Commission's Rescue & Restructuring Guidelines.

## Case summaries

### I. Antitrust

#### *Butadiene Rubber (BR) and Emulsion Styrene Butadiene Rubber (ESBR)*

On 29 November 2006, the Commission adopted a decision<sup>1</sup> finding that five groups of companies, including the Polish company Trade-Stomil Sp. z o.o. ("Trade-Stomil"), have infringed Article 81 EC and Article 53 of the EEA Agreement by agreeing on price targets for products; sharing customers by means of non-aggression agreements; and exchanging commercial information relating to prices, competitors and customers for certain types of synthetic rubber, including butadiene rubber (BR) and emulsion styrene butadiene rubber (ESBR).<sup>2</sup> Another Polish company, Dwory S.A. (renamed Synthos S.A.) was also targeted by the Commission's investigation but in the end, its liability could not be established because there was insufficient evidence of its participation in this cartel<sup>3</sup>.

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<sup>1</sup> Commission Decision C (2006) 5700 final of 29 November 2006 in Case COMP/F/ 38.638 – Butadiene Rubber and Emulsion Styrene Butadiene Rubber. A non-confidential version of the Decision is available at <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38638/en.pdf>.

<sup>2</sup> The main customers for BR and ESBR are tyre manufacturers such as Michelin, Pirelli and Goodyear, as well as producers of shoe soles and floor coverings.

<sup>3</sup> See paragraph 88 of the Decision.

The Commission's investigation was prompted by leniency applications lodged in December 2002 and January 2003, in accordance with the 2002 Leniency Notice, by the German company Bayer AG. In March 2003, the Commission carried out a dawn raid at Dow Deutschland GmbH & Co. OHG, which subsequently also applied for leniency.

The Commission based its decision principally on documents provided by the leniency applicants, which included corporate statements and witness testimonies as well as notes discovered by the Commission during the dawn raid. The Commission found that the majority of the cartel agreements were made either before or after a meeting of the European Synthetic Rubber Association. During these meetings, the participants agreed on prices and exchanged information on key customers and the amounts of synthetic rubber supplied to them. Bayer's statements were to a large extent confirmed by Dow. At a later stage, Shell also admitted to having participated in this cartel.

The Commission fined the five groups of companies a total of EUR 519 million. Bayer received full immunity from fines under the Commission's leniency programme, as it was the first company to inform the Commission about the cartel. Shell's admission was received too late in the investigation to qualify for a reduction in fines since its contribution to the findings of the case was not significant. Trade-Stomil was fined EUR 3.8 million out of the total fine imposed on the entire cartel.

In setting the fines, the Commission took into account the size of the EEA market for the product, the duration of the cartel (it operated from 1996 until 2002) and the size of the firms involved. The fines for Eni, Shell and Bayer were increased by 50% because of their previous participation in other cartels (polypropylene, PVC and citric acid).

Similarly to all other addressees of this decision (except Bayer)<sup>4</sup>, Trade-Stomil has lodged an appeal seeking its annulment<sup>5</sup>. It has argued, *inter alia*, that the Commission has failed to prove to the required standard that Trade-Stomil either participated in the cartel or that it was liable for the infringement (in the BR/ESBR decision, the Commission deemed Trade-Stomil liable for the infringement as Dwory's independent distributor). It has also made a number of arguments challenging the level of its fine<sup>6</sup>.

It is noteworthy that while the appeals are pending, on 21 December 2007, Cooper Tire & Rubber Co. (the second-largest U.S. tyre maker) and 25 other

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<sup>4</sup> Cases T-38/07, *Shell Petroleum and Others v Commission*; T-42/07, *Dow Chemical and Others v Commission*; T-44/07, *Kaučuk v Commission*; T-45/07, *Unipetrol v Commission*; and T-59/07, *Polimeri Europa v Commission*.

<sup>5</sup> Case T-53/07, pending.

<sup>6</sup> For more detail, see OJ [2007] C 95/45.

companies have brought before the High Court of England & Wales follow-on damage actions against the members of the cartel, including Trade-Stomil.

## II. Mergers

None of the merger cases with a nexus to Poland reviewed by the Commission so far have involved an in-depth market review<sup>7</sup> or have led to significant case law developments. One case of note, however, is the *Unicredito/HVB* decision that led to a political controversy regarding the Commission's competence in the merger area. A few other noteworthy cases involved close cooperation between the Commission and the Polish Competition and Consumer Protection Authority (UOKiK) under the referral provisions of the EC Merger Regulation (ECMR).

### *Unicredito/HVB (2005)*

On 13 September 2005, an Italian financial institution, Unicredito Italiano SpA (Unicredito), notified the Commission that it has acquired control over another bank, Bayerische Hypo- und Vereinsbank AG (HVB)<sup>8</sup>. Both Unicredito and HVB had, at that time, holdings in the Polish banking sector (Pekao S.A. and Bank Przemysłowo-Handlowy S.A., respectively). The Commission examined, amongst other things, the effects of the concentration on the Polish financial markets and, on 18 October 2005, unconditionally approved it.

Poland appealed<sup>9</sup> to the Court of First Instance (CFI) claiming that the Commission has failed to properly examine the concentration since it had not taken into account the existence and effects of Article 3(9) of the Pekao privatization agreement. Poland also argued that the Commission had “inappropriately evaluated concentrations on the Polish banking market and erred in its appraisal of the effect of the proposed concentration would have on competition within the market for investment funds and a number of specific markets within the Polish banking sector”<sup>10</sup>.

<sup>7</sup> E.g. on 18 October 2005, the Commission opened an in-depth (Phase II) investigation into the proposed acquisition of Eurotecnica by Agrolinz Melamine International. The case was referred to the Commission by the German Bundeskartellamt and the Polish UOKiK. However, the notifying parties withdrew from the transaction and the related Commission's documents are not publicly available.

<sup>8</sup> Case COMP/M.3894.

<sup>9</sup> Action brought on 6 February 2006 in Case T-41/06 – *Poland v. Commission* (withdrawn).

<sup>10</sup> Application in Case T-41/06, first head.

This appeal was withdrawn on 10 April 2008, following a change in the Polish government.

*PKN Orlen's Acquisitions – Unipetrol (2005) and Mazeikiu (2006)*

In 2005 and 2006, PKN Orlen acquired two petrochemical companies in the Czech Republic (Unipetrol a.s.) and Lithuania (AB Mazeikiu Nafta). Both transactions exceeded the ECMR thresholds and had to be approved by the Commission under the new test of “significant impediment of effective competition”.

The Unipetrol acquisition was finally notified on 11 March 2005, and unconditionally approved on 20 April 2005<sup>11</sup>. In line with its previous decisions, the Commission examined, in particular, the market for non-retail sales of refined oil products and bitumen (national scope) and the market for lubricating petroleum oils (EEA scope). After the examination, the Commission decided not to oppose the notified concentration.

The Mazeikiu acquisition was notified on 29 September 2006, and unconditionally approved on 7 November 2006<sup>12</sup>. This concentration had an effect on a number of markets. Horizontally, the operation affected the market for ex-refinery/cargo sales of diesel, gasoline and LPG (EEA-wide) and the national markets for non-retail sales of diesel and gasoline in Poland. It also vertically affected the national markets for the sale of diesel and gasoline in Poland, Lithuania, the Czech Republic and Estonia, as well as the market for retail sales of motor fuels in Poland. The Commission examined in particular a distinction between ex-refinery cargo sales and non-retail sales, as well as the geographic scope of the ex-refinery/cargo sales market (EEA or narrower, e.g. CEE). Typically for a Phase I case, the Commission did not need to reach a final conclusion on these points.

*Linde/BOC (2006)*

On 6 April 2006, Linde AG notified its acquisition of BOC Group plc.<sup>13</sup> The concentration was approved on 6 June 2006 after a Phase I investigation, subject to extensive commitments. Of particular note is that the activities of Linde and BOC overlapped on a number of markets for industrial and specialty gases in Poland and the UK. The transaction would have created a dominant player in various Polish gas markets and would have strengthened BOC's dominant position on various British markets. On 27 April 2006, the

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<sup>11</sup> Case COMP/M.3543.

<sup>12</sup> Case COMP/M.4348.

<sup>13</sup> Case COMP/M.4141.

Polish UOKiK submitted a request for a partial referral of this case<sup>14</sup> since it believed that the concentration would affect competition on a number of national markets in Poland, in particular, the bulk and cylinder supply of various industrial gases, helium retail supply as well as the supply of calibration mixtures and refrigerants. The request was withdrawn on 18 May 2006 after the parties had submitted remedies that addressed all UOKiK's concerns<sup>15</sup>.

### *Carrefour/Ahold (2007)*

On 16 February 2007, the Commission received notification of a proposed acquisition of control by Carrefour Nederland B.V. (part of the French Carrefour group) of Ahold Polska Sp. z o.o.<sup>16</sup> Carrefour is internationally active in food and non-food retailing, Ahold Polska is active in the same field but solely in Poland. The main horizontal overlap between Carrefour and Ahold arose in the retail market for daily consumer goods retail through modern distribution channels (supermarkets, hypermarkets and discounters) in Poland.

UOKiK made a request under Article 9(2)(b) of the ECMR asking the Commission to cede jurisdiction to investigate the proposed merger. The Commission accepted that the transaction's effects on competition would affect a number of markets within Poland, which present all the characteristics of distinct markets, and which do not constitute a substantial part of the Single Market. Thus, on 10 April 2007, the Commission referred the case to the Polish UOKiK under Article 9(3) of the ECMR (which removes the Commission's discretion to act).

The transaction was conditionally approved by UOKiK on 28 June 2007, subject to divestiture by Carrefour of nine clearly identified supermarkets by 31 December 2008<sup>17</sup>.

### **III. State aid**

This section covers the Commission's decisions that followed a formal investigation procedure under Article 88(2) EC taken in the period up to the end of 2007. The cases involve the steel sector (Huta Częstochowa, Huta Stalowa Wola, Technologie Buczek and Huta Arcelor Warszawa), as well as

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<sup>14</sup> Pursuant to Art. 9(2)(a) ECMR.

<sup>15</sup> The parties committed to divest, among other things, the whole of BOC's Polish gas business and the whole of Linde's UK gas business (thereby completely removing their overlaps in all relevant Polish and UK markets).

<sup>16</sup> Case COMP/M.4522 – Carrefour/Ahold Polska.

<sup>17</sup> Decision DOK – 86/2007.

other sectors (Techmatrans, Bison-Bial, FSO, Poczta Polska and PPAs). With minor exceptions relating to the mixed nature of the decisions, this section does not cover schemes<sup>18</sup>, pending cases<sup>19</sup>, cases withdrawn<sup>20</sup> or instances, where the Commission found no aid<sup>21</sup>.

### A. Rescue and restructuring aid

Article 87(1) EC sets out a general prohibition of State aid, subject to a limited number of exceptions. The normal operation of the market demands that inefficient firms go out of business. While rescue and restructuring aid may keep firms in difficulty viable, this is often at the expense of their competitors. Therefore, rescue or restructuring aid granted to failing firms is only permitted in limited and strictly defined circumstances.

#### *Steel sector cases*

Restructuring aid is generally prohibited in the steel sector<sup>22</sup>. However, new Member States are usually given a one-off opportunity to restructure their steel industry with the help of State aid. Protocol No. 8 of the Accession Treaty<sup>23</sup> granted this type of derogation to Poland so that it could support, in the context of accession, companies identified in the National Steel Restructuring program (“NRP”)<sup>24</sup>. A maximum amount of aid to be granted before the end of 2003 was set at approximately PLN 3.4 billion (EUR 850 million). The granting of aid was conditional on: the adoption and full implementation of a restructuring plan, attaining economic viability of the benefiting companies by 2006, and a significant reduction of production capacity in excess of one million tons. Two of the Protocol No. 8 cases (involving Technologie Buczek and Huta Arcelor Warszawa) led to a formal investigation. In the case involving

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<sup>18</sup> E.g. Case C-34/2007 – Maritime transport.

<sup>19</sup> E.g. the Polish shipyard cases (C-17/2005 – Stocznia Gdynia, C-18/2005 – Stocznia Gdańsk and C-19/2005 – Stocznia Szczecińska Nowa).

<sup>20</sup> E.g. Case C-49/2005 – Chemobudowa Kraków.

<sup>21</sup> E.g. Case C-32/2006 – Huta Cynku Miasteczko Śląskie.

<sup>22</sup> Communication from the Commission on Rescue and Restructuring aid and closure for the steel sector, OJ [2002] C70/21.

<sup>23</sup> Protocol No. 8 of the Accession Treaty on the restructuring of the Polish steel industry, OJ [2003] L236/948. A similar Protocol No. 2 applies to the Czech Republic, OJ [2003] L236/942.

<sup>24</sup> Protocol No. 8 identified eight steel producers. Three of them eventually went into liquidation (Technologie Buczek, Huta Andrzej and Huta Batory), while five companies restored their economic viability (Mittal Steel Poland, Huta Arcelor Warszawa, Huta Bankowa, Huta Łabędy and Huta Pokój).

Mittal Steel Poland (ex Polskie Huty Stali S.A.), the largest steel producer in Poland, the Commission accepted modifications of the ongoing restructuring process without opening a formal investigation<sup>25</sup>. Additionally, two formal investigations were opened involving steel producers that were outside of Protocol No. 8 (Huta Częstochowa and Huta Stalowa Wola).

### *Huta Częstochowa*

Huta Częstochowa S.A. (HCz) is Poland's second-largest steel producer. Due to financial difficulties, it went into liquidation at the end of 2002 and consequently was removed from the list of beneficiaries covered by the NRP. As a result, it was later not included in Protocol No. 8 to the Accession Treaty.

In October 2003, the Polish government adopted a law allowing public debt to be written off in relation to failing companies for the purposes of restructuring. Public law creditors (e.g. social security or tax offices) and creditors from commercial transactions (e.g. energy delivery) were split into two different groups that, in exchange for a waiver of their claims, received different assets (sold to pay parts of the claims). HCz subsequently planned comprehensive restructuring that included taking advantage of the debt waiver (even though the company was not eligible for State aid under Protocol No. 8).

On 19 May 2005, the Commission opened a formal investigation<sup>26</sup> into the restructuring process of HCz's<sup>27</sup>. In particular, the Commission considered that a waiver of public debt implied foregoing State revenue in a situation, where no private creditor would have done the same. According to settled case law, where a debtor in financial difficulties is proposing to reschedule debt to avoid liquidation, each public creditor must, at the very least, carefully balance the advantage inherent in obtaining the offered sum according to the restructuring plan and the sum that could be recovered due to possible liquidation. If liquidation brings higher proceeds than restructuring, the waiver of public claims qualifies as State aid<sup>28</sup>.

Considering the data provided by the Polish authorities (including a comprehensive analysis of all claims concerned, which was prepared by external experts), on 5 July 2005, the Commission adopted a mixed decision<sup>29</sup>. On the

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<sup>25</sup> Case N 186/2005, OJ [2006] C 12/2.

<sup>26</sup> OJ [2004] C 204/6.

<sup>27</sup> Case C-20/2004 (ex NN/25/2004) – Restructuring aid to steel producer Huta Częstochowa.

<sup>28</sup> C-342/96, *Tubacex* [199] ECR I-2459, para. 46; C-256/97, *DMT* [1999] ECR I-3913, para. 21 and T-152/99, *HAMSA* [2002] ECR II-3049, para. 167.

<sup>29</sup> OJ [2006] L 366/1.

one hand, it found that the restructuring scheme did not involve State aid. In particular, the decision established that aid evaluation may take into account a realistic bankruptcy scenario (in which bankruptcy proceedings are more time-consuming and costly than restructuring). On this basis, and following a detailed assessment of all claims and waivers, the Commission concluded that the write-off of public claims complied with normal market behaviour, as it offered every public creditor a solution that was more advantageous than bankruptcy.

On the other hand, the Commission also decided that around EUR 4 million of restructuring aid given to the company between 1997 and 2002 constituted aid incompatible with EC State aid rules and thus, had to be returned. While the recovery concerned a period of time before accession (where the Commission normally has no jurisdiction), it was ordered under Protocol No. 8, which covers the time frame starting before and continuing after accession and clearly differs from other State aid provisions of the Treaty, such as the interim mechanism<sup>30</sup>. The Commission considered that Protocol No. 8 could be regarded as *lex specialis* that, with regard to its subject matter, would supersede any other provision of the Accession Act.

The decision cleared the way for the sale of the company to the Ukrainian steel producer, Donbass. However, Donbass<sup>31</sup>, HCz<sup>32</sup> and other third parties<sup>33</sup> appealed the decision. On 11 December 2006, the CFI dismissed HCz's application for interim measures<sup>34</sup>. These cases are pending before the CFI on grounds of merit.

### *Huta Stalowa Wola*

On 8 October 2004, Poland informed the Commission about measures granted to support the restructuring of Huta Stalowa Wola S.A. (HSW), a Polish industrial machinery company<sup>35</sup>. According to the Polish authorities, as the aid was granted before accession, it could not be considered still applicable after. On 23 November 2005, the Commission opened a formal investigation into the restructuring aid given to HSW<sup>36</sup>. The examination focused on the write-off of

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<sup>30</sup> See Kuik K., "State Aid and the 2004 Accession – Overview of Recent Developments" (2004) 3(3) *European State Aid Law Quarterly*.

<sup>31</sup> Case T-273/06, *ISD Polska and Industrial Union of Donbass v. Commission*, application filed on 11 September 2006.

<sup>32</sup> Case T-288/06, *Huta Częstochowa v. Commission*, application filed on 18 October 2006.

<sup>33</sup> Case T-291/06, *Operator ARP v. Commission*, application filed on 18 October 2006; Case T-297/06, *Majatek Hutniczy v. Commission*, application filed on 17 October 2006.

<sup>34</sup> Order of 11 December 2006 in Case T-288/06R *Huta Częstochowa v. Commission*.

<sup>35</sup> Case C 44/2005 (ex NN 79/2005, ex N 439/2004) – Restructuring aid in favour of Huta Stalowa Wola S.A.

<sup>36</sup> OJ [2006] C 34/5.

public liabilities, amounting to EUR 17.3 million, which was granted without the Commission's approval after Poland's accession to the EU<sup>37</sup>. Following the formal investigation, on 20 December 2006, the Commission found that the measures complied with the Rescue and Restructuring Guidelines in that: (i) the restructuring plan restored the long-term viability of HSW, (ii) the aid was limited to the minimum necessary through a substantial private financing contribution (in excess of 50%), and (iii) HSW offered compensatory measures (divestiture of a number of profitable subsidiaries), which limited the scope and scale of its activities<sup>38</sup>.

Before the Commission's decision was taken, HSW modified, however, its restructuring plan following changes in market conditions<sup>39</sup>. On 10 October 2007, the Commission opened an in-depth investigation<sup>40</sup> to establish whether the modified restructuring plan would enable the company to become profitable long-term<sup>41</sup>. Under Article 9 of the Procedural Regulation, this is a necessary step to revoke the original decision and for a new decision to be taken<sup>42</sup>.

The Commission's new investigation has focused on the capital injection granted to HSW by the Polish Industrial Development Agency in 2003 and 2004. This loan took the form of a conversion into equity of two loans (already found to constitute State aid) intended to improve its liquidity and raise additional funds. The Commission is concerned that the capital injection would bring an additional advantage to HSW. During the pending investigation, the Commission will assess whether: (i) the aid is limited to the necessary minimum, (ii) there is no increase in the amount of aid, and (iii)

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<sup>37</sup> The Commission had no competence to assess the compatibility of measures (amounting to EUR 41.2 million) granted before accession. These measures were, nevertheless, taken into account in the general assessment of post-accession aid.

<sup>38</sup> OJ [2007] L 112/67.

<sup>39</sup> The Commission took a final positive decision on 20 December 2006 on the basis of the restructuring plan dated February 2006 and submitted by Poland on 9 March 2006. The Polish authorities notified an updated version of the plan dated November 2006 on 2 February 2007, i.e. after the original decision was already adopted (Case C 43/07 (ex N 64/07)).

<sup>40</sup> OJ [2007] C 298/10.

<sup>41</sup> The main modification is a change to the form of the aid: instead of HSW reimbursing two loans and interest on these loans, the Polish Industrial Development Agency would swap the nominal value of the debt into equity and thus become a shareholder of HSW. Other changes would include: postponements of organisational restructuring and a decision to undergo a less ambitious employment restructuring.

<sup>42</sup> Article 9 of the Procedural Regulation stipulates that "*the Commission may revoke a decision [...] after having given the Member State concerned the opportunity to submit its comments, where the decision was based on incorrect information provided during the procedure which was a determining factor for the decision. Before revoking a decision and taking a new decision, the Commission shall open the formal investigation procedure pursuant to Article 4(4). [...]*".

the original compensatory measures are proportional to the negative effects of the aid.

*Technologie Buczek S.A.*

In March 2002, a steel producer, Huta Buczek (renamed Technologie Buczek S.A. (TB) from 7 May 2003) submitted a restructuring plan to the Polish authorities. The plan earmarked for TB State aid amounting to approximately PLN 16.2 million. It became part of the NRP, which was submitted to the European institutions and was assessed by the Commission on 25 March 2003. The aid to TB was subsequently incorporated into Protocol No. 8. Poland's compliance with Protocol No. 8 was monitored on a bi-annual basis. Following its independent evaluation in 2005 and a series of letters exchanged with the Polish authorities, on 7 June 2006, the Commission opened a formal investigation into the aid granted to the Technologie Buczek Group<sup>43</sup>, which, having failed to properly implement its restructuring plan had no option but to file for bankruptcy in 2006<sup>44</sup>.

The Commission considered that the Technologie Buczek Group (viewed as one recipient<sup>45</sup>) misused the restructuring aid, which it had received in 2003. In particular, the Commission had serious doubts as to the proper use of State aid provided to this Group, which had not fully implemented its restructuring plan (as explicitly stipulated in point 9 of Protocol No. 8), which was directly proven by the fact that it did not achieve viability by 2006 and supported by the findings of the independent consultant. The potential misuse concerned the aid granted in 2002 and 2003 (approximately PLN 2.2 million) as well as the aid granted between 1997 and 2001 (PLN 4.4 million). Moreover, the Commission considered that additional aid might have been granted after 2003 (through the budgetary grant for employment restructuring and non-enforcement of the outstanding public debt).

On 23 October 2007, the Commission adopted a negative decision against the Technologie Buczek Group<sup>46</sup> finding that the non-enforcement after 2003

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<sup>43</sup> Technologie Buczek Group included Technologie Buczek S.A. and its four subsidiaries with significant business activities: Buczek Automotive Sp. z o.o. (ex P.U.R.M. REMEBUD Sp. z o.o.), Huta Buczek Sp. z o.o., Buczek – HB – Z.P.R. Sp. z o.o. and P.U.T SAMKOL Sp. z o.o.

<sup>44</sup> Case C-23/2006 (ex NN 35/2006) – Aid to steel producer Technologie Buczek Group, OJ [2006] C 196/23.

<sup>45</sup> In particular, Huta Buczek Sp. z o.o. and Buczek Automotive Sp. z o.o. were viewed as parts of the economic entity of Technologie Buczek Group as they were: (i) 100% owned by Technologie Buczek, (ii) received their assets without adequate consideration, and (iii) benefited from the restructuring aid.

<sup>46</sup> OJ [2008] L 116/26.

of public debts of approximately PLN 20.8 million (approximately EUR 5.3 million) amounted to State aid incompatible with the EC State aid rules, and that certain amounts designated as restructuring aid, training aid, environmental aid and employment aid, totalling PLN 1.4 million, had been misused. The Commission ordered the recovery of the aid resulting from public debt non-enforcement from Huta Buczek Sp. z o.o. and Buczek Automotive Sp. z o.o. in proportion, to the benefit actually obtained by them (approximately PLN 13.6 million and PLN 7.2 million, respectively), and recovery of the misused aid from TB.

The decision was appealed by Huta Buczek<sup>47</sup>, TB<sup>48</sup> and Buczek Automotive<sup>49</sup> on a number of (mostly procedural) grounds. The appeal is pending before the CFI.

#### *Arcelor Huta Warszawa*

Arcelor Huta Warszawa (AHW) is one of the largest steel producers in Poland, with an annual capacity of almost one million tons. In 2005, Arcelor took over the company, known at that time as Huta Lucchini Warszawa (HLW), from Lucchini.

The NRP allocated PLN 322 million (approximately EUR 73 million) of restructuring aid to HLW. The restructuring, which mainly consisted of hot rolling mill investments and repayment of short-term liabilities, was to be financed primarily by a State-guaranteed bridging loan of about PLN 300 million (approximately EUR 68 million).

HLW obtained approximately 50% of the amount approved in the NRP and used most of it to repay a long-term loan, instead of carrying out the investments and restoring the company's viability. When Arcelor took the company over, it decided to opt for a more ambitious investment strategy<sup>50</sup> and amended HLW's individual business plan (which required the Commission's approval).

On 6 December 2006, the Commission launched a formal investigation<sup>51</sup>. It considered that the use of the loan to pay off old debts was neither indicated in the restructuring plan nor necessary for the restructuring, and endangered the company's ability to achieve economic viability. Therefore, the restructuring

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<sup>47</sup> Case T-440/07, *Huta Buczek v. Commission*, application filed on 5 December 2007.

<sup>48</sup> Case T-465/07, *Salej and Technologie Buczek v. Commission*, application filed on 20 December 2007.

<sup>49</sup> Case T-1/08, *Buczek Automotive v. Commission*, application filed on 8 January 2008.

<sup>50</sup> Specifically, Arcelor wanted to replace its existing hot rolling mill by a new hot rolling mill (which required additional investments).

<sup>51</sup> Case C-51/2006 (ex N 748/2006) – *Misuse of aid to Arcelor Huta Warszawa*, OJ [2007] C 35/41.

aid given to HLW and approved by the Commission under Protocol No. 8 could be potentially incompatible with the Common Market and subject to recovery.

On 12 December 2007, the Commission decided that, prior to becoming part of the Arcelor group, AHW had misused the restructuring aid it had received in 2003 under Protocol No. 8. While it remained undisputed that after Arcelor took the company over in 2005 it became viable and repaid the State-guaranteed loan, the Commission considered that the advantage stemming from the aforementioned guarantee during a one year period amounted to unlawful State aid.

As the investments approved in the original restructuring plan were never implemented and the aid was not used for the indicated purposes, the Commission required the recovery of the aid (and AHW agreed to voluntarily repay the EUR 2 million of unlawful aid). The finding of the misuse of the aid received could not have been influenced by subsequent commitment to carry out the original investments because it could not “heal” the earlier misuse (see Lienemeyer and Mazurkiewicz-Gorgol 2008).

The Commission ordered, however, only the recovery of the aid actually misused (an interest subsidy for the loan amounting to approximately EUR 2 million) and not of the entire restructuring aid granted. This type of solution differs from the finding in the *Technologie Buczek* decision, where the Commission objected to the compatibility of the aid because the restructuring plan was not implemented in full and the company went into liquidation. AHW restored viability and thus paid only an amount equal to an interest subsidy, whereas *Technologie Buczek* never restored viability and therefore had to repay the entire amount of the restructuring aid which it had received.

### *Other restructuring cases*

#### *Techmatrans S.A.*

On 21 August 2006, Poland notified the Commission of the planned aid for Techmatrans<sup>52</sup>, a Polish State-owned company specialising in technological transportation devices and industrial plant systems for the automotive, metallurgical and construction sectors. Although the company met the SME thresholds, its State ownership placed it in the large enterprise category for the purposes of State aid assessment. On 21 February 2007, the Commission opened a formal investigation into the proposed capital injection of EUR 0.8 million for Techmatrans<sup>53</sup>. The Commissions had doubts: (i) whether the

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<sup>52</sup> Case C-6/07 (ex N 558/06) – Restructuring aid to Techmatrans S.A.

<sup>53</sup> OJ [2007] C 77/43.

intended restructuring would be sufficient to restore long-term viability of the company (due to the low projected profit margin); (ii) regarding the low level of the proposed “own” contribution (3% by 2010); and (iii) regarding the economic rationality of the proposed compensatory measures.

During the formal investigation, the Polish authorities provided detailed data on the proposed investment programme that allayed the doubts regarding the restoration of economic viability. In particular, they provided examples of private companies active in the same sector that generated similarly low profit margins (2-4%). The Commission also took into account the proposed privatization of Techmatrans scheduled to take place in 2009/2010. The Polish authorities also showed that “own” contribution was indeed in excess of 50% (over PLN 3 million out of a total of under PLN 6 million). Finally, the company’s intended withdrawal from one of its activities (the design and sale of technological transport steering systems) was deemed rational. The Commission, therefore, authorised the implementation of the State aid under Techmatrans’ restructuring plan<sup>54</sup>.

#### *Bison-Bial S.A.*

On 4 May 2006, the Polish authorities notified the Commission of a planned restructuring aid for Bison-Bial S.A., a Polish machine tools manufacturer, in the form of a public debt write-off and a loan (granted on preferential conditions) totalling EUR 7.6 million (intended to repay past public debt)<sup>55</sup>.

Following a preliminary assessment, the Commission expressed doubts whether the restructuring plan would be sufficient to restore the company’s long-term viability and would avoid difficulties similar to those faced by the company in 2001 (which led to a decrease in the workforce from 1,680 to 950 employees)<sup>56</sup>.

After a formal investigation, the Commission decided that the aid would be compatible with EC State aid rules provided that several conditions were met. First, the restructuring plan had to be implemented in full by the end of the prolonged restructuring period (i.e. 2010). Second, Bison-Bial’s existing site had to be sold and a significant additional investment (including a change to the manufacturing plant’s location) had to be made by the end of 2010. Finally, Bison-Bial had to sell, by the end of 2009, one of its profitable production divisions, therefore decreasing its product range by 46% and the number of machine tools by 12%, as well as reducing turnover by 13%<sup>57</sup>. These provisions,

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<sup>54</sup> OJ [2008] L 86/28.

<sup>55</sup> Case C-54/2006 (ex N 276/2006) – Restructuring aid to Bison-Bial S.A.

<sup>56</sup> OJ [2007] C 23/20.

<sup>57</sup> The Commission rejected two other alternative proposals, namely the reduction of the number of goods produced by 5% or the sale of 5% of the company’s machines.

together with the significant “own” contribution (in excess of 50%) as well as the fact that the State aid had been granted in the form of a reimbursable loan, allowed the Commission to approve the notified State aid to Bison-Bial<sup>58</sup>.

*Fabryka Samochodów Osobowych S.A.*

The restructuring aid for Fabryka Samochodów Osobowych S.A. (FSO) was the first case where the Commission opened a formal investigation procedure on pending State aid measures notified by a new Member State.

On 30 April 2004, the Polish authorities notified the Commission, in light of the interim procedure set out in the Accession Treaty, its decision to grant restructuring aid to FSO (previously Daewoo-FSO Motor S.A.), one of the largest Polish producers of passenger cars located in Warsaw<sup>59</sup>. FSO faced a difficult economic situation in 2000, mainly due to the bankruptcy of its largest shareholder Daewoo Motor Corporation Ltd. Following these events, FSO became State-controlled and adopted, or planned to adopt, various restructuring measures amounting to approximately EUR 172 million (planned for the period of time between the end of 2003 and the end of 2006).

On 19 January 2005, the Commission launched a formal investigation into these measures<sup>60</sup>. In the opening decision, the Commission considered that certain aid, amounting to approximately EUR 35 million, was considered to have been granted before, but “not applicable after accession” and was, as a consequence, outside the Commission’s jurisdiction. As a result, the investigation focused on other measures that, according to the Commission, had not yet been granted. On 20 December 2006, the Commission adopted a decision, in which it confirmed that the majority of the restructuring measures (totalling approximately EUR 75 million<sup>61</sup>) fell under its jurisdiction and conditionally approved them, subject to production and sales caps applicable until February 2011<sup>62</sup>. The Commission explained that the reason for the imposition of these conditions was to avoid shifting the difficulties in the car manufacturing sector to other firms.

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<sup>58</sup> See: [http://ec.europa.eu/comm/competition/state\\_aid/register/ii/doc/C-54-2006-WLWL-en-12.09.2007.pdf](http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/C-54-2006-WLWL-en-12.09.2007.pdf).

<sup>59</sup> Case C-3/2005 (ex N 592/2004) – Restructuring aid to Fabryka Samochodów Osobowych S.A.

<sup>60</sup> OJ [2005] C 100/2.

<sup>61</sup> The decision of 19 January 2005 launching a formal investigation (based on the initial Polish notification submitted on 30 April 2004) considered approximately EUR 138 million to be potential new aid (largely due to the significantly larger amount of the notified State guarantee for a future investment loan).

<sup>62</sup> OJ [2007] L 187/30.

On 22 March 2007, FSO lodged an appeal<sup>63</sup> against the decision alleging breaches of the principle of proportionality, the principle of free exercise of economic activity, a manifest error of appraisal of the facts of the case, as well as a breach of Article 253 EC. The appeal is pending before the CFI.

## B. Other State aid cases

### *Poczta Polska*

On 30 April 2004, as part of the “interim mechanism”<sup>64</sup>, Poland notified the Commission of two aid schemes granted to Poczta Polska, the Polish public postal operator entrusted with the universal postal service obligation within Poland. The first case (registered as PL 45/04) concerned compensation to Poczta Polska for carrying out universal postal services. The second case (registered as PL 49/04) concerned aid to Poczta Polska for investments related to the provision of universal postal services. On 29 June 2005, the Commission decided to initiate a formal investigation into the two aid schemes<sup>65</sup>. On 27 April 2006, the Commission terminated its investigation into the investment aid because the Polish authorities withdrew their notification and the aid was never implemented<sup>66</sup>. On 9 January 2007, the Commission partially terminated the investigation into the compensation scheme for universal services for the period 2004-2005 seeing as the aid was never implemented<sup>67</sup>. It is continuing the procedure for the period from 1 January 2006 onwards.

During its investigations of the two aforementioned schemes, it became apparent to the Commission that Poczta Polska benefited from a pre-existing legal status, which prevented it from going bankrupt<sup>68</sup>. By way of an Article 17 letter<sup>69</sup>, sent on 10 May 2005, the Commission informed Poland about its preliminary conclusion that the legal status of Poczta Polska under the applicable Polish legislation amounted to an existing aid in the form of an unlimited State guarantee<sup>70</sup>. A State guarantee of unlimited duration and amount covering

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<sup>63</sup> Case T-88/07, *Fabryka Samochodów Osobowych v. Commission*, application filed on 22 March 2007.

<sup>64</sup> Kuik K., “State Aid ...”, op. cit.

<sup>65</sup> OJ [2005] C 274/14

<sup>66</sup> OJ [2006] C 223/11.

<sup>67</sup> OJ [2007] C 33/9.

<sup>68</sup> Case C-12/2005 – Unlimited State guarantee in favour of Poczta Polska.

<sup>69</sup> Article 17 of the Council Regulation (EC) 659/1999.

<sup>70</sup> The Commission referred to point 2.1.3 of the Commission’s Guarantee Notice, which states that ‘the Commission also regards as aid in the form of a guarantee, the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures or provides an explicit State guarantee or coverage of losses by the State’; see Commission

all liabilities of Poczta Polska provided it with an economic advantage, and thus amounted to incompatible State aid. The Polish authorities subsequently committed themselves to abolishing the unlimited State guarantee at the latest by 30 June 2008 and thus, the Commission closed the existing aid proceedings by adopting a decision proposing “appropriate measures” pursuant to Article 88(1) EC (accepted by the Member State concerned)<sup>71</sup>.

The Poczta Polska cases should be viewed in the context of the Commission’s overall aim, which is to ensure that postal operators and their subsidiaries do not enjoy undue advantages, which could negate the effects of the ongoing liberalisation process of the postal sector. This involved assessing the compatibility of compensations granted to postal operators for providing services of general economic interest, as well as examining, whether postal operators were enjoying other advantages (such as unlimited State guarantees which result in lower financing costs). Thus, in addition to the Poczta Polska cases, on 29 November 2007, the Commission targeted France’s La Poste<sup>72</sup> and, on 21 February 2007, a series of funding measures taken by the United Kingdom in favour of Royal Mail<sup>73</sup>.

#### *Power Purchase Agreements (stranded costs)*

Poland’s main energy sector aim in the mid-1990s was to modernise its power generation infrastructure and to ensure security of supply. To facilitate the achievement of these objectives, Poland introduced a system of long-term Power Purchase Agreements (PPAs) to incentivise power generators to invest in Poland. Under these agreements, signed between 1994 and 1998, and which would have expired between 2005 and 2027, the State-owned network operator PSE had an obligation to purchase a fixed amount of electricity at a fixed price. Their price formulae guaranteed the viability of the generators concerned for the entire duration of the agreements. The Commission considered that such conditions created a barrier to a proper liberalisation of the power generation sector in Poland (the PPAs related to approximately 50% of the electricity generated and sold in Poland).

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Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ [2000] C 71/14.

<sup>71</sup> OJ [2007] C 284/2007.

<sup>72</sup> Case C-56/2007 (ex E 15/2005) – Garantie illimitée de l’Etat en faveur de La Poste. The Commission also examined public aid to finance La Poste’s pension scheme and, on 10 October 2007, gave a conditional authorisation for public aid to finance La Poste’s pensions for civil servants (see case C 43/2006 – Projet de réforme du financement des retraites des fonctionnaires de La Poste française).

<sup>73</sup> Case C-7/2007 (ex NN 82/2006 and NN 83/2006) – Alleged aid in favour of Royal Mail, OJ [2007] C 91/34.

On 1 March 2005, Poland notified to the Commission a Draft Law<sup>74</sup> that would allow generators to cancel their PPAs voluntarily and obtain in return a compensation covering stranded costs (i.e. costs which arise from the cancellation of long-term agreements that cannot be recouped by the generator). On 23 November 2005, the Commission launched a formal investigation into the Polish PPAs and the Draft Law. It considered that the PPAs constituted incompatible State aid as they foreclosed a significant part of the market and provided certain generators with a selective advantage over other power generators or other comparable sectors where no such long-term agreements were even proposed. Moreover, the Commission also initially considered that the compensation for the cancellation of PPAs under the Draft Law would not fulfil the conditions set out in the Commission's methodology for analysing State aid linked to stranded costs<sup>75</sup> and would, therefore, constitute incompatible State aid.

On 25 September 2007, the Commission decided to order the termination of the PPAs. Pursuant to this decision, the agreements on the annulment of the PPAs should have been concluded by 1 January 2008 and become effective on 1 April 2008 at the latest, in line with the Draft Law. In the same decision the Commission approved however the compensation included in the Draft Law for stranded costs, for those generators, which benefited from the PPAs, on the basis of the Commission's stranded costs methodology. The compensation system was deemed compatible with EC State aid rules as the compensation would not exceed what was necessary to recoup the shortfall in investment costs repayment over the assets' lifetime including, where necessary, a reasonable profit margin. A similar State aid procedure into PPAs covering around 80% of the power generation market in Hungary ended on 4 June 2008 with a negative decision and recovery<sup>76</sup>.

The Commission decision launching a formal investigation into the Polish PPAs was appealed and brought before the CFI by Elektrociepłownia "Zielona Góra" (part of the Electricite de France Group) on 12 May 2006<sup>77</sup>. Following the adoption of the Commission's final decision on 25 September 2007, the

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<sup>74</sup> Poland also notified an earlier version of the draft law as part of the 'interim mechanism' (PL 1/2003 – Polish stranded costs). The Commission objected and the law has never been adopted.

<sup>75</sup> The methodology implemented by the Commission to assess the stranded costs compensation scheme uses criteria, which ensure that the aid compensates costs genuinely incurred by the recipient companies and directly linked to the liberalisation of the sector; see Commission Communication relating to the methodology for analysing State aid linked to stranded costs adopted on 26 July 2006 (the 'Stranded Cost Methodology'), available at [http://ec.europa.eu/comm/competition/state\\_aid/legislation/stranded\\_costs\\_en.pdf](http://ec.europa.eu/comm/competition/state_aid/legislation/stranded_costs_en.pdf).

<sup>76</sup> Case C-41/2005 (ex NN 49/2005) – Hungarian stranded costs.

<sup>77</sup> Case T-142/06, Elektrociepłownia "Zielona Gora" v. Commission.

application was eventually withdrawn and removed from the court register on 14 April 2008.

## IV. Regulatory

### A. Article 7 veto decisions

Article 7 of the Electronic Communications Framework Directive 2002/21/EC (the Framework Directive) requires national regulatory authorities (NRAs), in consultation with the industry, to analyse their national markets for electronic communications and propose suitable measures to deal with market failures. NRAs should notify their findings and their proposed measures to the Commission and other NRAs. The aim of the procedure is to enable NRAs to assess whether any companies in the electronic communications market have significant market power (SMP) and, where companies are found to have SMP, to propose appropriate remedies to prevent such companies from impeding effective competition.

The Commission normally approves or comments on measures within a one-month Phase I procedure. If it concludes that the proposed measure is likely to create a barrier to the Single Market or has serious doubts about its compatibility with EU law, it will open a Phase II investigation and can then require a NRA to withdraw a proposed measure by imposing a veto. In relation to Poland, the Commission has used this veto power in a case concerning the Polish NRA's analysis of the retail markets for access to the public telephone network at a fixed location in Poland<sup>78</sup>. On 10 January 2007, the Commission adopted its fifth veto decision<sup>79</sup> under Article 7(4) of the Framework Directive. The Commission had serious doubts about the market definition proposed by the Polish regulator, which included broadband connections (such as DSL connections) in the same product market as narrowband connections. Under the proposed measures, broadband connections would be made subject to the same retail regulation as other (PSTN and ISDN) connections. In its revised analysis following the Commission's veto, the Polish NRA still partially included retail broadband access in the relevant market, which resulted in a further letter from the Commission expressing serious doubts. In April 2007, the Polish NRA decided to change its market definition by removing all retail broadband services from the scope of the product market definition, and the measures could finally be adopted.

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<sup>78</sup> Cases PL/2006/0518 and PL/2006/0524.

<sup>79</sup> In seven cases, moreover, there were numerous cases where NRAs have withdrawn their own measures to avoid a veto decision.

## B. Other procedures

The Commission opened ten separate infringement proceedings against Poland concerning the telecoms sector; these cases are listed in Table C below. By the end of 2007, five cases have been closed as Poland adopted required measures (in two of these cases, the Commission had to launch court actions before the European Court of Justice)<sup>80</sup>. In 2007, two court proceedings were pending against Poland (listed in Table A below)<sup>81</sup>. In two cases, the Commission's administrative procedure is currently ongoing<sup>82</sup>.

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<sup>80</sup> Cases 2005/2207, 2005/2063, 2005/2062 and 2004/1244, 2004/1251, 2004/1256. The Commission has referred case 2005/2207 to the ECJ before Poland complied with EC law.

<sup>81</sup> Cases C-492/07 (following the infringement procedure 2005/2060) and C-227/07 (following the infringement procedure 2005/2061).

<sup>82</sup> As of 20 October 2008; cases 2005/2291 (reasoned opinion) and 2007/2430 (letter of formal notice).

**Table A**  
**European Court of Justice cases**

Case no.	Parties	Area	Subject	Application	Status	Decision date
1	C-492/07 Commission v Poland	Industrial policy/ telecoms	Infringement/ Subscriber definition	2007-11-07	Pending	
2	C-227/07 Commission v Poland	Industrial policy/ telecoms	Infringement/ Interconnection negotiation obligation	2007-05-08	Opinion of AG Colomer on 2008-06-10	
3	C-416/06 Commission v Poland	Industrial policy/ telecoms	Infringement/ Directory enquiry service	2006-10-11	Removed from register	2008-06-10

Source: Community Courts' website.

**Table B**  
**Court of First Instance cases**

Case no.	Parties	Area	Subject	Application	Status	Decision date
1	Salej and Technologie Buczek v Commission	State aid	Restructuring aid/Steel	2007-12-20	Pending	
2	Huta Buczek v Commission	State aid	Restructuring aid/Steel		Dismissed	2008-03-14
3	Huta Buczek v Commission	State aid	Restructuring aid/Steel	2007-12-05	Pending	
4	Fabryka Samochodów Osobowych v Commission	State aid	Restructuring aid/Steel	2007-03-22	Pending	
5	Trade-Stomil v Commission	Competition/ Cartels	Cartel appeal	2007-02-19	Pending	
6	Majątek Hutniczy v Commission	State aid	Restructuring aid/Steel	2006-10-17	Pending	
7	Operator ARP v Commission	State aid	Restructuring aid/Steel	2006-10-18	Pending	
9	Huta 'Częstochowa' v Commission	State aid	Restructuring aid/Steel		Dismissed	2006-12-11
9	Huta 'Częstochowa' v Commission	State aid	Restructuring aid/Steel	2006-10-18	Pending	
10	ISD Polska and Industrial Union of Donbass v Commission	State aid	Restructuring aid/Steel	2006-09-11	Pending	
11	Elektrociepłownia "Zielona Góra" v Commission	State aid	Stranded costs/ Power purchase agreements	2006-05-12	Removed from register	2008-04-14
12	Poland v Commission	Competition	Merger appeal	2006-02-06	Removed from register	2008-04-10
13	T-191/98, Atlantic Container Line and Others v Commission (Polskie Linie Oceaniczne)	Competition	Cartel appeal	1998-12-07	Partial annulment	2003-09-30

Source: Community Courts' website.

**Table C**  
**Infringement cases**

Case no.	DG	Subject matter	Latest action	Date	Closed
1	INFSO	Broadband retail regulation	Court referral	2008-09-18	
2	INFSO	Non-availability of caller location information for 112	Court referral	2007-11-28	2008-02-29
3	INFSO	Independence and impartiality of the NRA	Court referral	2008-01-31	
4	INFSO	Failure to carry out market reviews	Reasoned opinion	2006-04-04	
5	INFSO	Lack of comprehensive directories of subscribers	Court referral	2006-06-28	2008-02-28
6	INFSO	112 emergency number	Reasoned opinion	2005-07-05	2005-12-13
7	INFSO	Number portability	Reasoned opinion	2005-07-05	2006-10-12
8	INFSO	Non-conformity with the Access Directive	Court referral	2006-12-12	
9	INFSO	Non-conformity with the Framework Directive	Court referral	2007-06-27	
10	COMP	Non-conformity with the Transparency Directive 80/723/EEC	Letter of formal notice	2006-04-04	2007-01-24
		2004/1244			
		2004/1251			
		2004/1256			

Source: Commission's infringement website.

**Table D**  
**Formal investigations in Polish new and existing aid cases**

Case no.	Beneficiary	Type	Objective	Launch / Proposal	Decision	Date
1	C 48/2007 Huta Jedność	Individual	R&R	2007-10-23	Pending	
2	C 43/2007 Huta Stalowa Wola	Individual	R&R	2007-10-10	Pending	
3	C 34/2007 Maritime transport	Scheme	Other	2007-09-12	Pending	
4	C 6/2007 Techmatrans	Individual	R&R	2007-02-21	Positive	2007-11-28
5	C 55/2006 Bison-Bial	Individual	R&R	2006-12-20	Conditional	2007-09-12
6	C 52/2006 Odlewnia Żeliwa Śrem	Individual	R&R	2006-12-06	Pending	
7	C 51/2006 Arcelor Huta Warszawa	Individual	R&R	2006-12-06	Negative with recovery	2007-12-11
8	C 32/2006 Huta Cynku Miasteczko S.	Individual	R&R	2006-07-18	No aid	2007-09-25
9	C 23/2006 Technologie Buczek	Individual	R&R	2006-06-07	Negative with recovery	2007-10-23
10	C 49/2005 Chemobudowa Kraków	Individual	R&R	2005-12-21	Withdrawn	2006-09-26
11	C 44/2005 Huta Stalowa Wola	Individual	R&R	2005-11-23	Positive	2006-12-20
12	C 43/2005 Stranded costs	Individual	Other	2005-11-23	Mixed: positive and negative	2007-09-25
13	C 22/2005 Poczta Polska	Scheme	Other	2005-06-29	Withdrawn	2006-04-25
14	C 21/2005 Poczta Polska	Individual	Other	2005-06-29	Termination (non-implementation of aid)	2007-01-09
15	C 19/2005 Stocznia Szczecińska Nowa	Individual	R&R	2005-06-01	Pending	
16	C 18/2005 Stocznia Gdańska	Individual	R&R	2005-06-01	Pending	
17	C 17/2005 Stocznia Gdynia	Individual	R&R	2005-06-01	Pending	
18	E 12/2005 Poczta Polska	Existing / Individual	Other	2005-04-29	Abolition	2007-04-24
19	C 3/2005 Daewoo / FSO	Individual	R&R	2005-01-19	Conditional	2006-12-20
20	C 20/2004 Huta Częstochowa	Individual	R&R	2004-05-19	Mixed: negative, no aid and positive	2005-07-05

Source : State Aid Register (DG Competition).

**Table E**  
**Antitrust and merger cases**

Case no.	Party/ies	Type	Industry	Filed/opened	Decision	Date
1	COMP/M.4950 Aviva/Bank Zachodni	Merger	Financial services	2007-12-20	Unconditional approval in Phase I	2008-02-05
2	COMP/M.4552 Carrefour/Ahold Polska	Merger	Retail	2007-02-16	Full referral	2007-04-10
3	COMP/M.4348 PKN/Mazeikiu	Merger	Petrochemicals	2006-09-29	Unconditional approval in Phase I	2006-11-07
4	COMP/M.4141 Linde/BOC	Merger	Industrial gases	2006-04-06	Conditional approval in Phase I	2006-06-06
5	COMP/M.3894 Unicredito/HVB	Merger	Financial services	2005-09-13	Unconditional approval in Phase I	2005-10-18
6	COMP/38.638 Butadiene Rubber/Emulsion Styrene Butadiene Rubber (Trade-Stomil)	Cartel	Chemicals	2005-06-07	Cartel infringement/fine	2006-11-29
7	COMP/M.3543 PKN Orlen/Unipetrol	Merger	Petrochemicals	2005-03-11	Unconditional approval in Phase I	2005-04-20

Source: DG Competition's website.

**Table F**  
**Regulatory (Article 7) proceedings in telecoms cases**

Case no.	Sector	Legal basis	Decision	Date
1 PL/2006/0518 PL/2006/0524	Electronic communications	Article 7(4) of Directive 2002/21/EC	Retail access to the public telephone network at a fixed location for residential customers Retail access to the public telephone network at a fixed location for non-residential customers in Poland	2007-01-10

Source: DG Information Society's website.



# **2007 Antitrust and Regulatory Developments in Legislation in Poland**

by

Marek Stefaniuk\*

## **I. Introduction**

In 2007, the Polish antitrust law and the particular regulatory regimes applicable to specific sectors of the Polish economy underwent major change. In the context of the antitrust legislation, a new Act of 16 February 2007 on Competition and Consumers Protection<sup>1</sup> was adopted, to be subsequently amended twice in the same year. Simultaneously, a number of key amendments were introduced into sectorial regulation, including: the Act of 10 April 1997 – the Energy Law<sup>2</sup>, the Act of 16 July 2004 – Telecommunication Law<sup>3</sup>, the Act of 28 March 2003 on Rail Transport<sup>4</sup>, and to the Act of 3 July 2002 – Aviation Law<sup>5</sup>. The purpose of this paper is to present the major amendments that were introduced into the Polish antitrust law and regulatory regime in 2007.

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<sup>1</sup> Journal of Laws No. 50, item 331 with subsequent amendments.

<sup>2</sup> Consolidated text in Journal of Laws 2006 No. 89, item 625 with subsequent amendments.

<sup>3</sup> Journal of Laws 2004 No. 171, item 1800 with subsequent amendments

<sup>4</sup> Consolidated text in Journal of Laws 2007 No. 16, item 94.

<sup>5</sup> Consolidated text in Journal of Laws 2006 No. 100, item 696 with subsequent amendments

## II. Act on competition and consumer protection

The subject matter of antitrust law is to govern various factual circumstances relating to a competitive market advantage obtainable by entrepreneurs, used to the detriment of other market players – especially competitors, contractors and consumers. Antitrust law constitutes one of the specific domains of administrative law, used to govern the economy; it belongs to the area of public law. Polish antitrust law remains under a relatively strong influence of EU law<sup>6</sup>. As a result, it continues to be subject to rapid developments, not only because its amendments reflect the constant need to adapt it to the development stage and profile of the market, but also because Polish antitrust law must be continuously adjusted to current EU solutions.

The new Act of 16 February 2007 on Competition and Consumer Protection came into force on 21 April 2007 as the fourth integrated act of law concerning antitrust matters in the Polish post-war history. The specific nature of each of the previous antitrust acts primarily reflected the particular market situation, in relation to which they were applicable. Thus, the first Act of 28 January 1987 on Combating Monopolistic Practices in the National Economy<sup>7</sup> aimed to limit the monopolistic power of state-owned enterprises in the period of the, so called, “second stage of the economic reform” of the still centrally planned Polish economy<sup>8</sup>. The new Act of 26 February 1990 on Combating Monopolistic Practices and Protecting Consumers’ Interests<sup>9</sup>, was one of many instruments of economic transformation intended to support the creation of a free market economy<sup>10</sup>. The following Act of 15 December 2000 on Competition and Consumer Protection<sup>11</sup>, which was adopted during

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<sup>6</sup> About europeization of the Polish antimonopoly law in the different periods of time see for example: T. Skoczny, *Zakres i kierunki dostosowywania polskiego prawa antymonopolowego do europejskich regul konkurencji*, Warszawa 1993, passim; T. Skoczny, *The Polish Competition Law in the 1990s – on the Way to Higher Effectiveness and Deeper Conformity with EC Competition Rules*, in: *Spontaneous Order, Organization and the Law. Roads to a European Civil Society*. Liber Amicorum Ernst-Joachim Mestmäcker. Edited by Talia Einhorn, T.M.C. Aster Press, The Hague 2003, p. 349-346; M. Stefaniuk, „Wpływ prawa Wspólnoty Europejskiej na publicznoprawne reguły konkurencji w Polsce” [in:] Z. Janku, Z. Leoński, M. Waligórski, K. Wojtczak (eds.), *Europeizacja polskiego prawa administracyjnego*, Wrocław 2005, s. 654-666.

<sup>7</sup> Journal of Laws No. 3, item 18.

<sup>8</sup> J. Trojanek, „Ustawa antymonopolowa z 1987 r. (Próba oceny podstawowych rozwiązań)” (1987) 4 *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 4; compare with W. Modzelewski, *Monopolistyczne praktyki przedsiębiorstw – problematyka prawna*, Warszawa 1988, passim.

<sup>9</sup> Journal of Laws No. 14, item 88 with further amendments.

<sup>10</sup> C. Kosikowski, T. Ławicki, *Ochrona prawna konkurencji i zwalczanie praktyk monopolistycznych*, Warszawa 1994, p. 33-36.

<sup>11</sup> Journal of Laws 2005 No. 244, item 2080; Journal of Laws 2006 No. 157, item 1119.

the period of pre-accession negotiations, was meant to harmonise the Polish antitrust law with Community competition rules<sup>12</sup>.

The need to replace the Act of 2000 can be primarily traced back to the fact that, even though it was considered to be an efficient act of legislation in terms of competition and consumer interest protection, it had, nevertheless, very numerous amendments. As a result, the antitrust Act of 2000 did not seem to form a complete and coherent act of legislation, despite having been published twice in the form of a uniform text<sup>13</sup>. Moreover, some of the rules it contained were regarded as far too detailed, focusing on cases of relatively small impact on competition. Among these were the rules concerning concentrations in the forms defined in Article 12 paragraph 3, and rules involving antitrust authorities in settling cases of minor importance. The Act was particularly related to instituting antitrust proceedings for cases concerning competition restricting practices (Article 84) and cases where collective consumer interests were violated (Article 100 a). Another reason for replacing the antitrust Act of 2000 was the need to implement into the Polish legal system, the procedures stated in the Directive No. 2006/2004/WE of the European Parliament and Council of 27 October 2004 on Cooperation between National Authorities responsible for executing legal regulations within the scope of consumer protection<sup>14</sup>. According to this Directive, Member States were meant to appoint public authorities (liaison offices and competent authorities) appropriate to cooperate in the field of consumer interest protection against cross-border violation of consumer interest<sup>15</sup>.

After an exceptionally rapid legislative process, a new antitrust Act of 2007 was adopted, which largely builds on the solutions present in the Act of 2000. The arrangement of the new Act is identical to the arrangement of the act it replaced. The Act of 2007 is divided into several sections. The number and range of rules contained in each section corresponds to the content of its predecessor – only the numbering of the sections changed. Section One (Articles 1-5) contains general rules. Section Two (Articles 6-12) sets out the prohibition of competition restricting practices – the specific rules concerning

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<sup>12</sup> See: E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2002, s. 7.

<sup>13</sup> Uniform texts of the act on competition and consumer protection were published in *Journal of Laws* 2002 No. 86 item 804 and *Journal of Laws* 2005 No. 244, item 1080.

<sup>14</sup> OJ [2004] L 364/1..

<sup>15</sup> In view of the regulation No. 2006/2004/WE a cross-border violation is every activity or abandonment contrary to the legal regulations which protect consumer interest and which is prejudicial or might be prejudicial to collective interests of consumers who live in one or more than one Member State – other than a Member State where this activity or abandonment took place, or where the guilty enterprise has its seat, or where evidence or assets related to this activity or abandonment can be found.

the prohibition of competition restricting agreements, the prohibition of abuse of a dominant position and the issue of administrative decisions taken in cases of competition restricting practices, are specified in Chapter One, Chapter Two and Chapter Three of Section Two, respectively. Section Three (Articles 13–23) concerns concentrations – Chapter One of Section Three deals with control of concentrations, Chapter Two concerns the administrative decisions in cases of concentration.

Section Four of the new Act (Articles 24–28) deals with practices violating collective consumer interests. Chapter One of Section Four is devoted to practices violating collective consumer interests, Chapter Two deals with the administrative decisions taken in cases of practices violating collective consumer interests. Section Five of the Act of 2007 (Articles 29–46) governs the organisation of competition and consumer protection - Chapter One of Section Five concerns the statutory position of the President of the Office for Competition and Consumer Protection (hereafter, UOKiK), Chapter 2 governs the role of territorial self-government (a large district [“poviat”] authorities) and consumer organisations in the scope of competition and consumer protection. Section Six of the Act of 2007 (Articles 47–105) provides rules applicable to proceedings held before the President of UOKiK. Aside from a chapter containing general provisions, Section Six contains also three chapters devoted to: antitrust proceedings in cases of competition restricting practices, antitrust proceedings in cases of concentrations, and proceedings in cases of practices violating collective consumer interests. Section Seven of the Act of 2007 (Articles 106–113) deals with fines while Section Eight (Article 114) set out relevant penal provisions. The Act of 2007 closes with rules relating to amendments and transitional and final provisions (Articles 115–138).

The new Act, similarly to the Act of 2000, does not contain a preamble. The objective and extent of its rules is set out in Article 1. According to this provision, the Act stipulates the conditions of developing and protecting competition as well as the principles contributing to the protection of enterprises and consumers in view of public concerns. The Act also governs the principles and procedures of combating competition-restricting practices, practices violating collective consumer interests as well as concentrations of enterprises and their associations, provided that these practices and concentrations have, or may have, an effect on the Polish territory. The provisions also determine bodies competent for cases of competition and consumer protection. Collective labour agreements are excluded from the scope of competition restrictions – the regulations of the new act are not applicable to them.

The new Act does not introduce many changes to the structure and powers of the enforcement authorities. The President of UOKiK is the competent body to assess the cases within the subject matter of the Act. The President is a body

belonging to central government administration, appointed and dismissed by the Prime Minister from among the candidates belonging to the state-staffing pool. Unlike the previous Act, the new Act does not determine the term of office for the President of the Office and does not provide a closed-catalogue of causes for dismissal. Other statutory changes introduced by the Act of 2007 highlight, in Article 29(2), the tasks of the President of UOKiK in terms of exercising EU law. These tasks are connected, most of all, to the performance of the function of “a competent competition protection authority” within the meaning of Article 35 of Regulation No. 1/2003/EC and the function of “a uniform liaison office” and “the competent authority” within the meaning of Regulation No. 2006/2004/WE of the European Parliament and Council. Vice Presidents are appointed also, upon request from the President of UOKiK, by the Prime Minister from among those, belonging to the national reserve of human resources. The Commercial Audit Office is subordinated to the President of UOKiK.

The organisational structure of UOKiK remains unchanged consisting of the Head Office in Warsaw and nine Regional Branch Offices in: Bydgoszcz, Gdańsk, Katowice, Kraków, Lublin, Łódź, Poznań, Warsaw and Wrocław. The territorial and material competence of Regional Branch Offices is stipulated by the Regulation of the Prime Minister of 17 July 2007 on the Territorial and Material Competence of the Regional Branch Offices of the Office for Competition and Consumer Protection<sup>16</sup>. Branch Directors manage their Branch Offices issuing, on behalf of the President of UOKiK, decisions and resolutions within the competence of the branches and in cases delegated by the President of UOKiK. The organisational structure of UOKiK is governed in detail by its Statute confirmed by the Prime Minister’s Regulation No. 65 of 20 June 2007 on approval of the Statute of the Office for Competition and Consumer Protection<sup>17</sup>.

Tasks within the scope of consumer protection are performed, according to Article 37 of the new Act, by territorial self-government bodies (municipalities), consumer organisations and other institutions, whose statutory tasks include consumer interest protection. At the territorial level of a “poviat” (a large district, encompassing several counties), consumer protection tasks are carried out by district consumer ombudsman, appointed and dismissed by the appropriate district council, subordinated to that council and reporting to it. The responsibilities of a district consumer ombudsman include, in particular: offering a free consumer advice service and providing legal information concerning the scope of consumer interest protection; submitting requests for the issue and amendment of local provisions (locally enforced law), where

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<sup>16</sup> Journal of Laws No. 134, item 939

<sup>17</sup> Monitor Polski No. 39, item 451

consumer interest protection is at stake; addressing enterprises in cases concerning protection of consumer rights and interests; and co-operating with the territorially competent UOKiK Regional Branch Offices, bodies of the Commercial Audit Office and consumer organisations. The new act enabled the consumer ombudsmen to work in cities populated by over 100 thousand inhabitants and in towns with district (“poviat”) rights to perform their tasks with the help of an individual office. The National Council of Consumer Ombudsmen, operating at the level of the state, is a standing opinion-giving and advisory body of the President of the Office to the extent of cases related to protection of consumer rights at the level of a large district (“poviat”).

The Act of 2007 does not introduce many changes to the scope of pre-existing material antitrust rules. What has changed, in comparison to the Act of 2000, is the content and substance of the dictionary of statutory terms used in the Act (Article 4) and some of the definitions including: the definition of an enterprise (Article 4.1); a dominant enterprise (Article 4.3); and, a share or assets deal (Article 4.4). A definition of the President of UOKiK was added (Article 4.18) as well as a definition of the EC Treaty (Article 4.19) and of Regulation No. 2006/2004/WE (Article 4.22). Moreover, a new way of converting EURO into Polish Złoty was introduced (Article 5).

Agreements restricting competition and abuse of a dominant position were included in the competition restricting practices category, similarly to the approach applied in the Act of 2000. The statutory definitions of the specific practices did not change; agreements between enterprises, between associations of enterprises as well as between enterprises and their associations were once again considered to constitute agreements restricting competition. It also deemed some stipulations of those agreements, adjustments of any form made by two or more enterprises or their associations and also resolutions and other acts of associations of enterprises or of their governing bodies as competition restricting practices. The legislator defined distribution agreements among other agreements – those concluded between enterprises operating at different levels of business proceedings, whose aim is to buy products in order to sell them later. The Act of 2007 in its Article 7 concerning *de minimis* agreements changes the definition of vertically-integrated enterprises from “enterprises operating at different levels of business turnover” to “enterprises which are not competitors”.

Correspondingly with the Act of 2000, a dominant position is understood as the one that allows an enterprise to prevent competition in the target market effectively by means of creation of possibilities to act independently of competitors, contractors and consumers to some substantial extent; it is assumed that an enterprise has a dominant position, if its market share is in excess of 40%.

The legislator used the rule of prohibition both in the case of the competition restricting agreements and in the case of the abuse of a dominant position. General prohibition of such practises is contained directly in the act and the decision of a law applying authority about treating given practice as competition restricting is of declaratory nature. The prohibition of every competition restricting practice, that had been previously in force, was maintained, too. In the case of competition restricting agreements the prohibition is of relative nature – the institution of minor agreements (Article 7) and a “common sense principle” (legislative rule of reason) were used (Article 8(1)). In the case of abuse of a dominant position on the other hand, the prohibition is of absolute nature. Catalogues of exemplary factual state of affairs that can constitute violation of the prohibition of competition restricting practises, included in Article 6(1) and 9(2) of the new Act, in principle correspond to the parallel catalogues from Article 5(1) and Article 8(2) the Act of 2000. The only difference can be observed in Article 9(2) that does not mention a practice of creation of disturbing conditions for consumers vindicating or claiming their rights.

In respect of the rules on concentrations, as compared to the previous Act, the Act of 2007 limits the scope of the obligation to notify an intended concentration. Two major amendments need to be noted here. The first one concerns the increase in the total turnover threshold (in the financial year prior to the year of notification), which creates the obligation to notify (an increase from a global turnover of 50 million EURO to a global turnover of 1 billion EURO or 50 million in the territory of Poland); by doing so, the legislator resigns from supervising these concentrations that have no major influence on the Polish market. The second change relates to the list of forms of concentration that remain under the supervision of the President of UOKiK. The legislator did not include in Article 13 of the new Act stock or shares deal which leads to obtaining at least 25% of votes at a General Meeting or a General Shareholders' Meeting, or performing by one person the position of a member of a managing or controlling authority of competitors as well as commencing execution of rights from shares taken or sold without prior notification (on the basis of Article 13(3) and 13(4) of the Act of 2000). On the other hand, a new form of concentration was introduced, concerning assets deal of total value exceeding the equivalent of 10 million EURO.

Unlike in the previous Act, Article 24(1) of the Act of 2007 contains a new general prohibition of practices violating collective consumer interests, defined slightly differently to the past. The legislator uses once more a rather casuistic description of what kind of conduct can be treated as a practice violating collective consumer interests. According to Article 24(2) a practice violating collective consumer interests is understood as any unlawful activity

of an enterprise prejudicial to these interests, especially application of the provisions of templates of agreements entered in the register of stipulations of template agreements that have been pronounced inadmissible as referred to in Article 479<sup>45</sup>, a breach of a duty to provide consumers with reliable, truthful and complete information, unfair or misleading advertising and other acts of unfair competition prejudicial to collective consumer interests.

An aggregated volume of individual consumer interests does not, however, constitute collective consumer interest. Such a flexible definition of the scope of practices violating collective consumer interests could have been justified previously, seeing as the Act of 2000 was based on the supervision principle, whereby a decision of the President of UOKiK considering a practice to be a violation of a collective consumer interest, was constitutive in nature. Currently, however, the general prohibition formulated in Article 24 paragraph 1 of the new Act, should be complemented by a definition that precisely sets out what behaviour and practices violating collective consumer interests are prohibited. The Act of 2007 introduces a possibility of using fines in the case of enterprises that violate collective consumer interests.

The Act of 2007 differs significantly from its predecessor in relation to procedural rules. These amendments can be divided into two groups. The first set of changes is based on the new Article 49, which states that proceedings in the cases of competition restricting practices, proceedings in the cases of practices violating collective consumer interests and in cases involving the imposition of fine are instituted *ex officio*. According to the Act of 2000, all proceedings before the President of UOKiK (except for explanatory proceedings) were instituted on request or *ex officio*. According to the previous Act, the group of entities entitled to institute antitrust proceedings in the cases of competition restricting practices included: enterprises or associations of enterprises, which could prove their legal interests in the case: territorial self-government bodies (municipalities); state inspection bodies; consumer ombudsmen and consumer organisations. The group of entities previously entitled to institute proceedings in the cases of practices violating collective consumer interests included: the Commissioner for Civil Rights Protection, the Insurance Ombudsman, the Consumer Ombudsman and consumer organisations. This new approach aims at improving the efficiency of the operations of UOKiK and enabling its President to commence proceedings only in cases, where the conduct in question has the most destructive impact on competition and consumer rights protected in the public interest. Shorter proceedings should constitute an additional improvement deriving from the new scheme. Despite the fact that all proceedings are now commenced *ex officio*, the Act of 2007 gives everybody a right to bring a complaint concerning breaches of the Act (Articles 87 and 101).

According to Article 10, Article 11(1) and Article 12(1) of the Act of 2007, the President of UOKiK has now a new competence to issue decisions in cases of competition restricting practices, on the basis of a commitment that an enterprise, or an association of undertakings, no longer infringes the prohibition specified in Article 6 or Article 9 of this Act, or in Article 81 or Article 82 of the EC Treaty. A separate group of new procedural rules (applicable to both, antitrust proceedings and proceedings in the cases of collective consumer interests violations) is made up by the Act's provisions enabling the President of UOKiK to perform the function of "a competent authority" and "a single liaison office" in accordance with Regulations No. 1/2003/EC and No. 2006/2004/EC<sup>18</sup>.

The key change in the context of the administrative decisions taken in cases of competition restricting practices and collective consumer interest violations is the fact that the new Act does not contain regulations concerning decisions which do not assess competition restricting practices or practices violating collective consumer interests. In such cases the new Act introduces the institution of discontinuing proceedings on the basis of KPA (Code of Administrative Proceedings) due to groundless nature of a case.

After its adoption, the Act of 2007 was amended twice in 2007. The first change was introduced by the Act of 13 April 2007 on amending the act on competition and consumer protection and the act on the national reserve of human resources and high state positions.<sup>19</sup> On its basis, the provisions of Article 29(1) of the Act of 2007 provide that the Prime Minister appoints the President of UOKiK from among candidates belonging to the state staffing pool.. Accordingly, paragraphs 5, 7 and 8 of Article 29 were omitted since they referred to the application procedure of the revoked rule. The Act of 2007 was further amended by the Act of 23 August 2007 on counteracting unfair market practices<sup>20</sup>. On its basis, unfair market practices, referred to in Article 24(2) of the Act of 2007, are now recognised as one of the types of practices that violate collective consumer interests. At the same time, the principle was introduced into Article 25 of the Act of 2007, according to which, the protection of collective consumer interests does not exclude protection under other legal regulations – especially those on combating unfair market practices.

Summing up, the provisions of the new Act of 2007 on competition and consumer protection largely reflect the evolution, rather than revolution, of the development process of the Polish antitrust law system. These changes are not particularly profound, illustrating the need to rearrange the text of

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<sup>18</sup> See Article 62(2(1)) and 62(2(2)), Article 73(2(3)) and 73(2(4)) of the Act on Competition and Consumer Protection.

<sup>19</sup> Journal of Laws No. 99, item 660.

<sup>20</sup> Journal of Laws No. 171, item 1206.

the Polish antitrust law, and further adjust it to EU solutions, rather than the will to implement bold new reformatory ideas. In contrast, such a moderate approach to the development of the Polish antitrust law has its unqualified advantages. Firstly, it allows the utilisation of a big part of the jurisprudence accumulated in the six years of the application of the Act of 2000. Secondly, the careful nature of the legislator's approach to the scope of the recent changes leads to the assumption that the content of the Polish antitrust law will slowly stabilise (institutionalise). As a result, a new approach that focuses on continuing the creation of institutions specific to the Polish antitrust system (strictly connected with the specific nature of its market and legal system) will perhaps accompany, or even replace, the old approach entailing the creation of specific legislation that often determines the patterns of prohibited and permissible conduct of enterprise in an arbitrary and instrumental manner.

### III. Act – Energy Law

The regulatory regime concerning the Polish power industry underwent major changes in 2007. These amendments reflect, most importantly, the growing need to ensure energy safety; the implementation of the liberalisation process of the energy market and, in particular, the “third party access” rule; and the development of energy production in co-generation and from renewable sources. The direction of the changes in the regulatory regime of the Polish power industry was determined mostly by the developmental trends of the EU.

The Polish power industry is primarily governed by the Act of 10 April 1997<sup>21</sup> – the Energy Law. This Act was amended five times in 2007 alone. The first set of amendments was brought about by the Act of 12 January 2007 on amending the Energy Law Act, the Environmental Protection Law Act and the Act on the Conformity Assessment System<sup>22</sup>; these changes came into force on 24 February 2007. The Amendment Act of 12 January 2007 added a number of new legal definitions to Article 3 of the Polish Energy Law: the notion of co-generation (point 33), useful heat in co-generation (point 36), referential efficiency value for divided production (point 37), high pressure co-generation (point 38), standard consumption profile (point 39), commercial balancing (point 40), the central mechanism of commercial balancing (point 41), and the entity responsible for commercial balancing (point 42).

Another area of change introduced to the Polish Energy Law by the Amendment Act of 12 January 2007 relates to agreements on electricity

<sup>21</sup> Journal of Laws No. 158, item 1123, as amended.

<sup>22</sup> Journal of Laws No. 21, item 124.

distribution services, where one party of the agreement is a user of the system, who is not an entity responsible for commercial balancing. Pursuant to Article 5(2a) added to the Act, such an agreement should also include other various elements in the case when the user of the system is a recipient (point 1), an energy company which produces electrical energy and is connected to the distribution network (point 2) or a seller (point 3). Article 5(2b) governs additional elements of agreements on electrical energy distribution services, where one party of the agreements is a recipient who is not an entity responsible for commercial balancing.

The Amendment Act of 12 January 2007 further added paragraph 6a and 6b to Article 5 of the Energy Law concerning the information duties of electricity sellers. Pursuant to Article 6a, an electricity seller is now obliged to inform its recipients of the make-up of the energy sources used to produce its electricity (in the previous calendar year) as well as of the location of information on the environmental impact that production (at least with respect of carbon dioxide emission and the production of nuclear waste). In turn, Article 6b concerns the situation when electrical energy is bought on a commodity exchange or is imported from the electroenergetic system of the countries that are not Member States of the European Union. In such situations, information concerning the make-up of the energy sources used to produce electricity can be provided on the basis of collective data concerning the proportion of particular types of energy sources used in the previous calendar year.

In relation to rules concerning the fees for network connection, the Amendment Act of 12 January 2007 added point 3 to the existing Article 7(8) of the Polish Energy Law. Accordingly, the fee collected for connecting the energy sources cooperating with the network, and the networks of energy companies taking care of transmission and distribution of gas fuels or energy, is calculated on the basis of the expenditures actually incurred when establishing the connection.

Moreover, paragraph 5 was added to Article 9a of the Energy Law stating that substitute fees (referred to in Article 9a(1(2)) and Article 9a(8(2))) constitute the income of the National Fund for Environmental Protection and Water Management and should be paid in arrears on the separated accounts of this fund until 31 March of each year.

Paragraph 9 and 10 were further added to Article 9a. Pursuant to Article 9a(9), the Minister responsible for the economy was authorised to determine the range of duties placed on energy companies that deal with the production of electrical energy or sales connected with it, and sell this power to the final recipients connected to the network within the territory of Poland. These duties are related to: obtaining from the President of the Energy Regulatory Office (URE), or applying for the discontinuation of, of

the certificate of origin referred to in Article 9a(1(1)); or paying the substitute fee referred to in Article 9a(1(2)); the purchase of electrical energy produced from renewable energy sources connected to the network within the area of operation of the seller, offered by the energy companies who obtained a licence for its production; and the purchase of the offered heat, referred to in Article 9a(7) of the Energy Law. In turn, Article 9a(10) contains an authorisation for the Minister dealing with the economy to determine the manner of calculating the data, which must be provided in the application form for the certificate of origin from co-generation, referred to in paragraph 8, and the duty concerning the confirmation of the data, referred to in Article 91(8) of the Energy Law.

Point 9a was added to Article 9c paragraph 2 of the Energy Law obliging the operator of an electro-energetic transmission system, or a connected electro-energetic system in the frame of a transmission system, to maintain a central mechanism of commercial balancing.

Point 6 was added to Article 9c(3) of the Energy Law obliging the operator of a distribution system, or a connected electro-energetic system in the scope of distribution systems, to balance the system. The operator was also obliged to carry out the operations referred to in Article 9c(3(9a)) of the Energy Law, which allow the execution of contracts for the sale of electricity concluded by recipients connected to the network.

The amended Article 9e(3) of the Energy Law made the President of URE responsible for issuing certificates of origin for energy produced from renewable sources. Such certificates are issued upon application of the energy company that produces electrical power from renewable energy sources. Issuing a certificate of origin is governed by the appropriate rules of the Code of Administrative Procedure concerning certification. Further detailed rules concerning the issue of certificates of origin are contained in paragraph 4a, 4b and 5a added to Article 9e and in its amended paragraph 5.

Paragraph 5a was added to Article 9g of the Energy Law. Accordingly, the operator of an electro-energetic distribution system is obliged to supply a log of transmission and exploitation of the distribution network, using the standard profile of consumption used in commercial balancing, and information concerning the location of the supply of electrical energy to its recipients with contractual power below 40 kW.

Article 91 consists of new rules relating to the certificate of origin of electricity produced in high pressure co-generation. Such a certificate can be issued by the President of URE upon an application by an energy company. Such certificate is issued within 14 days from the date of receipt of the application. Issuing certificates of origin of electrical energy produced from co-generation is governed by the appropriate rules of the Polish Code of Administrative Procedure concerning certification. The content of the

application is governed by Article 91(4) of the Energy Law. Article 91(5) concerns the data that must be included in the application form. Paragraphs 6-8 govern the procedure for submission of the application to the President of URE. Paragraph 9 governs the right to refuse to issue a certificate of origin from co-generation, which takes the form of a resolution of the President of URE, subject to appeal. Paragraphs 10-11 govern the issue of reports concerning the production of electrical energy in co-generation presented to the President of URE by energy companies. Article 91(13) and 91(14) of the Energy Law relate to the discontinuation of certificates of origin from co-generation by the President URE.

Article 9n of the Energy Law imposes on the Minister responsible for the economy an obligation to prepare a report every 4 years assessing the progress of increasing the proportion of electrical energy produced in high pressure co-generation in comparison to the total national production of electrical energy, and to present them to the European Commission within the stated time. The preparation of each report is announced in the Polish Official Journal "Monitor Polski" [Polish Monitor] by 21 February of each year, in which the obligation to prepare it arises. According to the provisions of Article 9n(3) of the Energy Law, the Minister responsible for the economy informs the European Commission of the actions taken in order to facilitate access to the electro-energetic system by energy companies producing electrical energy in high pressure co-generation and in co-generation units with the installed electrical energy capacity above 1 MW.

Another amendment can be found in the new wording of Article 16a(3) and the addition of Article 16(3a) of the Energy Law which concern: tender proceedings organised by the President of URE for the construction of new production facilities of electrical energy or for the implementation of projects, which decrease the demand for electrical energy; the conditions and procedures of organising and conducting tenders, including the appointment and operation of tender commissions, taking into consideration the necessity to assure clear tender conditions and criteria as well as equal treatment of bidders.

Amended was also Article 20(2) of the Energy Law, regarding the planning of heating, electrical energy and gas fuel supply to the whole of, or part of, the area of the municipality, prepared by the vojt (mayor or president of the city). In compliance with the new point 1a, the project resulting from such a plan should contain proposals regarding the use of renewable energy sources and high pressure co-generation.

The Amendment Act of 12 January 2007 broadened the scope of operation of the President of URE specified in Article 23(2) of the Energy Law by the charges receivable as individual substitute fees referred to in Article 9a(8a(3(e))) and issuing certificates of origin referred to in Article 9e(1) and

certificates of origin from co-generation referred to in Article 91 as well as their discontinuation (point 21).

This Amendment Act introduced also a change to the rules on obtaining a licence necessary to act in the power industry. Pursuant to the amended Article 32(1(1)) of the Energy Law, obtaining a licence requires conducting economic activity in respect of the production of fuels or energy, excluding: the production of solid or gas fuels, producing electrical energy in from sources with total installed electrical energy capacity below 50 MW, not included in renewable energy sources, or from sources producing electrical energy in co-generation, producing heat in the sources with the total installed heat power capacity below 5 MW.

The amended Article 47(2e) of the Energy Law imposes on the President of URE the obligation to analyse and verify the justifiable costs (specified in article 45(1(1)) and 45(1(2)) of this Act) in terms of their compliance with its rules. Such assessment must be based on financial statements as well as tangible, asset-related and financial plans of energy companies.

The final changes introduced into the Polish Energy Law by the Amendment Act of 12 January 2007 concern fines. According to Article 56, the liability to pay a fine arises for those: who do not abide by the obligation to receive, and present for discontinuation, to the President of URE a certificate of origin from co-generation, or who do not pay replacement fees (specified in Article 9a(1) and (8) of the Energy Law); or who do not abide by the obligation to buy electrical energy (specified in Article 9a(6) of the Energy Law); or who do not abide by the obligation to buy heat (specified in Article 9a(7) of the Energy Law); or who submit to the President of URE a motion to grant a certificate of origin or a certificate of origin from co-generation that includes incorrect data or information.

The second set of amendments that came into force on 7 April 2007, was introduced by the Act dated 16 February 2007 on the reserves of oil, oil products and natural gas, as well as the rules of conduct in situations threatening the country's fuel security and disturbances on the oil market<sup>23</sup>. Amendments to the Polish Energy Law introduced by this Act can be classified into three categories, they concern: statutory definitions, rules on power security, and licences for natural gas sales with foreign countries.

Article 3 of the Energy Law was complemented by a new point 10a, which includes a definition of "a storage installation" understood to be an installation used for storing gas fuels, including container-less natural gas storage and the storage capacities of gas pipelines, owned by an energy company or being exploited by such company, including this part of the installation with

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<sup>23</sup> Journal of Laws No. 52, item 343.

condensed gas, which is used for its storage, excluding however this part of the installation, which is used for production, or the installation used exclusively to execute tasks by the operators of the gas transmission system.

Articles 9j, 11 and 15b of the Energy Law Act were amended to improve the country's power security. Article 9j paragraph 1 sets out the obligations of energy companies producing electrical energy and connected to an electrical network. Pursuant to this rule, in order to ensure the security of the functioning of the electrical system, such a company is obliged to produce electrical energy or stay in readiness to produce it, if that is necessary to ensure the quality of the supplied power, and the continuance and reliability of the supply of this power to users, or the avoidance of a threat to personal security or threat of material loss. Article 9j(2) sets out the obligations of an operator of a transmission system in the case of a sudden, unforeseen damage to, or destruction of equipment, installation, network or buildings, causing a break in the usage thereof, or the loss of their qualities threatening the security of the functioning of the electrical system. In such a case, an operator of a transmission system undertakes, in co-operation with interested entities, actions necessary to restore the normal functioning of this system in accordance with the procedures specified in Article 9g(6) of the Energy Law Act. Such actions consist of; producing electrical energy or remaining in readiness to produce it; activating additional power production units; introducing restrictions, or putting a stop the consumption of electrical energy in a specified part of the Polish territory. According to Article 9j(4), an operator of an electrical transmission system is also obliged to immediately notify the Minister responsible for economy and the President of URE about the occurrence of any of the incidents specified in paragraph 2. According to Article 9j(5), costs incurred by an energy company connected with the implementation of these obligations are classified as costs of its business activity, as specified in Article 45(1) of the Energy Law Act.

Article 11 introduces rules aiming to restrict the sale of solid fuels and the supply and consumption of electrical energy or heat, in specified circumstances. These cases may include a threat to Poland's electrical security consisting of: long-term imbalance in the fuel-energy market, threats to personal security, or threats of considerable material loss. In such cases, time-limits on the sale of solid fuels, as well as on the supply and consumption of electrical energy or heat, may be introduced covering the whole, or a part of the territory of Poland. a restriction on the sale of solid fuels translates into the need to gain an authorisation for a user to buy specified quantities of fuels. A restriction on the supply and consumption of electrical energy or heat translate into a limit placed on the maximum consumption of electrical energy and daily consumption of electrical energy, and on the supplies of heat. Entities authorised to control the application of these restrictions include: the President of URE – with

reference to electrical energy supplied via electrical systems; the governors of particular provinces (“voivodeships”)– with reference to solid fuels or heat; and inspectorate bodies and authorities responsible for the regulation of fuel-energy economy, as specified in Article 21a. Article 11 of the Energy Law includes also an authorisation for the Council of Ministers to specify specific rules and the process of introducing restrictions on the sale of solid fuels and on the supply and consumption of electrical energy or heat. The Minister responsible for the economy should immediately notify the European Commission if such steps were taken.

Where the threat specified in Article 11(1) manifests itself, the Council of Ministers may introduce restrictions on the sale of solid fuels and on the supply and consumption of electrical energy or heating that are applicable for a specified period of time to the whole, or only a part, of the territory of Poland. Energy companies are not liable for the consequences of such restrictions introduced by the Council of Ministers. However, the Minister responsible for the economy must immediately notify the European Commission and the Member States of the European Free Trade Association (parties to the agreement on the European Economic Area) about the restrictions introduced, specified in paragraph 7, in respect to the supply and consumption of electrical energy, by the Council of Ministers by virtue of Article 11(7) of the Energy Law.

Another amendment concerns the content of Article 15b(2(11)) of the Energy Law, which sets out the extent of information that must be provided in the report on the results of the inspection of the security of natural gas and electrical energy supply, prepared by the Minister responsible for economy. In the wording, this Article obliges the Minister to report actions undertaken and restrictions introduced (specified in the Act of 16 February 2007 on the reserves of oil, oil products and natural gas) as well as the rules of conduct in cases of threats to the country’s fuel security and disturbances on the oil market and their impact on the competitive conditions on the natural gas market.

The Act of 16 February 2007 also regulated matters concerning licences for natural gas sales with foreign countries. According to the wording of Article 33 of the Energy Law, the President of URE grants a licence for natural gas sales with foreign countries to applicants, who have their own stock capacities, or have signed a preliminary agreement on rendering a service consisting of storing obligatory reserves of natural gas in the territory of Poland, in quantities specified in Article 15b(2(11)). According to Article 35(1a) of the Energy Law Act, an entity applying for such a licence should (besides other information specified in Article 35(1) of the Energy Law Act) state predicted quantities of natural gas delivery and the means of holding obligatory reserves of natural gas in the Polish territory. According to Article 41(2a) of the Energy

Law Act, the President of URE withdraws licences for natural gas sales with foreign countries, when an energy company acting in this field fails to hold obligatory reserves of natural gas, or makes them unavailable.

The third set of amendments to the Polish Energy Law that came into force on 29 June 2007 was introduced by the Act of 15 June 2007 concerning the revision of the Energy Law Act<sup>24</sup>. The new Article 5b deals with a situation where a part, which is not connected with distribution activities, is separated from a vertically integrated enterprise that functions as an operator of a distribution system, and then used as a non-cash contribution to cover the share capital of another enterprise before 1 July 2007. As a result, by virtue of the law, a change occurs in the agreements on the basis of which the vertically-integrated enterprise (acting as an operator of a distribution system) sells electrical energy to its final customers and provides its transmission or distribution services. By virtue of the law, from the day of the separation and contribution of the said part, these agreements change into contracts between the recipients of electrical energy and the energy company carrying out economic activity in electrical energy sales, to which the non-cash contribution was made. The day when the non-cash contribution is made, is regarded as the day of separation. Energy companies acting as operators of distribution systems are obliged to immediately notify the Prime Minister about the date of the separation. Furthermore, Article 5b(3), imposes a joint responsibility for obligations resulting from agreements that arose before the date of the separation on vertically-integrated enterprises acting as an operator of a distribution system, from which a part that is not connected with distribution, was separated and energy companies carrying out economic activity in the form of electrical energy sales, which received a non-cash contribution. Article 4 provides that final customers may terminate such an agreement, without bearing any additional costs, by way a written notice of termination submitted to the energy company carrying out activities in electrical energy sales. The agreement is terminated on the last day of the second month following the month, in which the notice reached the energy company. Within 3 months of the separation, such a vertically-integrated enterprise must notify its final customers about the fact of the separation and about the possibility, effects and date of lodging a termination notice.

The fourth set of amendments to the Polish Energy Law that came into force on 1 July 2007 was introduced by the Act of 4 March 2005 – Energy Law and the Act – Environment Protection Law<sup>25</sup>. This way, a right applicable to all energy recipients to choose the supplier of electrical energy and gas serving was introduced, in accordance with the Directive No. 2003/54/WE and the

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<sup>24</sup> Journal of Laws No 115, item 720.

<sup>25</sup> Journal of Laws No 62, item 552.

Directive No. 2003/55/WE of the European Parliament and European Council. As a result the “third party access” rule has been extended to individual recipients, including households. This principle gives receivers an opportunity to take advantage of the transmission infrastructure of a local operator, without the need to buy energy from him. The right to choose the supplier is therefore matched by the duties which, from now on, rest on: energy companies dealing with transmission or distribution of gas fuels or energy; enterprises dealing with transport of extracted natural gas; energy companies dealing with natural gas liquefaction or regasification of liquefied natural gas using liquefied natural gas systems; energy companies dealing with the production of electrical energy or its sale, selling this energy to final customers connected to the network on the territory of Poland; and the operators of electrical energy transmission, distribution and integrated systems.

Article 4 item 2 of the Energy Law imposes on energy companies dealing with the transmission or distribution of gas fuel or energy, the duty to ensure the provision of transmission or distribution services of gas fuels or energy, pursuant to the principles and within the range specified in this Act, to all the recipients and enterprises dealing with the sale of gas fuels on the basis of the equal treatment principle. Providing transmission or distribution services of such fuels or energy is carried out on the basis of an agreement for such services.

Article 4d places on an enterprise dealing with the transport of extracted natural gas the duty to ensure that the provision to its recipients and enterprises dealing with the sale of gas fuels, of transportation services, using the mine pipeline network to the place of their appropriation (selected by the recipient or the enterprise dealing with the sale of gas fuels), is carried out according to the equal treatment principle. This must be achieved in observance of the principles of safety, exploitation of deposits connected, execution of agreements for the sale of ore, and considering accessible or possible to obtain flow capacity of mine gas pipeline networks, as well as the requirements of environmental protection. Providing natural gas transportation services is carried out on the basis of an agreement concerning the provision of such services.

Article 4e places on an energy company the duty to ensure (if necessary for technical or economic reasons) that the provision to its recipients, and enterprises dealing with the sales of gas fuels, of the services of natural gas liquefaction or regasification of liquefied natural gas using liquefied natural gas systems, is carried out according to the equal treatment principle. Providing these services is carried out on the basis of an agreement for natural gas liquefaction.

According to Article 4j, the recipients of gas fuels or energy have the right to independently select the seller from whom to buy such fuels or energy.

Paragraph 8 and paragraphs 8a-8d were added to Article 9a. They govern the duty of an energy company dealing with the production or sale of electrical energy and selling this power to final recipients connected to its network within the Polish territory, to obtain, from the President of URE, or apply for the discontinuation of, a certificate of origin from co-generation (referred to in Article 91(1) of the Energy Law) for electrical energy produced in co-generation units within the Polish territory, or alternatively, the duty to pay a substitute fee.

The amended paragraphs 6 and 7 of Article 9c impose two duties for operators of electro-energetic systems. Firstly, priority is given to providing transmission and distribution services for electrical energy produced from renewable energy sources and high-pressure co-generation, while the reliability and safety of the national electro-energetic system must be maintained (paragraph 6). The second duty concerns receiving electricity produced in high-pressure co-generation in the sources within the Polish territory connected directly to the network of this operator (paragraph 7).

Article 9d(1) of the Energy Law imposes on a vertically integrated operator of a transmission, distribution and integrated system, a duty to maintain independence with regard to its legal and organisational form as well as, as far as making decisions concerning other activities, that is, activities not connected with the transmission, distribution or storage of gas fuels or the liquefaction of natural gas, or transmitting or distribution of electrical energy. Paragraph 2 determines personal, structural and functional criteria concerning the independence of operators.

Article 9i(2) of the Energy Law imposes on the President of URE the task to invite bids as well as organise and perform tenders in order to select sellers *ex officio*. Only energy companies with a licence to sell gas fuels or electrical energy can take part in such a tender.

The fifth group of amendments to the Polish Energy law that came into force on 4 August 2007 was introduced by the Act of 29 June 2007 on the rules of covering costs arising in producers in connection with the early termination of long-term agreements on the sale of energy and electrical power<sup>26</sup>.

It should be noted that since its adoption in 1997, the Energy Law has been amended 37 times. The changes made so far have not yet fully liberalised the Polish energy system. Whereas the amendments have contributed to the improvement of Poland's energy security, the implementation of the "third party access" rule, the promotion of energy produced by renewable sources and co-generation, the amendments have also led to a change and strengthening of the position of the President of URE. His tasks and competences have been

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<sup>26</sup> Journal of Laws No. 130, item 905.

adjusted to EU laws. The President has received legal instruments facilitating the inspection of the growth of the Polish energy market; Polish administrative and juridical practice continue to have at their disposal still underdeveloped instruments for shaping the consciousness and sensitivity of energy users. Of need of further regulation are also various aspects of regional and local energy policy to be implemented by local governments.

The great number of amendments introduced in 2007 to the Polish Energy Law justifies the preparation and announcement of an updated uniform text of this Act.

#### **IV. Act – Telecommunication Law**

The Polish telecoms sector is primarily governed by the Act of 16 July 2004 – the Telecommunication Law, which has undergone five major amendments in 2007 alone. The first changes were introduced by the Act of 17 November 2006 on the Conformity Assessment System for products intended for the State's defenses and security<sup>27</sup>. On its basis, a new Article 152a was added to the Telecommunication Law according to which, the provisions of the Act of 17 November 2006 govern the requirements for that equipment, including final users' telecoms equipment and radio devices, which is intended for the State's defenses and security. This amendment took effect on 1 January 2007. The following Act of 15 December 2006 on Amendments to the Act on the Conformity Assessment System and Amendments to some of other Acts<sup>28</sup> brings forward technical alterations to Articles 152-158, Articles 199-200 and Article 209 of the Telecommunication Law. These amendments came into force on 7 January 2007.

Another set of amendments derives from the Act of 12 January 2007 on amendments to the Act – Telecommunication Law<sup>29</sup> that introduced changes to frequency booking rules. Articles 114–116, Articles 118–119, Articles 122–123, Article 126, Article 185 and Article 188 of the Telecommunication Law were all amended on the basis of the Act of 12 January 2007, while Articles 118a–118d were added. These amendments took effect on 26 February 2007.

The Act of 16 February 2007 on Competition and Consumers Protection amended Article 1(3) of the Telecommunication Law. On its basis, the Telecommunication Law takes effect without prejudice to the rules on competition and consumers protection and the provisions contained in the

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<sup>27</sup> Journal of Laws No. 235, item 1700.

<sup>28</sup> Journal of Laws No. 249, item 1834.

<sup>29</sup> Journal of Laws No. 23, item 137.

Act of 29 December 1992 on Radio and Television Broadcasting<sup>30</sup>. The Act of 2007 on competition and consumers protection defines also the notion of the relevant market, which is used in the Telecommunication Law in relation to the target market in the meaning of the rules on competition and consumers protection. These amendments came into force on 21 April 2007.

Last but not the least, the Act of 13 April 2007 on Electromagnetic Compatibility<sup>31</sup> introduced a series of amendments to the Telecommunication Law regarding the rules on electromagnetic compatibility of radio devices and final users' telecommunication equipment. On its basis, the Telecommunication Law was extended to include: Article 1 clause 11, Article 2, Article 51 (revoked), Article 148, Articles 152–153, Article 156, Article 158, Article 200 and Articles 204–205. These amendments took effect on 20 July 2007.

## V. Act on Rail Transport

The Act of 28 March 2003 on Rail Transport was amended twice in 2007. The first set came into force under the Act of 24 August 2007 on Amendments to some Acts of Law due to the European Union Accession of the Republic of Poland<sup>32</sup>. On this basis, eight articles of the Act on Rail Transport were changed, all relating to the licensing of rail-related business activities. Article 4 clause 9 defines a rail carrier as an “enterprise that has been licensed to perform rail transport or to render railway services”. The same articles was supplemented with clause 9a, which defines railway services as business operations entailing the provision of a railway carriage along with rail transport services.

The amended Article 43 states that business operations taking the form of rail transport or railway services are subject to a licence. This licence is a proof that a company is a railway carrier in the territory of Poland and the Member States of the European Union or the European Free Trade Association Member States – parties to the Agreement on the European Economic Area. A licence is issued for an unlimited period of time. When a licence is suspended or revoked, due to failure to meet the requirements for financial credibility, the President of the Rail Transport Office (UTK) may issue a provisional licence to make it possible to introduce the necessary changes to the company, provided that this will not affect the safety of its business operations. A provisional licence expires after 6 months from the date of its issue.

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<sup>30</sup> Uniform Text in Journal of Laws of 2004, No 253, item 2531 with subsequent amendments.

<sup>31</sup> Journal of Laws No. 82, item 556.

<sup>32</sup> Journal of Laws No. 176, item 1238.

According to Article 45, the President of UTK is competent to issue, refuse, alter, suspend or revoke a licence. The President performs these duties in the form of an administrative decision. The Minister responsible for transport specifies the licence application procedure and the procedure for the assessment of a licence application as well as licence templates. A licence fee is collected in an amount not exceeding two thousand euro. The President of UTK may refuse, revoke, suspend a licence due to exposure to possible threats to the State's defences or security or other public concerns.

The Act on Rail Transport was also supplemented by Article 51a which states, that a licensed rail carrier is obliged to notify the President of the Rail Transport Office of changes, which may affect its legal status including, but not limited to, mergers or buy-outs of assets as well as share deals. If the President finds a threat to the safety of the carrier's business operations resulting from such changes, he may request a licence to be resubmitted for reconsideration and approval purposes. In view of Article 51a(2) and (3) a request for a licence to be resubmitted may be issued when a carrier notifies the President of its intention to change or extend his business operations (mandatory), or when it has not engaged in licensed operations for 6 months, or it has not commenced such operations within 6 months of the date of issue of a licence (optionally).

Article 52 was supplemented by paragraph 1a containing rules on licence suspension; paragraph 2 governing licence invalidation was amended. Paragraph 5 was added imposing the obligation to notify the European Commission of the issue, invalidation, suspension or alteration of a licence, which the President of the Rail Transport Office must execute without delay. Paragraph 6 was also added, which governs cases when the President states that a rail carrier, which holds a licence from a competent body of another Member State of the European Union or European Free Trade Association, does nevertheless not meet Polish licensing requirements. In such cases, the President is obliged to notify that fact without delay to the competent authority of this Member State.

All the aforementioned amendments came into force on 9 October 2007.

The second set of amendments to the Act on Rail Transport that came into force in 2007 was introduced by the Act of 19 September 2007 on amendments to the act on rail transport and some other acts<sup>33</sup>. Three issues were affected by this Act. Firstly, several new statutory definitions were added to Article 4 of the Act on Rail Transport including the definition of: a railway (Clause 2), a state railway (Clause 2a), a rail area (Clause 8), a siding (Clause 10), and regional rail liners (Clause 20). Definitions of a railroad (Clause 1a) and a siding user

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<sup>33</sup> Journal of Laws No. 191, item 1374.

(Clause 10a) were added. Secondly, the Amendment Act of 19 September 2007 supplemented the Act on Rail Transport with a new chapter 2b entitled “Detailed Development Guidelines for State Railway Hard Projects” (Articles 9n-9ad). These rules govern the process of developing state railway investment projects. They concern, in particular, conditions relating to the location and right-of-way land acquisitions; they also define competent bodies.

The Act of 19 September 2007 also introduced some minor amendments to Article 14(2), Article 18(1), Article 19. Moreover, Article 66 contains amended rules governing pecuniary penalties imposed, by the President of the Rail Transport Office in the form of administrative decisions, on enterprises violating the provisions of the Act on Rail Transport. The upper limit of the pecuniary penalty was lowered to the equivalent to 2% of the annual revenue in the last calendar year. The President may, however, decide against imposing a pecuniary penalty, if an enterprise has made up for the effects of its law violation.

The aforementioned amendments came into force on 1 November 2007.

## **VI. Act – Aviation Law**

The Act of 3 July 2002 – Aviation Law had in 2007 three amendments. One group of amendments was enforced under the Act of 16 February 2007 on Competition and Consumers Protection. Article 123 of this act amended Article 198(6), Article 203(1) and 205a(3). The amendments govern rights and duties of the President of the Civil Aviation Office (ULC) in case of discovering the breach of the competition and consumers protection provisions concerning applicability of the competition and consumers protection provisions to air transport and relations between the responsibilities and competences of the President of ULC and the President of the Office for Competition and Consumers Protection. The said amendments took effect on 21 April 2007

Another set of amendments to the Aviation Law was introduced by the Act of 13 April 2007 on Amendments to the Act on the Border Guard and some other Acts<sup>34</sup>. On its basis, the Aviation Law was supplemented by Article 186a according to which, an air carrier must have the border guards on board during flights defined by the President of the Civil Aviation Office as high risk. The air carrier bears the cost incurred, in the amount specified in paragraph 2 of this Article. The Council of Ministers (the Cabinet) is empowered to specify, in which cases must the Border Guard officers be provided with accommodation

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<sup>34</sup> Journal of Laws No. 82, item 558.

and set out the accommodation expenses reimbursement procedure applicable to cases, when an air carrier does not provide such accommodation. These amendments came into force on 10 June 2007.

Another set of amendments was introduced by the Act of 8 December 2006 on the Polish Air Liner Agency<sup>35</sup>. These amendments first of all govern conditions and methods of performance of functions resulting from the control and command in the Polish air space and air liner services in compliance with the European Union's law and its regulations governing the Single European Air Space, international agreements and international regulations and Polish law and its regulations. In this respect, Articles 4, 5 and 21 of the Aviation Law were amended. Furthermore, Article 77(2) of the Aviation Law was changed, which governs announcements in the Official Journal of the Civil Aviation Office and the Integrated Information Bulletin of air transport fees, approved by its President.

Section VI Chapter 1 of the Aviation Law was supplemented by a new Article 118a, which states that air liners in the Polish air space and the air space that comes within the Polish responsibility conforms with EU law and its regulations governing the Single European Air Space, international agreements and international regulations and Polish law and its implementing regulations.

Article 120 amended paragraphs 1-5 governing the accessibility of the Polish air space for air liners, institutions providing air liners with air transport services, and civil or military air transport authorities, civil air transport authorities operating in the space controlled, established by bodies managing airports of civil aviation authorities operating in the out-of-control space assigned to certain airports, military aviation authorities operating in the space assigned to a certain airport .

The amended Article 121 concerns air transport management in the Polish air space – providing air liner services appropriate to the nature, traffic volume, and conditions of air transport, air space management, and air traffic volume management. Paragraph 2 of this Article also introduces the principle according to which, aircrafts performing flights in the Polish air space are provided with search and rescue services.

According to the amended Article 122 of the Aviation Law, users of the Polish air space are obligated to immediately perform orders of institutions providing air transport services, civil and military air transport authorities, air defense command authorities and military aircrafts.

According to Article 122a, an aircraft may be shot down under general provisions of the Act of 12 October 1990 on State Border Guard, if that is

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<sup>35</sup> Journal of Laws No. 249, item 1829.

necessary for defense reasons, and the air defense command authority is given information (in particular by institutions providing air transport services) suggesting that a civil aircraft is being used to violate the law with the purpose, among other things, of performing a terrorist attack<sup>36</sup>.

Article 124 prohibits flights by engine-driven aircrafts over national parks and natural reserves, below a certain altitude, set out by institutions providing air transport services.

The amended Articles 127 and 128 of the Aviation Law concern the appointment and certification of institutions providing air liner services in the Polish air space, in compliance with EU law. Article 130 governs navigation fees referred to in EU law in the context of the Single European Air Space, international agreements and international law. Such navigation fees are approved by the President of the Civil Aviation Office.

The Aviation Law was also supplemented by Section Xia entitled “Pecuniary Penalties” (Article 209a–209e).

The aforementioned amendments came into force on 1 April 2007.

## VII. Conclusion

2007 was a year of quite comprehensive and frequent changes to the Polish antitrust law and the particular regulatory regimes applicable to specific sectors of the Polish economy. The amendments introduced in the domain of antitrust law were not very deep, they were, nevertheless, very comprehensive, seeing as a new Act on Competition and Consumer Protection was adopted. Still, the Act of 2007 does not depart much from its predecessor. The major amendments introduced under this Act concern procedural issues. In contrast, the amendments made in 2007 to the regulatory regime governing the principal foundations, operational grounds and activities of regulatory bodies concerning specific sectors of the Polish economy, were much deeper in nature. The extent and direction of these amendments reflects Community development trends for regulatory acts applicable to specific branches of the industry.

Such amendment policy may raise objections. For instance, very shortly after adopting the Act of 17 November 2006 on Conformity Assessment System for products intended for the State’s defenses and security<sup>37</sup>, the Act of 15 December 2006 on Amendments to the Act on Conformity Assessment System and some other Acts came into force<sup>38</sup>. The former took effect on 1st January

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<sup>36</sup> Journal of Laws 2005 No. 226, item 1944.

<sup>37</sup> Journal of Laws No. 235, item 1700.

<sup>38</sup> Journal of Laws No. 249, item 1834.

2007, the latter, on 7 January 2007. In practice, most amendments are not followed by the publication of a uniform text of the given legislation. It bears noting that in some sectors of the economy (for instance, the power engineering industry), the number of amendments made to its regulatory regimes justifies the development of a revised draft of a new Energy Law Act.

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# C A S E C O M M E N T S

## **The legal status of an undertaking – should local governments be treated more favourably in relation to the penalties for breaching Polish antitrust law?**

### **Case comment to the judgment of the Supreme Court of 5 January 2007 – *City Ostrołęka* (Ref. No. III SK 16/06)**

#### **Facts**

In the judgment of 5 January 2007 (III SK 16/06), the Polish Supreme Court confirmed that the source, form and method of financing of fines imposed for the violation of Article 5 and Article 8 of the Act of 15 December 2000 on Competition and Consumer Protection<sup>1</sup> (hereafter, Competition Act 2000) are irrelevant from the point of view of free competition and the role and function of fines within the antitrust law regime. A local government unit, such as a commune, can therefore not be treated in a privileged way in this respect, even if it provides public utility services. This principle also applies under the new Act of 16 July 2007 on Competition and Consumer Protection<sup>2</sup>.

The President of the Office of Competition and Consumer Protection (hereafter, UOKiK) issued on 19 December 2003 a decision (RWA – 24/2003) establishing an infringement of Article 8 of the Competition Act 2000 in the form of an abuse of a dominant position by the Ostrołęka city commune. The commune entered into an agreement for cemetery services at the City Cemetery in Ostrołęka with a single firm responsible for the administration of the cemetery. As a result, it was impossible for other undertakings to provide these services. That practice effectively hindered the development of free competition on the market of cemetery services at the City Cemetery in Ostrołęka. The President of UOKiK prohibited to continue the practice and imposed a fine of 12,500 EURO (50,252.50 PLN) on the commune.

Ostrołęka city appealed the decision of the President of UOKiK to the Court of Competition and Consumer Protection<sup>3</sup> (hereafter, SOKiK) in as far as the fine is concerned. SOKiK upheld the decision of the antitrust authority stressing that the

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<sup>1</sup> Journal of Laws 2005 No. 244, item 2080.

<sup>2</sup> Journal of Laws 2007 No. 50, item 331; amendments: Journal of Laws 2007 No. 99, item 660; Journal of Laws 2007 No. 171, item 1206.

<sup>3</sup> In Poland this court delivers the judgments as the court of first instance.

fine was adequate and could not be reduced since otherwise its imposition would be deprived of any significance.

Ostrołęka city appealed this judgment to the Court of Appeal in Warsaw. In its judgment of 28 March 2006 (VI Aca 1190/05), the Court of Appeal reduced the fine from 50,252.50 PLN to 25,126 PLN. The Court of Appeal justified its decision by stressing that the amount of the fine set by the President of UOKiK was too high. It suggested that unlike in the case of commercial undertakings, a fine imposed on a local government unit has no effect since it is covered from public funds. The Court of Appeal noted also that Ostrołęka city ceased the practice immediately after the infringement was established and that its fault was limited.

The President of UOKiK filed a cassation appeal to the Polish Supreme Court claiming that the Court of Appeal infringed substantial rules of the Competition Act 2000 (Article 1(1) and Article 4.1) in the light of the principle of equality contained in Article 32(1) of the Polish Constitution. According to the President of UOKiK, this took place because the Court of Appeal found that the fines imposed on a local government unit should be, as a rule, lower than those for commercial undertakings. The President of UOKiK objected also to the view of the Court of Appeal that fines paid from public funds can not fulfil their repressive and educational role.

### **Key legal problems of the case**

#### ***The local government unit as an undertaking under the competition law***

The definition of “an undertaking” under the Competition Act 2000 is very wide. Its Article 4 para. 1 states that the term shall have the same meaning as under the provisions on the freedom of business activity. Additionally treated as an undertaking shall be organisational units without a legal status, to which the legislation grants legal capacity, organising or rendering services of a public utility nature, which are not a business activity within the meaning of the provisions on the freedom of business activity. The fact that local government units can render business activities, and therefore be considered as an undertaking under antitrust law, has been repeatedly confirmed by the Polish jurisprudence<sup>4</sup>.

A local government unit influences the state of competition on its local markets by providing certain services directly. However, a similar influence can occur when it provides services indirectly especially by being responsible for the organisation of the provision of external services (such situation was assessed in the commented judgment)<sup>5</sup>. A local government unit usually organises the way in which public utility

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<sup>4</sup> See the decision of the Supreme Court of 19 October 1999, III CZ 112/99 (2000) 20 *Wspólnota*, item 26, decision of the Supreme Court of 12 May 2000, V CKN 48/00, LEX No. 52691, decision of the Supreme Court of 7 August 2003, IV CZ 90/03, unpublished.

<sup>5</sup> Judgment of Antimonopoly Court of 23 April 1992, XVII Amr 7/92, unpublished; judgment of Antimonopoly Court of 8 September 1999, XVII Ama 27/99 (2001) 1 *Wokanda*, item 55. Also K. Kohutek, [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i*

services are provided in its territory including: cemetery and burial services<sup>6</sup>, garbage collection<sup>7</sup> and the organisation of public city transportation, in particular, deciding about the access to bus stops<sup>8</sup>.

In the commented judgment, the Ostrołęka city commune had a fine imposed upon itself for the organisation of public utility services. That fact was supported by the direct provisions of the Competition Act 2000 as well as by antitrust jurisprudence. The approach of the Supreme Court must be therefore approved.

### *The prerequisites to be taken into consideration when imposing a fine under antitrust law*

According to Article 104 of the Competition Act 2000<sup>9</sup>, when fixing the amount of the fine referred to by Articles 101-103, taken into account should be, in particular, the duration, gravity and circumstances of the infringement of the antitrust rules as well as previous infringements. The use of the term “in particular” means that the catalogue does not have an exhaustive character; jurisprudence has therefore identified two types of additional factors influencing the imposition of antitrust fines. The first one concerns relatively precise circumstances of the case such as: profits resulting from the practice<sup>10</sup>, the role of the leader in the practice<sup>11</sup> or the fact that the company ceased the practice<sup>12</sup>. The second group concerns the imprecise motion of the level of the danger to the public interest<sup>13</sup>. It is worth stressing that neither of the two groups can be seen to include the source, form and method of financing of the fines imposed for the violation of Article 5 and Article 8 of the Competition Act 2000 and as such, they cannot be treated as grounds for the justification of giving local government units a privileged treatment in this respect.

Despite this, SOKiK has on one occasion reduced the fine believing that it would have affected the fulfilment of the Polish Football Association’s public duties that

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*konsumentów, Komentarz [Act on competition and consumer protection. Commentary], Warszawa 2008, p. 106.*

<sup>6</sup> Judgment of the Court of Competition and Consumer Protection of 1 December 2004, XVII Ama 70/03 (2005) 11 *Wokanda*, item 53.

<sup>7</sup> Judgment of the Court of Competition and Consumer Protection of 3 December 2003, XVII Ama 139/02 (2004) 11 *Wokanda*, item 50.

<sup>8</sup> Judgment of the Court of Appeal in Warsaw of 8 January 2008, VI ACa 481/07, unpublished.

<sup>9</sup> Article 111 of Competition Act 2007.

<sup>10</sup> Judgment of the Supreme Court of 27 June 2000, I CKN 793/98, Lex No. 50870.

<sup>11</sup> Judgment of the Court of Competition and Consumer Protection of 17 June 2004, XVII Ama 39/03 (2005) 7-8 *Wokanda*, item 106.

<sup>12</sup> Judgment of the Court of Competition and Consumer Protection of 10 April 2006, XVII Ama 88/04 UOKiK Official Journal 2006 No. 3, item 44.

<sup>13</sup> Judgment of the Supreme Court of 27 June 2000, I CKN 793/98, Lex No. 50870; judgment of the Court of Competition and Consumer Protection of 7 April 2004, XVII Ama 46/03 (2005) 5 *Wokanda*, item 52; judgment of the Court of Competition and Consumer Protection of 21 March 2005, XVII Ama 16/04, UOKiK Official Journal 2005 No. 2, item 27.

relied on such funding<sup>14</sup>. On several occasions, the courts have nevertheless refused to reduce fines just because they would have been covered from public funds, even when the funds were meant to be spent on local investments<sup>15</sup>. In some cases, the courts did not even consider the source of the funding while imposing the penalty<sup>16</sup>.

### **Key findings of the Supreme Court**

The Supreme Court approved the cassation appeal submitted by the President of UOKiK due to the very low quality of the justification of the judgment of the Court of Appeal. In the opinion of the Supreme Court, the Court of Appeal based its judgment on general observations only, without proper reference to the legal basis or facts of the case. The Supreme Court noted that Article 101(2(1)) of the Competition Act 2000, which lists the circumstances that have to be taken into consideration while imposing a fine, does not include the character or structure (public or private) of the entity that is to be fined. The fact was stressed, that the Court of Appeal failed to precisely show on which legal grounds it decided to reduce the fine.

In more general terms, the Supreme Court confirmed that a local government unit is an undertaking from the point of view of antitrust law and thus, the fact that the fine would be covered from public funds is irrelevant to the imposition of the fine. The Supreme Court further clarified that a fine fulfils its repressive and educating role regardless of whether it is paid from private or public funds. It was said in addition that the source, form and method of financing the fine imposed for a violation of the Competition Act 2000 are not relevant from the point of view of free competition protection and the role and function of fines within the antitrust law regime. Thus, a local government unit, such as a commune, cannot be treated in a privileged way in this respect, even if it provides public utility services.

### **Final remarks**

The judgment of the Supreme Court of 5 January 2007 (III SK 16/06) finally confirmed that the sources, form and method of financing of the fines imposed for the violation of the provisions of the Competition Act 2000 are irrelevant to their imposition<sup>17</sup>. When determining the level of the fine, the President of UOKiK must take into account the grounds specified directly in the Competition Act 2000 (now

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<sup>14</sup> Judgment of the Court of Competition and Consumer Protection of 14 February 2007, XVII Ama 98/06, unpublished.

<sup>15</sup> Judgment of the Court of Competition and Consumer Protection of 7 April 2004, XVII Ama 48/03, UOKiK Official Journal 2006 No. 3, item 311.

<sup>16</sup> Judgment of the Court of Appeal in Warsaw of 24 November 2005, VI ACa 361/05, unpublished; judgment of the Court of Competition and Consumer Protection of 23 June 2005, XVII Ama 44/04, UOKiK Official Journal 2005 No. 3, item 43.

<sup>17</sup> The doctrine approves this approach. See comments to the Supreme Court judgment by G. Materna, "Czynniki wpływające na kary pieniężne za naruszenie przez jednostkę samorządu terytorialnego zakazów praktyk ograniczających konkurencję" ["Factors influencing penalties for

Article 111) or those identified by jurisprudence. It is not correct to determine the amount of the fine on the basis of the presumption that local government units should have their fines reduced because they would cover them from public funds. To ensure effective protection of free competition on local markets and the general function of antitrust fines, the same rules must apply to the penalisation of antitrust infringements committed by private undertakings and local government units. In fact, local government units are also “undertakings” even in cases where they merely organise public utility services. A different approach would have discriminative effects for other entities conducting their business activities on the same markets. Unequal treatment could also prove disadvantageous for consumers, for whom access to services provided by competing firms guarantees their proper quality and price.

Considering all of the above, the judgment of the Supreme Court must be supported.

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an infringement by a local government unit of prohibitions of practices restricting competition”] (2008) 1 *Glosa*.

**When will the imposition of the requirement to co-finance  
the construction of necessary facilities constitute an abuse  
of a dominant position?**

**Case comment to the judgment of the Supreme Court of 5 January  
2007 – *Kolej Gondolowa*  
(Ref. No. III SK 17/06)**

**Facts**

The President of the Office of Competition and Consumer Protection (hereafter, UOKiK) issued on 24 March 1999 a decision (RKR-500s-01 9/98/LP-454/99) in which he refused to accept the motion<sup>1</sup> lodged by *Koleja Gondolowa Jaworzyna Krynicka S.A.* (hereafter, KGJ) claiming that *Zakład Energetyczny Kraków S.A.* (hereafter, ZEK) had abused its dominant position on the local market for the supply of electricity. In the opinion of KGJ, the abuse took the form of the imposition upon KGJ by ZEK of onerous terms and conditions of their agreements. KGJ and ZEK concluded two functionally related contracts:

- an investment contract which obliged the parties to jointly finance the construction of the energy facilities necessary to build and operate by KGJ a cable-car system on Jaworzyna (KGJ – 53% and ZEK - 43%); and
- a contract concerning the gratuitous transfer from KGJ to ZEK of the jointly financed facilities.

The President of UOKiK did not agree with the position of KGJ. Instead, he stated that the return by ZEK of all the expenses incurred by KGJ would lead to a violation of the performance equivalency principle. A similar view was taken by the Court of Consumer and Competition Protection (hereafter, SOKiK) that stated that the demands of KGJ should be viewed as an attempt to apply competition rules so as to avoid the participation in the settlement of the joint investment. KGJ filed for cassation to the Supreme Court which remanded the case to the Court of Appeal for

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<sup>1</sup> The possibility to file a motion for instituting antimonopoly proceedings is no longer provided under the provisions of the Act of 17 February 2007 on Competition and Consumer Protection (Journal of Laws 2007 No. 50, item 331; hereafter, Competition Act). That institution was replaced by the currently available right to notify UOKiK of a suspicion that a competition restricting practice has been applied (see Article 86 of Competition Act); see also K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2008, p. 904.

its examination as an appeal. The appeal was dismissed. Finally, the Supreme Court in its judgment of 5 January 2007 settled this dispute in favour of KGJ quashing the judgment of the Court of Appeal and remanding the case for re-examination.

### **Key legal problems of the case and key findings of the Supreme Court**

The basic problem that arose in this case concerned the different legal qualifications of the contracts concluded between KGJ and ZEK in the light of the prohibition of the abuse of a dominant market position. The Supreme Court found, and in my opinion rightly so, that ZEK's conduct should be qualified as an abuse taking the form of the imposition upon KGJ of onerous terms and conditions of their agreements, which yielded unjustified profits to ZEK (see Article 9(2(6)) of the Competition Act<sup>2</sup>). This form of abuse constitutes an exploitative practice of a dominant firm.

Finding that the assessed conduct constitutes an abuse requires however the cumulative fulfillment of the three following prerequisites:

- the “imposition” of the terms and conditions by the dominant firm;
- the “onerousness” of these terms and conditions (from the perspective of the dominant undertaking's contracting party);
- the “yielding of unjustified profits” (to the dominant undertaking<sup>3</sup>).

The Supreme Court distinguished all of the abovementioned prerequisites, pointing out that all of them were fulfilled in this case.

### ***Imposition of onerous agreement terms and conditions***

For the purposes of Article 9(2(6)) of the Competition Act, the notion of “imposition” shall be interpreted broadly. In this respect, it is advisable to follow the position of the Supreme Court stating that the objective scope of “imposition” encompasses situations where the potentially exploited firm (which has interests in receiving the necessary energy from a dominant firm) has no option but to purchase goods (in this case: energy) from the sole existing supplier. Such findings are correct seeing as they refer to the state of competition existing on the market or, to be more precise considering the circumstances of the assessed case, to the state of the lack of competition in the given market (or its significant restriction).

Nonetheless, the fact that the relevant upstream market is characterised by the existence of a dominant undertaking does not – *per se* – translate into a lack of alternative supply options for undertakings operating on the downstream market

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<sup>2</sup> That form of abuse was listed in the former Polish competition acts; see Article 5 para. 1 point 6 of the Act of 24 February 1990 on Counteracting Monopolistic Practices and Consumer Protection (consolidated text: Journal of Laws 1999 No. 52, item 547) and Article 8(2(6)) of the Act of 15 December 2000 on Competition and Consumer Protection (consolidated text: Journal of Laws 2003 No. 68, item 804).

<sup>3</sup> That prerequisite was not closely examined by the Supreme Court; thus discussing it will be omitted.

since they still have (or certainly can have) the possibility of receiving the necessary products/services<sup>4</sup> from other upstream firms<sup>5</sup>. However, in this case there was no such possibility. ZEK was a **natural monopolist** on the local market of electricity supply in Krynica. As a result, KGJ was in fact forced to use the supply of a local monopolist since it needed to gain access to the energy necessary for starting and operating a cable-car on Jaworzyna.

That does not mean that finding an exploitative practice (described in Article 9 para. 2 point 6 of the Competition Act) is limited only to situations where the undertaking, which imposes onerous agreement terms and conditions, possesses a monopolistic position. In my opinion however, enjoying such a position constitutes a factor that *per se* determines the fulfillment of the “imposition” criteria<sup>6</sup>. Possessing therefore merely a dominant, rather than monopolistic, position will require additional proof that, despite the existence of some substitutive goods<sup>7</sup>, the downstream undertaking (undertakings) has in actuality very limited supply options or even – particularly when considering all case specific circumstances – that such options *de facto* do not exist.

### *The onerousness of the imposed terms and conditions*

The second prerequisite requires that the terms and conditions imposed by a dominant firm (in this case: ZEK) are onerous from the point of view of its contracting party (in this case: KGJ). Concerning this issue, the Supreme Court took however in the case concerning KGJ and ZEK a view completely different from the opinions previously expressed by the President of UOKiK, SOKiK and the Court of Appeal. The prerequisite of onerousness should generally be considered to be fulfilled if the dominant contracting party is granted benefits that exceed those which would normally follow such contract. For that purpose it is necessary to examine whether, hypothetically, a dominant undertaking would be able to negotiate such onerous terms and conditions<sup>8</sup> in a competitive market, or a market that is at least more competitive than the one under scrutiny. It seems very unlikely that the result of such test would be positive in this case. The terms and conditions of the contracts between KGJ and ZEK (see: Facts) differed from the terms that could have been negotiated for similar

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<sup>4</sup> See the definition of “goods” which includes not only products, but also all forms of energy, securities and other property rights, services as well as construction works (Article 4(7) of the Competition Act).

<sup>5</sup> These firms are the competitors of the dominant company.

<sup>6</sup> This of course does not determine the qualification of such monopolistic conduct as an abuse; this “only” confirms the fulfillment of the first of the prerequisites. The monopolist could effectively question the charge of an abuse by proving that, in spite of an “imposition” of certain terms and conditions, those terms were not onerous for his contracting party and eventually, that they did not yield unjustified profits to him.

<sup>7</sup> Offered by the competitors of the dominant company.

<sup>8</sup> See also judgment of SOKiK of 26 January 2005, XVII Ama 89/03, UOKiK Official Journal 2005 No. 2, item 25.

services (in this case: energy supply) under the condition of effective (“normal”) competition.

The onerousness of the assessed terms and conditions consisted of the imposition on KGJ of the obligation of a gratuitous transfer to ZEK of the relevant facilities, even though KGJ incurred 53% of the expense of their creation. In consequence, on the basis of such obligation, ZEK was granted “free financing” of over half of the investment in the construction of the facilities. Negotiating a “donation” of that kind is highly unlikely on a competitive market. Therefore, one should share the Supreme Court’s position rejecting the statement of SOKiK which incorrectly claimed that a free transfer of the facilities was not onerous to KGJ because it allowed the former to obtain (in return) access to a source of energy that was necessary to conduct its economic activity.

The conclusion of the Supreme Court is justified for at least two reasons. Firstly, a legal relationship for energy sale does not include the construction of facilities<sup>9</sup> or the financing/co-financing of such investment. Secondly, the possibility of gaining access to an energy supply network cannot be treated as equivalent to the non-dominant party’s co-financing of the construction expenses (perhaps such a finding would be justified if, for a certain period of time, KGJ was supplied energy free of charge<sup>10</sup>). Under normal business practice in the energy supply field, the equivalent compensation for the energy supplied is the fee payable to the supplier by its customers. The fact that the energy received by this specific customer is to be used solely for profit-making activities (conducted by this customer), is irrelevant to the above assessment.

In practice however, cases in which a firm interested in receiving a certain service participates in the financing or co-financing of the construction of the facilities necessary for the provision of such service, can occur relatively frequently. There are no grounds to treat such cases as a *per se* violation of the prohibition of a dominant position abuse<sup>11</sup>. Nevertheless, when parties decide to finance the necessary investment jointly, than each of them simultaneously (and usually also proportionally to the expenditure incurred) participates in the profits associated with such investment. Similarly therefore, a part of the profits made by ZEK from the supply of the energy, which was made possible on the basis of the jointly financed facilities, should be transferred to KGJ. This case is quite unique, because one (and the same) undertaking appears in a “dual role”. As such, KGJ is both an investor that should have the right to a share in the profits as well as the sole customer of ZEK, making it the sole source of those profits. In this context, KGJ should have therefore been temporarily released from its obligation of pay fees for the energy supplied by ZEK (or a proportional reduction of such fees)<sup>12</sup>. The Supreme Court supported this second view noticing that

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<sup>9</sup> I.e. facilities which are necessary to render energy supply services.

<sup>10</sup> In this case ZEK however was not obliged to free energy supply to KGJ.

<sup>11</sup> It was pointed out by the Supreme Court that co-financing of investment by customers should not *per se* be treated as a monopolistic practice.

<sup>12</sup> Such solution would simultaneously comply with the principle of performance equivalency and above all would eliminate the grounds for finding an abuse of a dominant position by ZEK.

the prerequisite of onerousness would not be fulfilled (and consequently, no abuse would be found) if the free transfer of the facilities to ZEK led to an appropriate lowering of the price that KGJ would pay for the energy supplied by ZEK<sup>13</sup>.

### Final remarks (consumer welfare test)

An additional argument supports the position taken by the Supreme Court. One can refer to the consumer welfare test as a criterion for the legal qualification of the conduct of a dominant company in the light of its conformity with competition law<sup>14</sup> and, in particular, with its ultimate aim. That aim is to enhance or (at least) to satisfy consumer welfare<sup>15</sup>. With regard to Article 82 EC, the European Commission has also pointed out that the aim of the prohibition of abuse is to help markets to work better for the benefit of businesses and consumers<sup>16</sup>. When applying the abovementioned test to this case, it is justified to find that the conduct of ZEK did not promote consumer welfare or, in fact, that it even hindered its enhancement. It is in the interests of consumers<sup>17</sup> to create a new “product” (in this case: a cable-car) and to be able to buy it for a competitive, rather than inflated, price. Therefore the following findings seem to be justified:

- i) the creation and operation of the cable-car facilities would probably be hindered if KGJ, behaving as if the given market was “more competitive” than it actually was, demanded from ZEK that the latter resigned from the condition requiring the gratuitous transfer of KGJ’s investment for the construction of the facilities and the supply of energy<sup>18</sup> necessary for KGJ’s activities;
- ii) rejecting the qualification of the relevant contracts (see Facts) as an abuse of a dominant position would result in burdening KGJ with over half of the construction costs of the facilities without receiving an equivalent return from ZEK. The negative consequences of such solution would be “passed on” to

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<sup>13</sup> The prices were not lowered in this case.

<sup>14</sup> Applying a consumer welfare test as a criterion for finding or excluding abuse is postulated in the literature; see e.g. R. O’Donoghue, A.J. Padilla, *The Law and Economics of Article 82 EC*, Oxford, Portland, Oregon 2006, p. 191 - 193.

<sup>15</sup> See M. Bernatt, A. Jurkowska, T. Skoczny, *Ochrona konkurencji i konsumentów [Competition and consumer protection]*, Warszawa 2007, p. 20; see also K. Kohutek, [in:] K. Kohutek, M. Sieradzka, *Ustawa...*, p. 42 i 43.

<sup>16</sup> See the draft Guidance (of 3 December 2008) on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (see points 1, 5, 19, 82 of that document) which refers to exclusionary abuses. However, exploitative practices of a dominant firm are, by their nature, even more able to harm consumers or trade partners (also in a direct way) than exclusionary ones.

<sup>17</sup> Consumers that constitute a certain group which, in the public interest, is meant to be protected by proper application of competition rules (see also Article 1 of the Competition Act).

<sup>18</sup> KGJ having faced the lack of an alternative offer of energy supply was actually forced to accept the terms and conditions required by ZEK.

consumers (the users of the cable-car) by fixing the prices for using the cable-car on a higher level than that which would normally be expected in a competitive environment. Such practice is very common in the economy; prices of goods/services offered by an undertaking usually include the costs which are, or were, being incurred by that undertaking to produce those goods or to render those services.

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**The legal status of foreign undertakings –  
could undertakings with a registered seat abroad be regarded  
as undertakings entitled to file a request for the institution of  
antimonopoly proceedings under Polish antitrust law?  
Case comments to the judgment of the Supreme Court of 10 May 2007  
– *Netherlands Antilles*  
(Ref. No. III SK 24/06)**

**Facts**

By the judgment of 10 May 2007 (III SK 24/06)<sup>1</sup>, the Polish Supreme Court ended an over decade-long debate concerning the anticompetitive practices of the Polish incumbent telecoms operator Telekomunikacja Polska S.A. (hereafter, TP) on the national market for audio-text services. In this judgment, the Supreme Court interpreted the provisions of the Act of 24 February 1990 on Counteracting Monopolistic Practices<sup>2</sup> (hereafter, Antimonopoly Act). However, in its assessment of the general principles of the case, the Court also made reference to the Act of 15 December 2000 on Competition and Consumer Protection<sup>3</sup> (Competition Act 2000), which replaced the Antimonopoly Act. The Supreme Court ruled that a firm's entry, or lack thereof, into the Register of Entrepreneurs of the National Court Register does not prejudice its status as "an undertaking" within the meaning of Article 4(1) of the Competition Act 2000 – decisive in this context was said to be the conduct of an economic activity, rather than the fact of registration. Both the principle and the line of reasoning contained in the judgment remain valid, partly at least, under the current Act of 16 February 2007 on Competition and Consumer Protection<sup>4</sup> (Competition Act 2007).

In 1995 TP blocked the possibility for consumers to make an automatic connection with foreign audio-text operators – consumers who wished to use their services had to dial the required number through an operator, which was inconvenient and costly. Simultaneously, consumers could dial directly the numbers of national audio-text service providers. Almost at the same time that automatic access to foreign audio-

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<sup>1</sup> (2008) 9-10 OSNP, item 152.

<sup>2</sup> Consolidated text - Journal of Laws 1995 No. 80, item 405, as amended.

<sup>3</sup> Journal of Laws 2005 No. 244, item 2080, as amended.

<sup>4</sup> Journal of Laws 2007 No. 50, item 331, as amended.

text services was blocked, the first entertainment telecoms company was created in Poland, which shared profits with TP.

In 1997 two companies from the Netherlands Antilles, Antillephone N.V. and Antelecom N.V., accused TP of abusing its dominant position, which hindered their activities on the Polish market of audio-text services. Following their request for the institution of antimonopoly proceedings against TP, the President of the Office of Competition and Consumer Protection (hereafter, UOKiK) opened such proceedings in accordance with the Antimonopoly Act. The authority ultimately decided that the actions of TP constituted a competition restricting practice, which resulted in the elimination of foreign providers from the national market of audio-text services, depriving consumers of their free choice. By the decision of 15 September 2000, the President of UOKiK ordered TP to stop the illegal practices and imposed a penalty of PLN 1 million (about EUR 260,000).

### Key legal problems of the case

TP appealed the decision of the President of UOKiK to the Court of Competition and Consumer Protection (hereafter, SOKiK) asserting, *inter alia*, that the President of UOKiK failed to establish that the applicants were “undertakings” within the meaning of the Antimonopoly Act and the Economic Activity Act of 23 December 1988<sup>5</sup> (hereafter, the Economic Activity Act). According to the appeal, the applicants did not possess the legal status of an undertaking since they were not listed in the Register of Entrepreneurs of the National Court Register. Thus, as companies with their registered seat abroad, they could not be protected by Polish law. By the judgment of 18 December 2002 (XVII Ama 19/01)<sup>6</sup>, SOKiK dismissed the appeal approving both the factual and legal findings of the President of UOKiK. However, SOKiK also pointed out that according to Article 113 of the Competition Act 2000, proceedings instituted under the Antimonopoly Act should be conducted under the new Act. TP filed a cassation appeal to the Polish Supreme Court claiming that the judgment violated material and procedural laws. In the judgment of 24 May 2004 (III SK 41/04)<sup>7</sup>, the Supreme Court held that the case should be decided pursuant to the Antimonopoly Act, hence, the evaluation of the legitimacy of the request for the institution of antimonopoly proceedings should be performed in accordance with the provisions of the earlier Act.

By the judgment of 3 August 2005, SOKiK once more dismissed the appeal. It confirmed that both applicants did fall within the definition of “an undertaking” contained in the Antimonopoly Act and in accordance with the definition of “an economic activity” contained in the Economic Activity Act (proven by the extracts from the Netherlands Antilles’ commercial register). As a result, the applicants were indeed

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<sup>5</sup> Journal of Laws 1988 No. 41, item 324, as amended.

<sup>6</sup> UOKiK Official Journal 2003 No. 2, item 260.

<sup>7</sup> (2005) 13 OSNP, item 199.

entitled to request the institution of antimonopoly proceedings against TP. SOKiK performed once more a substantive evaluation of the defendant's actions, upholding its previous position in terms of the anticompetitive nature of the practices of the incumbent.

TP appealed the second judgment of SOKiK to the Court of Appeal in Warsaw, sustaining its previous charges. By the judgment of 30 June 2006, the Court of Appeal in Warsaw rejected the appeal as groundless. Once more, TP filed a cassation appeal to the Supreme Court claiming that the Court of Appeal incorrectly defined the term "an undertaking" and thus incorrectly assumed that the applicants were entitled to file a request for the institution of antimonopoly proceedings. TP claimed that the two foreign companies did not prove their legal interest in filing such a request, which, in the defendant's opinion, was required by the Antimonopoly Act.

### **Key findings of the Supreme Court**

**I.** By the judgment of 10 May 2007 (III SK 24/06), the Polish Supreme Court dismissed the cassation appeal in its entirety holding that the applicants were "economic entities" (undertakings) within the meaning of the Antimonopoly Act and that they were legally entitled to submit a request for the institution of antimonopoly proceedings. According to the principle established by this judgment, a firm's entry, or lack thereof, into the Register of Entrepreneurs of the National Court Register does not prejudice its status as "an undertaking" within the meaning of Article 4(1) of the Competition Act 2000 (the conduct of an economic activity constitutes the decisive criterion in this respect).

**II.** Both the conclusions reached as well as the justification given by the Supreme Court are correct. In the light of the Supreme Court's judgment in case III SK 41/04, there is no doubt that with regard to the case under consideration here, the evaluation of the effectiveness of the request for the institution of antimonopoly proceedings, as well as the legitimacy of such request, should be performed in accordance with the provisions of the Antimonopoly Act. According to Article 21 of this Act, the said proceedings could be instituted on an *ex officio* basis or upon request of an entitled entity. Those entitled to request the institution of antimonopoly proceedings included, among others: economic entities whose business suffered or may suffer as a result of monopolistic practices.

**III.** In accordance with Article 2(1) of the Antimonopoly Act, an "economic entity" (subsequently replaced by the term "an undertaking") meant "a natural person, a legal person, and an organisational unit, which is not a legal person, conducting an economic activity or organising or performing public utility services, that do not constitute an economic activity in accordance with the Economic Activity Act". As the Supreme Court rightly observed in its justification of the judgment in the III SK 41/04 case, the aforementioned provision of the Antimonopoly Act did not make a reference to the provisions of the Economic Activity Act concerning the definition of an economic entity. The Antimonopoly Act included its own definition of an economic entity (an undertaking), making reference to the provisions of the Economic Activity

Act only with regard to the definition of an economic activity<sup>8</sup>. Therefore, in order to qualify a given entity as an economic entity within the meaning of the Antimonopoly Act, it was not significant whether the entity conducted an economic activity in Poland in accordance with the provisions of the Economic Activity Act or other legislation. Important instead was the fact whether the given entity was a natural person, a legal person or an organisational unit and performed activities, which in the light of the provisions specified in the Economic Activity Act, could be seen as an economic activity.

In accordance with Article 2(1) of the Economic Activity Act, an economic activity meant “a production, construction, trade and service activity conducted in order to generate profit and performed on the own account of the entity conducting the said activity”. As the Supreme Court rightly emphasised, these were the only significant criteria that qualified a given entity as an economic entity within the meaning of the Antimonopoly Act – the registration in a specific register should have been of no relevance in this context<sup>9</sup>. It may be added in support of this opinion that the mere fact of fulfilling, or failing to fulfil, the obligation to register (for example: in the Register of Entrepreneurs or the Economic Activity Records) was also not decisive for the Economic Activity Act when qualifying a given activity as an economic activity and an entity conducting that activity as an entrepreneur. Crucial in this context was the fulfilment of statutory prerequisites of the definition of an economic activity and an entrepreneur<sup>10</sup>. The situation is similar under the Act of 2 July 2004 on the Freedom of Economic Activity<sup>11</sup> which replaced the Economic Activity Act.

The broad interpretation of the definition of an economic entity (an undertaking) for the purposes of Polish antitrust law that was accepted in the commented judgment (also generally accepted in the legal doctrine) seems to be additionally supported by Article 1 of the Antimonopoly Act that states that “the Act determines conditions for the development of competition, regulates the rules and measures of counteracting monopolistic practices as well as violations of consumer interests by undertakings and associations thereof, where such practices or violations cause or may cause effects in the territory of the Republic of Poland”. On the basis of the principle of extraterritoriality contained in this provision, the Polish Supreme Court rightly assumed (with reference to the justification of the judgments of the first and second instance courts) that if the Antimonopoly Act applied to monopolistic practices bearing consequences within the territory of the Republic of Poland, irrespective of the fact whether the entity responsible for them had the status of an entrepreneur (in accordance with the

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<sup>8</sup> S. Gronowski, *Ustawa antymonopolowa – komentarz [Antimonopoly law – commentary]*, Warszawa 1999, p. 56-57.

<sup>9</sup> *Ibidem*, p. 56.

<sup>10</sup> See E. Bieniek-Koronkiewicz, T. Mróz, “Kontrowersje wokół pojęcia ‘przedsiębiorca’” (2003) 6 *Prawo Spółek* 42.

<sup>11</sup> See A. Powalowski (ed.), *Ustawa o swobodzie działalności gospodarczej. Komentarz [Act on Freedom of Economic Activity. Commentary]*, Warszawa 2007, p. 39; M. Szydło, *Swoboda działalności gospodarczej [Freedom of Economic Activity]*, Warszawa 2005, p. 102-103; judgment of the Supreme Administrative Court of 25 October 2006, II GSK 179/06, LEX No. 276729.

laws regulating economic activity of Polish economic entities), then a similar method should apply to the qualification of the entity submitting a request for the institution of antimonopoly proceedings.

If a different approach was taken, a foreign undertaking wishing to submit a request for the institution of proceedings on the basis of the Antimonopoly Act would have had to formally commence economic activities in Poland. It would be wrong to accept an approach that deprived all foreign undertakings, which did not conduct an economic activity in the form stated in Polish laws, of the status of an economic entity within the meaning of the Antimonopoly Act and thereby, of the capacity to file a request for the institution of antimonopoly proceedings. Moreover, if this approach was applied, it would consequently lead to the assumption that such entities had also no capacity to be passive participants in Polish antimonopoly proceedings, in other words, that they could not have had proceedings instituted against them. This would have allowed them to violate Polish antitrust law without bearing any consequences for it.

Justifying its position, the Supreme Court was right to observe that, with regard to the decisions made so far, the possibility of applying the provisions of the Antimonopoly Act to foreign undertakings did not raise any doubts. This opinion is proven by at least two of the many decisions taken in cases concerning foreign undertakings quoted by the Supreme Court: 1) “The Antimonopoly Act also applies to agreements concluded with entities with their registered seat abroad, if their consequences with regard to monopolistic practices occur within the territory of the Republic of Poland”<sup>12</sup>; 2) “In order to assess whether a given action of a foreign undertaking bears the consequences of monopolistic practice within the territory of Poland, which is governed by Polish laws, in accordance with Article 1 of the Antimonopoly Act, we should rely on the market position (power) of the said undertaking on the foreign market where its activity concerning a given product is concentrated”<sup>13</sup>.

IV. The objections made against the judgment of the Court of Appeal concerning the potential violation of Article 21(2(1)) of the Antimonopoly Act (accepting the active capacity of the entities to request the institution of the proceedings, despite the claim that they did not prove their legal interest in filling such a request) were also rightly considered to be groundless by the Supreme Court. In accordance with the then generally accepted view that Article 21 (2(1)) was concerned with “actual”, rather than legal, interest of the applicant, any firm that decided that its business interests had suffered or may have had suffered from a monopolistic practice could prove actual interest. If the legislator intended here to require proving a legal interest, this rule would have made a direct reference to the definition of “a legal interest” as was the case, for example, in Article 84(1) of the Competition Act 2000.

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<sup>12</sup> Judgment of the Antimonopoly Court of 24 January 1991, XV Amr 19/90 (1992) 5 *Wokanda*, item 37.

<sup>13</sup> Judgment of the Antimonopoly Court of 21 January 1998, XVII Ama 55/97 (1999) 2 *Wokanda*, item 48.

### **Final remarks**

Fortunately, in its justification of judgment under consideration, the Supreme Court did not repeat its opinions formulated in the justification of the III SK 41/04 case where it was said “that it can hardly be assumed that, for the purposes of public commercial law (both the Antimonopoly Act, as well as the Economic Activity Act could be included in this particular branch of law), the legislators used the same definition with a different meaning, attributing it with different prescriptive content, in particular, including various types of entities”. This opinion seems to contradict the legislative practice (which is difficult to accept, but unfortunately well established) of defining the same term in different ways in various legal acts, as exemplified by the different legal definitions of the term “undertaking” used in the Antimonopoly Act and the Economic Activity Act<sup>14</sup>. The same situation applies to the Competition Act 2007 and the Freedom of Economic Activity Act 2004.

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<sup>14</sup> It must be noted here that the terms: “an undertaking” under the Antimonopoly Act and “an entrepreneur” under the Economic Activity Act had one and the same Polish equivalent, which was “przedsiębiorca”.

**Does a selection of contractors in a public tender constitute an  
infringement of a prohibition of competition restricting agreements?  
Case comment to the judgment of the Supreme Court of 25 April 2007  
– STALEXPORT – TRANSROUTE  
(Ref. No. III SK 3/07)**

**Facts**

The judgment of the Supreme Court of 25 April 2007 (Ref. No. III SK 3/07) must be supported. Assessed was primarily the relationship between Polish legislation concerning toll motorways and road traffic and the former Act of 15 December 2000 on competition and consumer protection (hereafter, Competition Act 2000)<sup>1</sup>. The Supreme Court had to determine most of all whether it was possible to evaluate the actions of a motorway operator in the light of Article 3 section 1 of the Competition Act 2000<sup>2</sup> as well as, whether the use of a public tender procedure (Article 70<sup>1-5</sup> of the Civil Code) justified the restriction of competition that occurred on the basis of the agreement that was concluded between the motorway operator and provider selected by the tender.

In a decision of 23 January 2003 (No. RTK 6/2003), the President of the Office of Competition and Consumer Protection (hereafter, UOKiK) found that the contracts that the motorway operator STALEXPORT – TRANSROUTE Autostrada S.A. concluded with several accident assistance providers constituted a set of competition restricting agreements. The Authority established that the parties have:

- (a) fixed the prices that consumer would have to pay for accident assistance services on the relevant part of the local road system, which constituted a breach of Article 5 section 1 item 1 of the Competition Act 2000;
- (b) divided the market for accident assistance services on the toll section of the A4 motorway, which constituted a breach of Article 5 section 1 item 3 of the Competition Act 2000; and

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<sup>1</sup> Journal of Laws 2003 No.. 86, item 804 as amended. The judgment of the Supreme Court remains fully valid also on the grounds of the new Competition and Consumer Protection Act dated 16 February 2007.

<sup>2</sup> In accordance with this provision “(...) *this Act shall not be applicable to any restriction on competition permitted under separate law*”.

- (c) limited access to the market for non-selected service providers, which constituted a breach of Article 5 section 1 item 6 of the Competition Act 2000.

The President of UOKiK imposed a fine on the parties for restricting competition on the relevant market. The parties were also charged with the costs of the proceedings. All of the fined companies submitted appeals requesting for the antitrust decision to be amended by declaring that the disputed agreements did not restrict competition. The Court for Competition and Consumer Protection (hereafter, SOKiK) dismissed the appeals on 24 March 2004. The motorway operator submitted a cassation appeal to the Supreme Court against the judgment of SOKiK, seeking to repeal it in its entirety and refer the case to SOKiK for reconsideration. The motorway operator claimed that many provisions of substantive law as well as numerous procedural rules were breached.

In its judgment of 14 December 2005, the Supreme Court<sup>3</sup> remanded the cassation appeal as an ordinary appeal to be reassessed by the Court of Appeal. In its judgment of 20 September 2006, the Court of Appeal dismissed the appeal once again in the light of Article 385 of the Polish Civil Procedure Code. The second-instance court agreed with SOKiK's earlier assessment of the facts of the case as well as of its legal basis. The motorway operator submitted another cassation appeal to be assessed by the Supreme Court requesting that the judgment of the Court of Appeal be repealed in its entirety and remand for reassessment. The cassation appeal was once again based on allegations of breaches of the provisions of substantive law and procedural rules.

## Key legal problems of the case

### *Relevant market and exclusivity clauses*

There was no doubt that the lower instance courts have correctly determined the market position of the motorway operator<sup>4</sup> as well as the relevant market in its product and geographic dimension<sup>5</sup>. It was also clear that the disputed agreements contained an exclusivity clause and that they fixed prices for the assistance services available to consumers on the toll section of the A4 motorway<sup>6</sup>. It should be emphasised however,

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<sup>3</sup> Due to amendment to the Polish Code of Civil Procedure that was applicable to the original proceedings.

<sup>4</sup> The courts found that the motorway licensee holds a 100% share in the relevant market.

<sup>5</sup> The courts of all the instances correctly stated that the relevant geographic market in this case was a section of the A4 Katowice-Krakow motorway; the product market included motor accident assistance services. Since the toll section of the motorway is used by drivers (consumers paying a certain fee), they are able to travel the distance from Krakow to Katowice in a fast and comfortable way; neither public roads nor express roads can be regarded as a substitute for this motorway since their features cannot be compared to the toll section of the A4 motorway.

<sup>6</sup> Attached to the disputed agreements was a fixed pricelist agreed between the selected assistance providers and the motorway licensee; the fees were two times higher than the prices

that the exclusivity clauses protected mainly the interests of the accident assistance service providers. The contracts resembled therefore exclusive distribution agreements where exclusivity is granted for a given territory (the toll section of the A4 motorway) and the obligation to guarantee exclusivity rests with the supplier (the operator of the toll motorway)<sup>7</sup>. To additionally strengthen the exclusivity clause, competition was prohibited between the selected providers on certain sections of the motorway and all the nearby police units were required to call for assistance only those providers that were authorised by the motorway operator. As a result, the selected accident assistance providers were given absolute territorial protection in their relevant market<sup>8</sup>.

Antitrust authorities are known to strongly disapprove of such market practice<sup>9</sup> since absolute exclusivity allows the selected providers to act in a state of no competition<sup>10</sup>. The Supreme Court correctly noted therefore that, as a result of the disputed agreements, all possible competition was eliminated by dividing the market in an illegal manner and restricting access to it to the detriment of consumers and independent assistance providers. As a result, consumers (the users of the motorway) were deprived of the opportunity to choose their service provider and were obliged to pay a high flat rate fee for accident assistance services as fixed in the disputed agreements.

### *The possibility of excluding the application of antitrust provisions under separate laws*

When considering the possibility of excluding the application of antitrust rules based on separate legal provisions (Article 3(1) of the Competition Act 2000), it is worth referring to the Community legal practice and specifically, to the jurisprudence of the European Court of Justice (hereafter, ECJ). There are no provisions in European law that exclude the application of antitrust rules in certain areas (sectors), which is similar to the Polish legal system. The ECJ assesses the possibility of applying Article 81 or Article 82 EC by analysing the notion of an “undertaking” and an “economic activity”. In this respect the ECJ considers an economic activity to be any activity

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charged by independent local providers.

<sup>7</sup> R. Poźdźik, *Dystrybucja produktów na zasadzie wyłączności w Polsce i Unii Europejskiej* [Exclusive distribution of products in Poland and the European Union], Lublin 2006, p. 11 and 106.

<sup>8</sup> The fact that in extraordinary circumstances (such as a pile-up), certain authorised service providers could provide assistance on other motorway sections does not affect their absolute territorial protection. Such an exception did not restrict the exclusivity granted to the selected service providers but aimed to ensure that customers receive adequate assistance in the case of a pile-up. Services providers authorised to act on a given section were otherwise not permitted to provide assistance to consumers involved in an accident on other sections of the motorway.

<sup>9</sup> Ibidem, p. 107.

<sup>10</sup> See D. Miąsik, [in:] R. Skubisz and others, *Prawo europejskie. Zarys wykładu* [European Law. Framework of lectures], Lublin 2006, p. 353.

consisting in offering goods or services on a given market<sup>11</sup>, regardless of its legal form and the way in which it is financed<sup>12</sup>. If these conditions are met, antitrust law should be applied irrespective of whether such economic activity is associated with sports<sup>13</sup>, regulated professions<sup>14</sup> or with public roads. However, according to the jurisprudence of the ECJ, EC antitrust rules do not apply to an activity which, by its nature, aim and the rules to which it is subject, does not belong to the economic sphere<sup>15</sup> or, which is connected with the exercise of the powers of public authorities<sup>16</sup>.

The Polish Supreme Court was right therefore to state that the application of antitrust rules could not have been excluded in this case by the obligation of the motorway operator (contained in its licence agreement) to organise the accident assistance services, even though this obligation was not contractual but rather was imposed on motorway operators under Article 31 section 2 item 5 of the Act dated 20 June 1997 the Road Traffic Law Act<sup>17</sup>, § 7 of the Regulation of the Council of Ministers dated 25 September 2001 on General Directions of the Cooperation between a Road Licensee, the Road Administration, the Police, the Ambulance Service and the Fire and Rescue Service<sup>18</sup> in connection with Article 62 of the Act dated 27 October 1994 on Toll Motorways and the National Road Fund.<sup>19</sup> Under these provisions, a licence agreement for the operation of motorways should include an obligation of the licensee to ensure the safety of road users, provide continuous access to the motorway and

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<sup>11</sup> See, in particular, the judgments of the ECJ dated 18 June 1998 in case C-35/96 *Commission v. Italy* [1998] ECR I-3851, para. 36; and the judgment dated 12 September 2000 in joint cases C-180/98 to C-184/98 *Pavlov and others* [2000] ECR I-6451, para. 75.

<sup>12</sup> See, in particular, the judgment of the ECJ dated 23 April 1991 in case C-41/90 *Höfner and Elser* [1991] ECR I-1979, para. 21; the judgment dated 17 February 1993 in joint cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, para. 17 and the judgment dated 16 November 1995 in case C-244/94 *Fédération française des sociétés d'assurance and others* [1995] ECR I-4013, para. 14.

<sup>13</sup> See the judgments of the ECJ dated 12 December 1974 in case 36/74 *Walrave and Koch* [1974] ECR I405, para. 4; the judgment dated 15 December 1995 in case C-415/93 *Bosman* [1995] ECR I-4921, para. 73 and the judgment dated 18 June 2006 in case C-519/04 P *Meca-Medina and Majcen v. Commission* [2006] ECR I-6991, paras. 22 and 28.

<sup>14</sup> See, with respect to medical doctors, the judgment of the ECJ dated 12 December 2000 in joint cases C-180/98 to C-184/98 *Pavlov and others* [2002] ECR I-6451, para. 77 and with respect to lawyers, the judgment of the ECJ dated 19 February 2002 in case C-309/99 *J.C.J. Wouters* [2002] ECR I-1577.

<sup>15</sup> See, the judgment of the ECJ dated 17 February 1993 in joint cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paras. 18 and 19, concerning the management of the public social security system.

<sup>16</sup> See the judgment of the ECJ dated 19 January 1994 in case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, para. 30 concerning the control and supervision of air space, and the judgment of the ECJ dated 18 March 1997 in case C-343/95 *Diego Cali & Figli* [1997] ECR I-1547, paras. 22 and 23, concerning anti-pollution surveillance of the maritime environment.

<sup>17</sup> Journal of Laws 2005 No. 108, item 908 as amended.

<sup>18</sup> Journal of Laws No. 118, item 1251.

<sup>19</sup> Journal of Laws 2001 No. 110, item 1192 as amended.

ensure its suitability for driving. However, when performing their statutory obligations, the parties to the licence agreement should always comply with competition rules. However, it is only possible to apply Article 3 section 1 of the Competition Act 2000, if the legislation governing a specific subject matter (*lex specialis*) allows *expressis verbis* for exclusion or restriction of competition. There is no direct restriction of competition under the Act on Toll Motorways.

### ***Tender procedure and the restriction of competition***

The courts of the first and second instances were in agreement that the fact that the motorway operator held a public tender did not affect the assessment of its actions under Competition Act 2000.<sup>20</sup> This view is not correct since using a public tender for the conclusion of an agreement may be important for the determination whether an exclusivity clause is applied in a valid and correct way.<sup>21</sup> Selecting the best offer neither restricts competition purposefully nor results in the restriction of competition. However, as it was correctly indicated by the Supreme Court in the justification of its judgment, the organisation of a public tender does not justify any restrictions of competition introduced by the motorway operator in its contracts with the selected accident assistance providers.

### ***Key findings of the Supreme Court***

The Supreme Court dismissed the final cassation appeal. In the opinion of the Supreme Court, the main legal issue in this case was the assessment of the relationship between the statutory provisions concerning toll motorways and road traffic (and the obligations of a motorway operator arising from these provisions) and the rules of the Competition Act 2000. The Supreme Court rejected the basic claim contained in the cassation appeal stating instead that a motorway operator is bound by the limitations set out in certain provisions of the Competition Act 2000 even in the light of its specific statutory obligations. The Supreme Court agreed with the views of the lower instance courts that the infringement of the prohibition of competition restricting agreements was not evaded by the fact that the selection of the providers took the form of a public tender seeing as a tender cannot, on its own, be seen as an acceptable form of competition in this market. In the opinion of the Supreme Court, the fact that the service providers were selected by means of a public tender did not justify the disputed agreements considering that the contracts made it possible for the motorway operator to use the road users' obligation to inform the motorway operator of their need of assistance to call upon only the selected service providers and, to enable the

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<sup>20</sup> The organisation to select accident assistance service providers via a public tender was one of the obligations contained in the A-4 Katowice toll motorway licensee agreement with STALEXPORT S.A.

<sup>21</sup> See the judgment of the Anti-Monopoly Court dated 6 December 1995, case ref. No.. XVII Amr 44/95.

service providers to charge consumer a fee that significantly exceeding its actual market value.

### **Final remarks**

The motorway operator would not have breached antitrust rules if the disputed agreements secured only its specific statutory obligations (to ensure the flow of the traffic on the motorway and the roads suitability for driving, allowing consumers to call for assistance on independent accident assistance providers for typical events occurring on public roads). Evidently, it was inadmissible that a fee for such assistance services was fixed in these agreements.

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## **The economic approach in Polish courts: permitted agency agreements or prohibited price fixing?**

**Case comment to the judgment of the Appeal Court in Warsaw  
of 13 February 2007 – *Roche and Hand-Prod*  
(Ref. No. VI AcA 819/06)**

### **Facts**

By the decision of 29 June 2004 (no. RWA-18/2004), the President of the Polish Office for Competition and Consumer Protection (hereafter, UOKiK) found that the agreement between Roche Polska Sp. z o.o. (hereafter, Roche) and Hand-Prod Sp. z o.o. (hereafter, Hand-Prod) fitted the definition of a competition restricting practice. The President of UOKiK stated that the agreement restricted Hand-Prod's right to freely decide the selling price of two of Roche's medicinal products containing Erythropoietin: Recormon and NeoRecormon (hereafter, the Products). As a consequence, these products would be offered for sale, by way of centrally organised tender proceedings, at fixed prices agreed upon by the two parties. The President of UOKiK ordered the companies to cease the practice and imposed on them the following fines: Roche – PLN 235,850 (EUR 50,000) and Hand-Prod – PLN 70,755 (EUR 15,000).

Both companies appealed the contested decision. Hand-Prod asked for the proceedings to be dismissed claiming that they were groundless; the company, alternatively, requested that the fines be lowered. Roche asked for the decision to be changed in full and stated that the alleged anticompetitive practice did not exist; it further requested that the fines be cancelled or, alternatively, that the President of UOKiK declared that the prohibited practice had existed but had not been employed since 15 March 2003.

The Competition and Consumer Protection Court in Warsaw (hereafter, SOKiK) issued on 29 March 2006 a judgment changing the appealed decision. SOKiK ruled that Roche and Hand-Prod had not engaged in an anticompetitive practice of entering into a prohibited vertical agreement restricting Hand-Prod's right to set the selling prices of the two aforementioned products and offering them, by way of centrally organised tender proceedings, at prices fixed by the two companies. SOKiK stated that the agreement between Roche and Hand-Prod was in fact an agency agreement the provisions of which were not subject to assessment under antitrust law.

SOKiK's judgment was appealed by the President of UOKiK. The appeal was based mostly on the claim that SOKiK wrongly interpreted the agreement between Roche and Hand-Prod as an agency agreement and that, by doing so, it groundlessly applied in this context the European Commission's Notice – Guidelines on Vertical Restraints (hereafter, the Notice).

By the judgment of 13 February 2007, the Court of Appeal in Warsaw dismissed the appeal lodged by the President of UOKiK. The Court of Appeal accepted the judgment of SOKiK presenting additionally its own analysis of some of the aspects of the case. Below is the outline of that assessment.

### **Key legal problems of the case**

The core problem in this case was the correct classification of the relationship between Roche and Hand-Prod as well as the question: which antitrust rules should be applied in the assessment of this relationship.

The accused companies were not unanimous in their interpretation of the problematic price-fixing clause (hereafter, the Arrangement) nor, more broadly, in their interpretation of the nature of the whole of their agreement (hereafter, the Storage Agreement). Although both parties raised many sound procedural and substantive arguments, they were weakened by the fact that they were not consistent.

Roche claimed that the Arrangement was in fact an agreement on setting maximum, rather than fixed, prices. It also stated that the Arrangement did not have any negative effects on the relevant market since it was never implemented. In fact, due to the changes in the system of public tenders applicable to the pharmaceutical sector, during the time the Arrangement was in force, no centrally organised tenders were actually held.

Hand-Prod also claimed that the Arrangement only set maximum prices. It also argued that the Arrangement should be considered in conjunction with other provisions of the Storage Agreement, seeing as this would show that the clear economic aim of the Arrangement was to enter into an agency and logistic services agreement, rather than a typical distribution agreement. In the context of the tenders, Hand-Prod was meant to act therefore only an agent of Roche, a fact that precluded the application of the price fixing prohibition. Hand-Prod agreed with Roche that the practice had no negative effects on the relevant market.

The President of UOKiK did not agree with the line of argumentation presented by the parties. The authority interpreted the Arrangement as a prohibited agreement between independent undertakings which had the effect of restricting competition. The President of UOKiK did not agree that the Arrangement was in fact an agency and logistic services agreement, seeing as it contained all the typical elements of a distribution agreement that gave Hand-Prod the role of a distributor in its relationships with Roche. Therefore, the relationship between the two companies had to be treated as a vertical agreement subject to an antitrust analysis. The President concluded also that the Arrangement represented a form of cooperation between the companies that set fixed, rather than maximum, prices. In response to the argument that the

Arrangement did not cause any harm (considering that no tenders were actually organised) the authority pointed out that even potential restrictions of competition should be penalised.

### **Key findings of the Courts**

SOKiK and the Court of Appeal commented in detail on all of these arguments, providing the Polish doctrine with a valuable body of jurisprudence in this context. However, while worthy of approval is the overall assessment of the courts stating that an anticompetitive practice did not occur in this case, some parts of the justification of the judgments call for the following comments.

#### *Difference between maximum and fixed prices*

The distribution of the Products by Hand-Prod was organised on the basis of the Storage Agreement that stated that Hand-Prod undertook to sell the Products for the same price at which they were purchased from Roche, without any mark-up, provided it was not agreed in writing with Roche. Hand-Prod undertook to provide Roche, on a monthly basis, with its price list. The contract stated that Hand-Prod had the right to grant rebates to its clients on the condition that Roche agreed to them and that the rebates would be granted according to the conditions set out by Roche. Rebates given by Hand-Prod to its clients were to be reimbursed in full by Roche.

Taking the above into account, the opinion of the President of UOKiK seems to be justified finding that a system of fixed prices was agreed upon by Roche and Hand-Prod. Thus, the view taken by SOKiK and the Court of Appeal that the companies merely agreed on setting maximum prices should be considered to be incorrect. The courts based their opinion on the mere fact that the Storage Agreement allowed Hand-Prod to sell the Products below the fixed price suggesting that it was a maximum, rather than a fixed, price. Such reasoning could be accepted in a situation where a distributor had to respect only the maximum level of prices, agreed upon with the supplier, but retained full discretion concerning the sell below that level. However, in this case, giving rebates was dependent on Roche's consent. Therefore, Hand-Prod was bound both by the fixed price and by the level of rebates approved by Roche. Clearly, if Roche did not agree to a rebate, Hand-Prod would have to apply the fixed price.

Both courts concluded that the Arrangement between the companies was in the public interest since it reduced the prices of the Products. This view was based on the assumption that the described situation, where the fixed price may be lowered by the rebates granted by Hand-Prod upon prior approval by Roche, is equivalent to creating a maximum price system. This line of thought gives rise to justified reservations however seeing as it distorts the proper understanding of the concept of prohibited price fixing. If the approach of the courts was indeed correct, the prohibition of price fixing could be easily circumvented by supplementing all price fixing contracts with a clause allowing the use of rebates upon agreement of the supplier. Such clause would

give an alibi to prohibited price fixing contracts making it possible to claim that they merely constituted permitted maximum price setting agreements.

Thus, the interpretation given by the courts concerning the qualification of the Arrangement as a maximum price fixing clause remains controversial.

### *Possibility of relying on soft European Union law in national proceedings*

SOKiK was of the opinion that the Storage Agreement should be analysed in the light of the European Commission's Notice on vertical restraints. The Notice concerns agreements which are excluded from assessment under Article 81(1) EC. SOKiK pointed out that the provisions of Article 81(1) EC have their equivalent in Polish antitrust law; agency agreements are however not covered by Polish block exemptions from the prohibition of competition restraining agreements, while they are dealt with by the EC Notice. Thus the analysis whether or not the arrangement between Roche and Hand-Prod was excluded from the domestic provisions prohibiting uncompetitive agreements should be performed on the basis of the conditions specified in the Notice. SOKiK stated also that national antitrust law should not be considered to be more restrictive in this field than EC law, if the Polish legislator had not enacted domestic regulations regarding the exclusion of agency agreements from the prohibition of competition restricting agreements.

In the appeal against the judgment of SOKiK, the President of UOKiK tried to challenge the above reasoning by pointing out that it was not possible to assess the Storage Agreement between Roche and Hand-Prod in the light of EC law, especially the Notice, as the contract was concluded before Poland's accession to the European Union.

The Court of Appeal did not accept this argument and referred to the European Agreement of 16 December 1991 Establishing an Association between the European Communities and Their Member States, of the One Part, and the Republic of Poland, of the Other Part. Although the Association Agreement did not serve as a basis for direct applicability of EC law in Poland, it was nevertheless a source of obligations to adjust the Polish legal system with that of the Community. Therefore, even though prior to Poland's accession the national legislator had not regulated the problem of the exclusion of agency agreements from the prohibition of competition restricting agreements, EC law cannot be excluded in the assessment of agency agreements. The Court of Appeal stressed that the interpretations given by Polish courts should be in line with the spirit of EC law and EC jurisprudence.

The reasoning presented by SOKiK and the Court of Appeal carries great significance for the assessment of the behaviour of businesses in the context of antitrust law. The President of UOKiK has not yet issued any formal guidelines or notices on the proper application of Polish antitrust law. This situation causes many problems for practitioners seeing as many of its rules are so general that it is difficult to apply them without further instructions from the President of UOKiK regarding their rationale and their interpretation. Thus the judgments given in this case clearly show that it is justified to rely on EC law in the absence of domestic legislation.

The important consequence of these judgments is that the courts imposed on the President of UOKiK the obligation to abide by the provisions of the Notice even though it constitutes an act of Community soft-law only and thus, it is not actually legally binding.

*Proper identification of an agency agreement*

Taking into account the conditions specified in the Notice, both SOKiK and the Court of Appeal were in agreement that the Storage Agreement had the features of an agency agreement. The risks associated with the activities of Hand-Prod such as storage financing, financing the investments needed for the activities conducted by Hand-Prod and risks resulting from selling the Products, were to be exclusively associated with Roche. Roche was the owner of the Products until they were sold to clients. Hand-Prod did not bear the costs of supplies to the warehouse, marketing and advertisement costs or costs of post-sale service.

SOKiK considered the relationship between Roche and Hand-Prod to be clear. Roche remained the only company controlling the prices of the Products but, at the same time, commissioned all the activities relating to the storage and sale of the Products to Hand-Prod, which specialised in such activities. Hand-Prod was paid for its services only in the form of a 21.7% commission on the Products sold. Hand-Prod's economic interest was not in any way connected with sales profits of the Products, which were associated in full with Roche.

The courts were right to conclude that Roche and Hand-Prod should have been treated by the President of UOKiK as one economic body. Considering that the prohibition of pricing agreements applies only to agreements between economically independent businesses, the Arrangement between Roche and Hand-Prod should not be deemed to be prohibited.

*A more economic approach to the analysis of alleged breaches of competition law*

The Court of Appeal stressed that the assessment whether or not a given agreement was anticompetitive could not be done solely by referring to the literal wording of the contract but also consider its economic context and the analysis of the relevant market. The Court of Appeal emphasised that the Arrangement between Roche and Hand-Prod was not implemented since the government resigned from organising central tenders for the Products in question. The President of UOKiK could therefore only attempt to prove that the aim of the Arrangement was in breach of antitrust rules. According to the Court however, it is not certain that the contract had such aim. The authority did not prove its accusations limiting its analysis to the statement that the mere wording of the Storage Agreement in the context of price fixing unquestionably proved the existence of a competition restricting arrangement.

In the opinion of the Court of Appeal, the position taken by the President of UOKiK was not justifiable. It is not permissible to interpret antitrust rules on the assumption that any potential threat to competition resulting from an agreement

constitutes a breach of law regardless of whether such threat has any chance of materialising. The Court of Appeal referred to the jurisprudence of the Supreme Court which stated that any threat to free competition must be real in order to be interpreted as a breach of competition law.

The position presented by the Court of Appeal is in line with the need, currently discussed by the European Commission and national competition authorities, to take a more economic approach to antitrust law. Antitrust law is a special kind of law that is in fact a mixture of legal rules and economic theories. Seeing it as a form of an administrative intervention into the free market, its scope must be interpreted in a narrow way and applied only in justified circumstances. If other clauses of the agreement suggest the opposite, antitrust authorities may not pick out only those contractual provisions that seem to prove the theory of the existence of an anticompetitive practice. Most importantly, antitrust authorities cannot base their decisions purely on the assumption of a contract's anticompetitive effect without checking whether its effects, or its aim, would be in fact detrimental to the market.

It can only be hoped that future antitrust enforcement proceedings will follow the line of argumentation presented in this case by the Court of Appeal.

### **Final remarks**

The relationships between market players in the pharmaceutical sector are quite complex. In most branches of the economy, the role of a producer or importer of goods usually ends with their sale to wholesalers or other distributors. The latter companies resell the goods that are, at that time, already their property, to final customers and independently develop marketing strategies and advertising campaigns, rebate systems and other sales enhancing initiatives.

The role the suppliers of medicinal products play in the pharmaceutical sector is very different. Although they also use intermediaries, they continue to pursue their own market strategies regarding their products. They use their own sales representatives to promote products already sold to wholesalers, pharmacies and hospitals (the main purchasers of medicinal products).

In Poland, the system of reimbursement from public funds for medicinal products as well as the distribution margins system between the various participants of the pharmaceutical distribution chain is quite complex. In this unclear legal environment, suppliers of medicinal products try to cooperate with other market participants in a way that would guarantee the lowest possible final prices for their products ensuring in turn their competitiveness vis-a-vis substitute products.

Properly adjusting these trading strategies to antitrust law is problematic. A couple of years ago, relevant antitrust rules were not yet well known to the participants of the pharmaceutical markets; the case under consideration here is an excellent example of that fact. Both Roche and Hand-Prod had no clear position regarding the assessment of their contract. During the proceedings, they tried to raise many arguments in their defence putting ultimately far too little emphasis on the one argument most important in this respect, that is, the identification of their contract as an agency agreement.

Luckily, SOKiK and the Court of Appeal assessed their contract properly developing this argument in full.

Undertakings conducting business activities in Poland right now, including pharmaceutical companies, are far more aware of the fact that their vertical agreements are subject to antitrust scrutiny. They identify from the outset what effects they wish their contract to achieve, drafting its provisions so as to prepare either a distribution or an agency agreement. Unfortunately, the Polish legislator has still not issued its own guidelines on the relationship between antitrust law and agency agreements. However, in line with the views of the Polish courts, as expressed in this case, reviewing domestic contracts in the light of the EC Notice on vertical restraints has become common practice in Poland.

The Polish pharmaceutical market has recently undergone significant changes, the distribution of medicinal products in particular. More companies think about introducing direct sales systems in their relationships with pharmacies and hospitals, using their former distributors as agents only. It is likely therefore that the interpretation given by SOKiK and the Court of Appeal in the case against Roche and Hand-Prod will progressively gain in importance.

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**What does an obligation to purchase “green energy” mean?**  
**Case comment to the judgment of the Supreme Court of 5 July 2007 –**  
***Green energy***  
**(Ref. No. III SK 13/07)**

**Facts**

In 2002, a power company, the claimant in the commented case, purchased 7.993 Megawatt hours of renewable power directly from its producers and 157.145 Megawatt hours from an intermediary trading in renewable power. In a decision taken on 30 December 2003 (no. DPE/253/2003), the President of Polish Energy Regulatory Office (hereafter, URE), the defendant in this case, imposed a fine on the power company amounting to PLN 550,000 which constituted 0.1744% of the firm’s income from its licensed activities achieved in the year 2002. The fine constituted a penalty for the failure to observe the legal obligation place upon power companies to purchase electricity from non-conventional and renewable sources. The President of URE justified the decision by stating that the obligation to purchase green-power may be deemed to be fulfilled only if the power was purchased directly from producers of such power, rather than from intermediaries.

The obligation to purchase electricity from non-conventional and renewable sources is set out in § 1(1) and § 2.1 the decree of the Polish Minister of the Economic Affairs of 15 December 2000 on the obligation to purchase electricity from non-conventional and renewable sources and generated in association with the production of heat, as well as heat from unconventional and renewable sources within the scope of this obligation<sup>1</sup>. Failure to fulfil this obligation justifies the imposition of a fine by the President of URE on the basis of Article 56(1(1a)) of the Energy Law Act of 10 April 1997<sup>2</sup> (*Prawo Energetyczne*, hereafter, PE).

The claimant submitted an appeal against the decision of the President of URE to the Competition and Consumer Protection Court in Warsaw (SOKiK). On 4 April 2005, the appeal was dismissed<sup>3</sup> on the basis of a literal interpretation of PE according to which, SOKiK believed the term “source” to commonly indicate the location of power generation. The claimant appealed the judgment to the Court of Appeal which

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<sup>1</sup> Journal of Laws No.. 122, pos. 1337.

<sup>2</sup> Journal of Laws 2003 No.. 153, pos. 1504.

<sup>3</sup> Ref. no. XVII Ame 12/04, unpublished.

dismissed the appeal on 27 October 2006<sup>4</sup>. The Court of Appeal acknowledged that the term “obligation to purchase from non-conventional and renewable resources” meant the obligation of power companies to purchase green-energy directly from its producers. Moreover, the Court of Appeal referred to a purposeful interpretation, which, in the view of the Court, confirmed the result of a literal interpretation of the law. The Court of Appeal acknowledged therefore the fact that the claimant failed to fulfill its legal obligation to purchase renewable power and that the fine imposed by the President of URE was in accordance with the law.

The claimant appealed the judgment to the Supreme Court submitting a cassation appeal, requesting for annulling the judgment and the case to be remanded by the Court of Appeal or, alternatively, requesting for the judgment to be amended through an annulment of the decision of the President of URE of 30 December 2003. On 5 July 2007, the Supreme Court decided the appeal in favour of the claimant annulling the judgment of the Court of Appeal and changing the decision of SOKiK preceding it through the annulment of the original decision taken in this case by the President of URE.

### **Key legal problems of the case**

On the basis of the circumstances of the case, the Supreme Court settled two fundamental legal problems: the interpretation of the term “obligation to purchase from non-conventional and renewable sources” and the nature of the regulation contained in Article 9(3) PE.

### **Key findings of the Supreme Court**

Considering the definition of the obligation to purchase from renewable sources, the Supreme Court rejected the literal interpretation of the PE applied by SOKiK and Court of Appeal. Instead, the Supreme Court was of the opinion that “the obligation to purchase from non-conventional and renewable sources” does not equal the obligation to purchase renewable energy directly from producers. The Supreme Court expressed a similar opinion in a previous judgment dated 25 April 2007<sup>5</sup>. “The Energy Law, in the wording effective until 31 December 2002, did not impose an obligation *ex lege* on power companies trading in electricity or heat to purchase electricity or heat, within the scope of their respective commercial activities, from non-conventional and renewable sources connected to a common network, directly from producers of such power or heat”.

The Supreme Court also stated that such an obligation could not have been imposed on energy companies on the basis of an executive regulation relating to Article 9(3) PE, since this act is a norm pertaining to authority. On its basis, the minister in charge of economic affairs can indeed impose on energy companies an obligation to purchase renewable energy but, he cannot specify the range of subjects entitled to sell such

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<sup>4</sup> Ref. no. VI ACa 723/05 – available at: <http://www.www.ure.gov.pl/wai/pl/282/1799/>.

<sup>5</sup> Ref. no. III SK 1/07 – available at: <http://www.ure.gov.pl/wai/pl/260/1496/>.

energy. According to the Supreme Court, it clearly arises from the content of Article 9(3) PE that the minister in charge of economic affairs cannot specify the manner in which to execute this obligation (at that time, Article 9(3) PE read: “The minister for economic affairs shall through a decree impose the duty on energy companies dealing with trade or the dispatch and distribution of electrical power or heat, to purchase electrical power from non-conventional and renewable sources produced in association with heat generation, as well as heat from non-conventional and renewable sources, and shall establish a detailed scope of this duty by taking energy production technology and energy source size into account as well as the manner of including costs of its purchase in tariffs”).

Moreover, justifying the approach taken, the Supreme Court mentioned the judgment of the Constitutional Tribunal of Poland, which declared on 25 April 2006 that Article 9 item 3 PE conforms to the Constitution of the Republic of Poland.

### Final remarks

The judgment of the Supreme Court taken on 5 July 2007 was particularly significant for the clarification of the scope of the obligation to purchase green-energy as it applied from 14 June 2000 to 1 July 2007. The obligation to purchase energy from renewable sources was at that time a new regulatory instrument that was only recently incorporated into the Polish power trading system. In this context, the judgment of the Supreme Court needs to be criticised for the opening of a third party (intermediaries) trade channel in renewable energy because the use of intermediaries in green-energy trade is a harmful phenomenon seeing as it leads to green-energy price manipulation as well as distorting the functioning of the market.

The obligation to purchase energy from non-conventional sources has now been replaced with the institution of “certificates of origin” that confirm that the method used for the production of electricity was based on renewable energy sources. According to the new Article 9a item 1 PE, an energy company dealing with the production, trade, or sale of electricity, must obtain a number of certificates of origin, as specified by way of an executive regulation, and present them for approval to the President of URE. Otherwise, a power company is obliged to pay a substitute fee calculated according to a formula set forth in the current Energy Law Act. According to Article 9e(3), the President of URE issues a certificate of origin upon an application of an energy company dealing with the production of renewable energy.

Since 1 July 2007, in accordance with Article 9a item 8 PE, such certificates can be traded through the Property Rights Market for certificates of origin for energy produced from renewable resources, which is organised by Towarowa Gielda Energii [*Polish Power Exchange*] that maintains the Register of the Certificates of Origin. Entitled to engage in such trade (brokerage firms) are only entities that are members of the Polish Power Exchange, which employ licensed brokers and possess consent from the Polish Financial Supervision Authority to maintain stock goods accounting. This mechanism provides its participants with access to the renewable energy market on equal terms and ensures the safety of turnover.

The judgment of the Supreme Court, which is under consideration here, was issued after the implementation of the property rights turnover mechanism for certificates of origin. Hence, the judgment did directly negatively affect the Polish energy field. Legislative actions have prevented an unjustified increase of green-energy prices and have sealed the system of its turnover. However, the Supreme Court should have nevertheless applied a more “purposive” interpretation of the law when deciding this case considering, in particular, all of the possible consequences associated with the acceptance of intermediation in green-energy trade.

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**What is the link between Article 6 Section 3a of the Energy Law Act and Article 490 of the Civil Code regarding the right of a grid operator to suspend the supply of electricity?**

**Case comment to the judgment of the Supreme Court Judgment of 5 June 2007 – GZE (Ref No. III SK 11/07)**

**Facts**

On 5 June 2007 the Supreme Court delivered a judgment<sup>1</sup> that concluded a long lasting legal dispute between a grid operator – Górnośląski Zakład Energetyczny (hereafter, GZE), acting as the plaintiff in this case, and the President of the Polish Energy Regulatory Office (hereafter, URE), acting as the defendant. The judgment of the Supreme Court directly concerned an earlier decision taken by the President of URE, which adjudicated a contractual dispute between GZE and Huta Łaziska steelworks (customer seeking third party access) regarding the terms of a transmission services contract to be concluded between those two companies. The economic origin of the dispute lied in the fact that Huta Łaziska intended to purchase electricity from a “third” (independent) supplier – a power producing company Zakład Energetyczny Pątnów-Adamów-Konin. For that purpose, in 2003 and 2004, it entered into a third round of negotiations with GZE, the local grid operator for the southern part of Poland and the Silesian region, concerning the conclusion of a contract that would grant Huta Łaziska access to the grid belonging to GZE, which was necessary in order to obtain the electricity purchased from the alternative supplier.<sup>2</sup>

Till the time of the controversy both parties had been previously bound by two transmission services contract. This time however, they could not reach an agreement concerning some of the terms of the new contract. Considering the judgment of the Supreme Court that is under review here, the most interesting points of dispute between the two companies were: (1) the use of an advance payment scheme for transmission services in light of some disputable claims arising from previous transmission services contracts concluded between the parties and, (2) the level of the prices and fee rates

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<sup>1</sup> Judgment of the Supreme Court of 5 June 2007, III SK 11/07 – available at: [www.ure.gov.pl/ftp/prawo/orzecznictwo/orzeczenia\\_sadu\\_naj/akt\\_iii\\_sk\\_11-07\\_05-06-2007.pdf](http://www.ure.gov.pl/ftp/prawo/orzecznictwo/orzeczenia_sadu_naj/akt_iii_sk_11-07_05-06-2007.pdf)

<sup>2</sup> Decision of the President of URE of 19 February 2004, DPK-511-1(10)/2004/ZM, amended by the decision of 25 March 2004, DPK-5111-1(14)/2004/ZM.

for the provision of transmission services considering, in particular, that Huta Łaziska proposed its own calculation scheme that was different from the GZE's tariff, which was approved by the President of URE according to Article 47 of the Polish Energy Law Act (*Prawo Energetyczne*, hereafter, PE).

### Key legal problems of the case

Upon the request of the parties submitted pursuant to Article 8 PE, the President of URE settled the dispute between Huta Łaziska and GZE in a decision issued on 19 February 2004<sup>3</sup>. Having acknowledged that GZE was to provide transmission services to Huta Łaziska, according to Article 4(2) PE, the authority stipulated the content of the agreement between the parties in regard to the contractual provisions under dispute.

In the context of the advance payment scheme, the President of URE pointed out, that the core of an administrative settlement of conflicts between firms negotiating third party access is the substitution of market mechanisms. The President of URE made reference here to a pattern of a "reasonable entrepreneur acting on a competitive market". Also taken into account was the fact that, at the time the decision was taken, a litigation was pending concerning earlier contractual obligations of Huta Łaziska and GZE. In that light, the authority concluded that there was a sufficiently legitimate reason for the incorporation into the contract of a provision obliging Huta Łaziska to pay instalments for the transmission services at least 10 days before their provision is due, in a ten-day-period. The President of URE formulated this contractual clause according to Article 491 § 1 of the Polish Civil Code (*Kodeks Cywilny*, hereafter, KC) and Article 6(3a) PE, which entitle the power supplier, such as the grid operator, to suspend the supply of electricity if the customer delays the payment for electricity or transmission services, provided that the delay amounts to at least a month after the due date of the payment and, provided that the delay persists in spite of a prior written notification of the intention to terminate the contract.

Considering the level of prices and fee rates for transmission services, the President of URE stressed that even though grid operators and other energy companies are entitled to vary their tariff prices and fee rates for their transmission services (according to Article 45(4) PE), they may only do so in relation to entire groups of customers, and solely on the basis of justified differences in costs related to the provision of the services to the particular groups of customers. According to the President of URE, the permitted variations of prices and fee rates did not apply to individual customers. Thus, individual charges were subject to negotiations and individual arrangement between the parties solely within the scope of Article 45(4) PE. As a result, the President of URE used GZE's existing tariffs as the basis for the determination of the prices and fee rates for transmission services provided to Huta Łaziska.

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<sup>3</sup> Decision of the President of URE of 19 February 2004, DPK-511-1(10)/2004/ZM, amended by the decision of 25 March 2004, DPK-5111-1(14)/2004/ZM (unpublished).

Both parties appealed the decision of the President of URE to the first instance Court for Competition and Consumer Protection (hereafter, SOKiK)<sup>4</sup> and later, to the second instance Court of Appeal<sup>5</sup>. Both courts dismissed the appeals considering them to be unfounded; they upheld the decision of the President of URE. GZE argued that the President of URE infringed the grid operator's right for sufficient defence of its economic interests because the authority did not incorporate into the contract a clause pursuant to Article 490 KC. Such provision would enable GZE to immediately suspend its services to Huta Łaziska if the steelworks delayed their instalment payments for these services. In fact, both companies submitted serious objections in relation to the clause that obliged Huta Łaziska to pay instalments for the transmission services. In the opinion of GZE, all of the instalments should have had to be paid at least one month before the provision of the services was due. Huta Łaziska argued to the contrary stating that this condition had an onerous character and no legal basis, considering that the requirements of Article 6(3a) PE were not fulfilled in this case. Besides, the questionable condition would illegally substitute the mechanism of prepayment metering and settlement facility contained in Article 6a PE (the conditions of its application were however also not met).

Huta Łaziska objected also to the fact that the President of URE determined the prices and fee rates for the contractual services on a basis of the grid operator's approved tariff and thus, seriously infringed the rule of equivalency of mutual obligations. In the opinion of Huta Łaziska, this approach did not reflect the actual justified costs of the provision of the services. According to the calculations of the steelworks, the prices and fee rates should have been set at a much lower level than the ones approved in GZE's tariff, otherwise they would allow cross-subsidisation. Huta Łaziska argued that prices and fee rates included in the tariff of the grid operator, approved according to Article 47 PE, should be regarded as maximum prices only. The decision of the President of URE suggested however that the authority treated them as fixed prices instead (prices not subject to negotiations or reduction).

Referring to the arguments of GZE, both courts stated that Article 6a PE did not entitle the grid operator to immediately suspend its transmission services. Article 6a PE merely allowed a grid operator to install a prepayment metering and settlement system if certain, precisely formulated conditions were met, that is, if the customer, among other things, had at least twice delayed the payment for the services received for a period of at least one month within 12 subsequent months. However, these conditions cannot apply in a given case. In the opinion of the courts, a clause that would oblige Huta Łaziska to pay instalments at least one month before the provision

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<sup>4</sup> Judgment of the Court for Competition and Consumer Protection of 3 August 2005, AmE 32/04 – available at: [http://www.ure.gov.pl/ftp/prawo/orzecznictwo/okik/wyroki/2005/ame\\_32-04\\_3-08-2005.pdf](http://www.ure.gov.pl/ftp/prawo/orzecznictwo/okik/wyroki/2005/ame_32-04_3-08-2005.pdf)

<sup>5</sup> Judgment of the Court of Appeal in Warsaw of 19 July 2006, VI ACa 95/06 – available at: [http://www.ure.gov.pl/ftp/prawo/orzecznictwo/orzeczenia\\_sadu\\_ap/2006/via\\_ca\\_95-06\\_19\\_07\\_2006.pdf](http://www.ure.gov.pl/ftp/prawo/orzecznictwo/orzeczenia_sadu_ap/2006/via_ca_95-06_19_07_2006.pdf)

of transmission services is due for a given ten-day-period, as requested by GZE, would create an excessive and unjustified burden for the customer.

On the other hand, previous disputes between the parties due to their past contractual relations justified, in the opinion of the courts, the implementation of a specific guarantee in favour of the grid operator in the form of the instalments paid in advance in ten-day-periods. However, the courts agreed that the obligation to pay such instalments at least 10 days before the due date of the provision of services, as formulated by the President of URE, sufficiently secured the economic interests of the grid operator. According to the courts, Article 490 KC was not infringed seeing as the contractual terms drafted by the President of URE did not exclude the application of this legal provision. Furthermore, the fact that Huta Łaziska had some arrears still outstanding (resulting from past agreements with GZE) did not justify a presumption that its performance under this contract was unlikely or uncertain. No reasons were also found to change the contractual clauses concerning the right of the grid operator to suspend its transmission services because Article 6(3a) PE was unconditionally applicable and enjoyed priority over Article 490 KC.

Considering the objections of Huta Łaziska in relation to the level of prices and fee rates set in the decision of the President of URE, both courts reconfirmed their previous judgments as well as quoted a judgment of the Supreme Court of 9 March 2004 (III SK 18/04) where it was said, based upon Article 735 § 2 KC, that while adjudicating a dispute between parties according to Article 8 PE, the President of URE should not apply other prices and fee rates than the ones set in the tariff of the energy enterprise concerned.

### **Key findings of the Supreme Court**

GZE was the only party to submit a cassation appeal to the Supreme Court which dismissed the appeal on 5 June 2007. The Supreme Court agreed with the views of the courts of the lower instances, repeating the arguments presented in their sentences. In the opinion of the Supreme Court, the argument that the decision of the President of URE infringed Article 490 KC was unsubstantiated since the wording of Article 6(3a) PE was clear, precisely establishing the right of the grid operator to suspend the supply of electricity in such a manner that excluded the application of Article 490 KC in this case. The same view had to be taken in relation to the objection of the infringement of Article 6a PE. In the opinion of the Supreme Court, a “prepayment metering and settlement system” equals a mechanical device that requires physical installation. Thus, this provision should not be interpreted extensively; it was, in so far, inapplicable as the conditions set forth in Article 6a PE did not occur in the given case.

## Final remarks

The presented case addresses some of the practical questions concerning the interpretation of the Polish energy law regime in relation to the concept of “economic” reasons of legitimate grid access denial, which were disputed by the legal doctrine already<sup>6</sup>. In the lower instances only, this case concerns the question of the nature of the prices and fee rates for transmission services (grid access) and the rules for their determination<sup>7</sup>.

Non-discriminatory access to the grid for all customers and independent suppliers constitutes one of the most important pro-competitive instruments of energy law. According to Article 4(2) PE, grid operators shall be obliged to provide the transmission or distribution services of electricity to all customers while the latter shall have, pursuant to Article 4j PE, the right to purchase energy from the supplier of their choice. These provisions implement the so-called “third party access” rule contained in Article 20(1) of Directive 2003/54/EC. The details of “third party access” are subject to negotiation between the parties. Thus, while access to the grid is, according to Polish energy law, carried out on a contractual basis, access prices must conform to the rules set out in Directive 2003/54/EC. As a result, access prices should be based on tariffs published by grid operators that are applied objectively and without discrimination between system users (customers).

In the context of this rule, there is no consensus among the Polish legal doctrine and judicial practice as to what conditions must be met for a grid operator to have the right to refuse the provision of transmission services. Directive 2003/54/EC mentions only one factor that constitutes a sufficiently legitimate reason to refuse access – lack of necessary transmission capacity. However, considering the “essential facilities doctrine”, not only technical reasons but also legitimate economic interests of the grid operator might be taken into account when determining whether the refusal was sufficiently justified or not. Those legitimate economic interests include: the impracticability of third party access and difficulty to provide services to the customers of the essential facility holder<sup>8</sup>; the

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<sup>6</sup> See e.g. A. Walaszek-Pyziół, *Energia i prawo* [Energy and law], Warsaw 2002, p. 152; J. Baehr, E. Stawicki, [in:] J. Baehr, E. Stawicki, J. Antczak, *Prawo energetyczne. Komentarz* [Energy law. Commentary], Poznań 2001, p. 47.

<sup>7</sup> The discussion concerning the nature of tariff’s prices and fees for transmission services has led in the past to significant controversies in the Polish doctrine. Some authors argued that an approved tariff sets out fixed prices (not subject to negotiations or alterations) – S. Gronowski, “Rozbieżność ocen” [“Discrepancy of assessments”] (2000) 132 *Rzeczpospolita*, 7 June 2000, p. C2; H. Palarz, *Prawo energetyczne z komentarzem* [Energy Law with a commentary], 2 ed., Gdańsk 2000, Article 47; others saw them as maximum prices only in accordance with the “price cap regulation” regime – A. Walaszek-Pyziół, op.cit., p. 139 – till now this question has been cleared in the judgment of the Supreme Court of 9 March 2004, III SK 18/04 – available at: [www.ure.gov.pl/ftp/prawo/orzecznictwo/orzeczenia\\_sadu\\_naj/akt\\_iii\\_sk\\_18-04\\_09-03-2004.pdf](http://www.ure.gov.pl/ftp/prawo/orzecznictwo/orzeczenia_sadu_naj/akt_iii_sk_18-04_09-03-2004.pdf)

<sup>8</sup> *Hecht v. Pro Football*, 570 F. 2d 982 (D.C. Cir. 1977), cert. denied, 436 U.S. 956 (1978).

lack of incentives to develop the infrastructure<sup>9</sup>; the lack of customer credit standing<sup>10</sup>; the inefficiency of the exploitation of the facility due to third party access<sup>11</sup>.

The wording of Article 4(2) PE in its original version was imprecise stating that grid operators should grant third party access if the “economical” conditions for the supply were fulfilled. The Polish legal doctrine was therefore concerned that the recognition of economic reasons as a legitimate justification for access denial would have led to abusive conduct of grid operators<sup>12</sup>. Nevertheless, in light of general rules of civil law, some circumstances, referring primarily to the capacity and willingness of customers to pay for the transmission services, were acknowledged as legitimate grounds for the denial of grid access<sup>13</sup>. Article 490 KC played a fundamental role here entitling, in case of mutual obligations, one party of the agreement to suspend the performance of its contractual obligations if the performance of obligations of the other party is doubtful.

However, as stressed by the President of URE and all of the courts, the provisions contained in Article 6(3a) and Article 6a PE must be taken into account when considering whether the grid operator has the right to deny third party access. These provisions were added to the Energy Law Act through the Amendment Act of 24 July 2002<sup>14</sup>. Pursuant to Article 6(3a) PE “the energy enterprises (...) may suspend the supply of gaseous fuels, electricity or heat if the customer delays the payment for the gaseous fuel, electricity, heat or the services received for at least a month after the due date of payment in spite of a prior written notification of the intention to terminate the agreement and a designation of an additional two-week long term of settlement of the outstanding and current liabilities”. Pursuant to Article 6a “an energy enterprise may install a prepayment metering and settlement system used for the settlement of the supply with gaseous fuels, electricity or heat if the customer: 1) has at least twice delayed the payment for the gaseous fuel, electricity or heat or the services received for a period of at least one month within 12 subsequent months, 2) does not have a legal title to the real estate, installation or premises to which the gaseous fuels, electricity or heat is supplied, or 3) uses the real estate, installation or premises in a way that renders regular inspections of the metering and settlement system impossible”. The Supreme Court has delivered a clear statement that these provisions exclude the application of Article 490 KC under the specified conditions. Financial difficulties *ex parte* potential customers do not justify therefore a grid access

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<sup>9</sup> Ch. Stothers, “Refusal to Supply as Abuse of A Dominant Position: Essential Facilities in the European Union”, (2001) 22(7) E.C.L.R. 260.

<sup>10</sup> Decision of the European Commission 92/213 *British Midland v. Aer Lingus* (OJ 1992 L 96/34).

<sup>11</sup> J. Majcher, *Dostęp do urządzeń kluczowych w świetle orzecznictwa antymonopolowego [Access to essential facilities in the light of antitrust case-law]*, Warsaw 2005, p. 108.

<sup>12</sup> A. Walaszek-Pyziol, *Energia...*, p. 152; J. Baehr, E. Stawicki, *Prawo...*, p. 47.

<sup>13</sup> A. Walaszek-Pyziol, *Energia...*, p. 154; H. Palarz, *Prawo...*, Article 7.

<sup>14</sup> See Article 1 No. 6 and 7 Act of 24 July 2002 amending the Energy Law Act, Journal of Laws 2002 No. 135, item 1144.

denial “in advance”. They only justify the suspension of transmission services *ex post* provided that the requirements contained in Article 6(3a) are fulfilled.

The judgment under consideration here carries great significance for the application of Polish energy law and especially for the determination of what “economic” reasons sufficiently justify third party access denial. According to the judgment of the Supreme Court, general rules of civil law concerning the performance of contractual obligations are restricted by the provisions contained in the energy law regime. Nevertheless, the question remains open whether other reasons of an “economic” nature, as were recognized within the framework of the “essential facilities doctrine”, may sufficiently justify a denial of grid access.

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**A courier service as a postal universal service – can a court assess the correctness of a legal qualification of a service of a courier company that was not contested by the company in an earlier decision taken by the postal regulator?**

**Case comment to the judgment of the Supreme Court of 25 April 2007  
– Courier services  
(Ref. No. III SK 2/07)**

**Facts**

The President of the Polish Regulatory Office for Telecommunication and Post (hereafter, URTiP) issued in 1994 a decision prohibiting the shipping and transport company A., which was previously granted a concession for the provision of certain shipping services, from providing postal services (collection, transport, and delivery of inland post under the 500 grams weight limit) charged at a “per unit” fee that was five times lower than the fee charged by the public operator of universal postal services for the collection, transport, and delivery of postal items of the lowest weight and fastest delivery category described in the public operator’s tariff. The decision was adopted under the Communications Law Act of 23 November 1990<sup>1</sup> (*Prawo Komunikacyjne*, hereafter, PK), which was later replaced by the current Postal Law Act of 12 June 2003<sup>2</sup> (*Prawo Pocztowe*, hereafter, PP). Company A. did not appeal this decision.

The President of URTiP issued on 20 January 2004 another decision concerning the same company. This time the firm was found to have breached Article 47(2) PP by providing services that were reserved for the public postal operator. The President of URTiP claimed that according to the PP Act, the courier services that were being provided by company A. (on the basis of concession No. 3/96) fell into the scope of universal services as defined by the new legislation. Company A. was instructed to cease those activities. The firm did not appeal the decision.

However, in the context of the second decision, the President of URTiP asked company A. to additionally submit its financial data concerning the firm’s revenue in 2002. The regulator informed the company that unless such documentation was delivered, the amount of the fine that was to be imposed on the firm would have

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<sup>1</sup> Consolidated text: Journal of Laws 1995 No. 117, item 564 with amendments.

<sup>2</sup> Journal of Laws No 130, item 1188 with amendments.

to be estimated, rather than precisely calculated on the basis of the company's actual revenue. The requested documents were not delivered. On 3 March 2004, the President of URTiP issued a decision imposing a fine of 22,622 PLN on company A. The decision was appealed to the Court of Competition and Consumer Protection (hereafter, SOKiK) on the basis of the claim that a breach of Article 2, 22, 23 of Polish Constitution and Article 68(2) and 88 PP took place. The appeal was dismissed in its entirety. SOKiK's judgment was appealed once again to the Court of Appeal however, its verdict was sustained. Finally, company A. submitted a cassation appeal which was dismissed by the Supreme Court as unfounded<sup>3</sup>.

### Key legal problems of the case

**I.** Company A. claimed in its appeal that it could not be obliged to pay a fine as the decision that the fine was connected with was based on a misinterpretation of the PP Act of 2003. The company stressed that the President of URTiP infringed Article 67(1(3)) PP (in connection with Article 46.1, 47.2, 88.1) by applying an interpretation of the concept of courier services that was too broad and thus considering them to be universal postal services<sup>4</sup>. In the company's opinion, the monopolistic status of the public operator referred only to reserved services and not to all the services of collection, transport, and delivery of postal items that met the weight criteria set out in the PP Act. Therefore, the plaintiff claimed that a misapplication of Article 3.25 and Article 47(2) PP took place.

In response, the President of the Polish Office of Electronic Communications (UKE) – the institutional successor of URTiP since January 2006– stressed that the actual circumstances of the case showed that the plaintiff conducted its business within the activity area reserved to the public operator in Article 47 PP. This fact was confirmed in the decision of 20 January 2004, which the company did not appeal.

**II.** Moreover, the plaintiff claimed that pursuant to the PP Act, it was deprived of its rights resulting from the concession that the company received in 1996. The concession for the provision of courier services, which was granted according to the rules of the older PK Act, turned into a permit on the basis of Article 88(1) PP. According to the plaintiff, as a consequence of that change, the company actually lost some of its constitutionally protected rights. Simultaneously, the company regarded this fact as an unlawful limitation of its economic freedom, which may be restricted only because of an important social interest. In the opinion of the plaintiff, no such

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<sup>3</sup> On court proceedings in the field of postal regulation see: K. Flaga-Gieruszyńska, "Istota postępowania sądowego w sprawach z zakresu regulacji poczty" ["The core of a court proceeding in cases concerning postal regulation"], [in:] R. Czaplewski, K. Flaga-Gieruszyńska (eds.), *Rynek usług pocztowych* [Market of postal services], Warszawa 2008, p. 414-418.

<sup>4</sup> See R. Sowiński, *Podstawy prawne świadczenia usług na polskim rynku pocztowym* [Legal basis of providing services in the Polish postal market], [in:] R. Czaplewski, K. Flaga-Gieruszyńska (eds.), *Rynek usług pocztowych...*, p. 283-290; see also the judgment of the Supreme Court of 10 May 2002, IV CKN 1035/00 (2003) 3 OSNC, item 44.

interest existed in this case<sup>5</sup>. On this basis, the company claimed that its constitutional right to the protection of rights already granted as well as its economic freedom was infringed (Article 2, 20 and 22 of the Constitution of the Republic of Poland).

In response to this claim, the President of UKE pointed out that one of the conditions for granting a concession to the plaintiff was that it had to perform its economic activity in compliance with the law being in force in the Republic of Poland. Therefore, it was the plaintiff's duty to adapt the scope and the form of its business to the changing legislation.

**III.** Regarding the fine, the company stated that in the decision of 3 March 2004 the President of URTiP did not refer to the amount of the imposed fine in terms of the social harm, which the activities of the company could have caused, the scope of its fault or the firm's conduct so far. The decision of the President of URTiP was criticised by the company for the fact that its justification considered merely the financial aspect of the case and the results of the non-provision by the plaintiff of the data required by the authority. According to company A., while deciding on the amount of a fine, the President of URTiP should have referred to the fine setting criteria contained in Article 68(2) PP.

The President of UKE found the above plea to be unfounded as the application of Article 68 PP remains a task of the regulatory body and cannot be applied by courts.

### **Key findings of the Supreme Court**

**I.** The Supreme Court did not share the opinion of the plaintiff concerning the alleged misapplication of Article 47(2) PP. The Court stated that the only criteria affecting the assessment whether the monopoly rights granted to the public operator were infringed was the weight of the postal items. Pursuant to Article 47(1) PP, a public operator is granted exclusivity for the provision of services such as collection, transport, and delivery of inland postal items under a specified weight limit. The way in which such service is to be performed is irrelevant (for example whether a courier service is used or traditional mail). The monopoly right would have been rendered meaningless especially if another company (not the legal monopolist) intended to collect, transport and deliver postal items weighing less than 500 grams in a way that would correspond with the requirements resulting from the definition of universal postal services.

The Supreme Court stressed that Article 47 PP does not limit the exclusive right of the operator to deliver postal items under 500 grams only to universal postal services. The Court admitted that this fact constituted a fundamental change in comparison

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<sup>5</sup> Compare: the judgment of the Polish Constitutional Tribunal of 6 April 2004, SK 56/03 where the Tribunal focused on the fact that the Telecommunications Law of 2000 abolished Article 91 of the Communications Law granting social privileges to employees of telecoms enterprises. Ruling on depriving them of the rights already granted, the Tribunal regarded that as lawful and compliant with the Constitution.

to the legal solution applied in the previous PK Act<sup>6</sup>. Article 3(4) PK restricted the legal monopoly of the public operator to “providing universal postal services in collection, transport, and delivery of postal items inland and abroad (...)”. The Supreme Court stated that the interpretation of that provision could have led to a conclusion that the legal monopoly of the public operator had been limited only to universal postal services, not covering services provided by courier companies on the basis of contracts concluded with individual senders. However, the PP Act cannot be interpreted this way, even if a systematic interpretation of the existing rules could confirm the arguments of the plaintiff. In the opinion of the Supreme Court, a literal and a “purposive” interpretation of the law would render different results.

Nonetheless, the Supreme Court stressed that there was actually no need to consider the plaintiff's claim concerning the qualifications of its business activities in the light of the PP Act; this issue was deemed to have been resolved in the decision of the President of URTiP taken on 20 January 2004 seeing as the decision was not appealed by the plaintiff.

**II.** In response to the claim that the company's economic freedom was violated, the Supreme Court stressed that to accept the plaintiff's view would preclude the possibility to amend the law because amendments restrict economic activities. The case-law of the Constitutional Tribunal proves also that the constitutional right of protection of rights already granted cannot be applied in cases where an individual should consider legislative amendments. The amendments of the Polish postal law regime were required due to the obligation to adapt the national legal system to EC law<sup>7</sup> as well as due to the necessity to guarantee a continuity of the provision of universal services in order to ensure that the public operator retains the necessary resources to finance its activities. On the basis of Article 88 PP, concessions for courier services granted under the PK Act turned into permits for the provision of postal services according to the PP Act. Since the new legislation came into force, the plaintiff was obliged to conduct its activities according to the rules of the PP Act rather than according to the provisions of its concession.

Moreover, the Supreme Court emphasised that Article 47(2) PP does not deprive courier companies of the right to provide services of collection, transport, and delivery of postal items not exceeding 500 grams provided that they have an appropriate permit

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<sup>6</sup> See judgment of the Supreme Court of 10 May 2002, IV CKN 1035/00 (2003) 3 OSNC, item 44.

<sup>7</sup> At that time, Poland was obliged to adapt its postal law to Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ [1998] L 15/14), as amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services (OJ [2002] L 176/21). Currently, the legal standard of the postal law in the EC is settled by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (OJ [2008] L 52/3).

and that the fee which they charge for those services is not lower than two and half times the fee set in the tariff for universal postal services of the public operator. In other words, services reserved for the public operator may still be provided by other companies but at appropriate prices.

The Supreme Court rejected therefore the claim that the provisions of the Polish Constitution on economic freedom were infringed.

III. According to the Supreme Court, the decision of 29 March 2004 imposing a fine on company A. did not lack the necessary justification for the actual amount of the fine, as claimed by the plaintiff. In the opinion of the Supreme Court, what was in fact lacking in this decision was reference to Article 68(2) PP. The President of URTiP specifically informed the plaintiff that if the requested documentation was not delivered, the basis for the calculation of the fine (not less than 250,000 EUR) would be estimated in light of Article 68(3) PP. Since the company failed to submit the requested data, the President of URTiP imposed a fine of 2% of the estimated basis. Considering that the plaintiff did not co-operate with the authority, the Supreme Court shared the opinion of the lower instances courts that the President of URTiP was not obliged to explain in detail the way in which the criteria stated in Article 68(2) PP were applied.

### Final remarks

The judgment under consideration, is one of the rare examples of a juridical ruling relating to the liberalisation process of the Polish postal sector<sup>8</sup> even though, the judgment refers only indirectly to the liberalisation rules. The key finding in this area was the confirmation that the legal monopoly of the public operator is not limited to universal postal services but covers also services meeting the weight limit criteria set out in the PP Act. That statement will remain true until the postal market is fully liberalised (that is, in 2013); pursuant to Article 3 of the Annex I to Directive 2008/06/EC Poland will use a derogating period for opening its postal market<sup>9</sup>.

The judgment mostly influences the procedural aspects of the decision-making process by the national postal regulator (currently: President of UKE). According to the Supreme Court, in appeal proceedings concerning regulatory decisions that imposed fines for the infringement of the PP Act, a court cannot assess the correctness of the legal qualification of the activities of the fined company, if that qualification was presented in the earlier decision, which was not appealed by that company according to the prescribed procedure. Even if the judgment focuses on the postal sector, its key

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<sup>8</sup> See: judgment of the Polish Supreme Administrative Court of 16 September 2004, GSK 77/04, unpublished; judgment of the Supreme Court of 10 May 2002, IV CKN 1035/00, (2003) 3 OSNC, item 44.

<sup>9</sup> On the current state of liberalisation of the postal sector in Poland see: *Raport Prezesa UKE o stanie usług rynku usług pocztowych w Polsce w 2007 r.* [Report of the President of UKE on the state of the services on the postal services market in Poland in 2007], UKE, Warszawa 2007.

finding seems to have a more universal impact; the legal interpretation given by the Supreme Court could easily be applied to decisions adopted by other Polish sectorial regulators – the President of UKE for the telecoms sector and the President of the Energy Regulatory Office (URE) for the gas and energy sectors.

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## **Should a fee for mobile phone number portability be determined solely by subscriber preferences?**

### **Comments to the judgments of the Court of Competition and Consumers Protection of 8 January 2007 (Ref. No. XVII AmT 29/06) and 6 March 2007 (Ref. No. XVII AmT 33/06) – Portability fee**

#### **Facts**

Comments concerning the Court of the Competition and Consumer Protection (hereafter, SOKiK) case files no. XVII AmT 33/06<sup>1</sup> and XVII AmT 29/06<sup>2</sup> referring to the fees imposed on subscribers for transferring mobile phone numbers from one mobile phone service provider to another.

The concept of “number portability” refers to a specific telecoms service allowing subscribers to retain a mobile number when switching telecoms operators. According to Article 71(3) of the Polish Telecommunication law (hereafter, PT), a subscriber may be charged a specified one-off fee for retaining a particular mobile number. However, the actual amount of the fee should not discourage subscribers from exercising their right to port numbers. Mobile number portability was designed to increase competition and to help customers switch operators. According to Article 30 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (hereafter, the Directive), the cost of switching operators that must be born by subscribers should be kept to a minimum.

In 2006, the President of the Polish Office of Electronic Communications (hereafter, UKE) conducted a consumer survey concerning the acceptable level of portability fees. The results of the survey indicated that most Polish individual consumers were inclined to pay not more than PLN 50 for retaining their assigned numbers. On this basis, the President of UKE made a statement saying that one-off porting fees should not exceed the gross amount of PLN 50. This statement was published on 28 March 2006 on the official website of UKE.

The President of UKE later determined that from 1 June 2006 one of the Polish mobile phone service providers – Polska Telefonia Komórkowa Centertel sp. z o.o.

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<sup>1</sup> Available at: [http://www.uke.gov.pl/uke/index.jsp?place=Lead01&news\\_cat\\_id=285&news\\_id=2100&layout=3&page=text](http://www.uke.gov.pl/uke/index.jsp?place=Lead01&news_cat_id=285&news_id=2100&layout=3&page=text)

<sup>2</sup> Available at: [http://www.uke.gov.pl/\\_gAllery/56/20/5620/wyrok\\_SOKiK\\_8.01.2007.pdf](http://www.uke.gov.pl/_gAllery/56/20/5620/wyrok_SOKiK_8.01.2007.pdf)

(hereafter, PTK) – has charged its consumers a number porting fee equal to the gross amount of PLN 61 (it used to charged a fee that was equal to PLN 122). The President of UKE decided that this amount discouraged the subscribers of PTK from exercising their right to port numbers, which constituted an infringement of Article 71(3) of the PT. As a result, a fine was imposed on PTK amounting to PLN 200,000. A similar fine of PLN 100,000 was imposed on another Polish mobile phone service provider – Polska Telefonía Cyfrowa sp. z o.o. (hereafter, PTC). In the opinion of the President of UKE, PTC charged, from 28 March 2006 (the publication date of the statement concerning the acceptable level of porting fees) until 31 May 2006, a porting fee set at a level that effectively discouraged its subscribers from transferring their assigned numbers, preventing them from exercising their legal right to port numbers. In this case, the porting fee was initially equal to the gross amount of PLN 120 but decreased to PLN 50 from 1 June 2006 as result of the tariff statement of the President of UKE.

Both PTK and PTC filed separate appeals against the two decisions of the President of UKE. They requested the dismissal of the decisions and the reimbursement of the costs incurred by the firms. PTK and PTC (jointly referred to as the “Operators”) claimed that the President of UKE wrongly interpreted Article 71(3) of the PT by stating that it bans operators from establishing a porting fee on a level that is higher than that expected by consumers, irrespective of the costs actually incurred by the operators. According to PTK, the fee that it charged from 1 June 2006 did not discourage its subscribers from exercising their right to port numbers. PTK claimed that, according to the results of a survey conducted among its customers, its subscribers accept a porting fee equal to the gross amount of PLN 75. Furthermore, PTK argued that mobile phone service providers offer a refund of the porting fees to new subscribers who wish to retain their numbers when switching operators.

The Operators’ interpretation of Article 30(2) of the Directive, and of Article 71(3) of the Polish PT that implements that provision, indicates that a portability fee should take into account and, at least partly reflect, the actual costs of the service incurred by the operators. The fact should be determined therefore, whether PTK or PTC raised their fees beyond their costs, which would discourage their subscribers from number porting. Pursuant to the Directive, national regulatory authorities shall ensure that pricing for interconnection related to the provision of number portability is cost-oriented and that direct charges to subscribers, if any, do not act as a disincentive for the use of these facilities.

Furthermore, PTC and PTK claimed that an individual decision of the President of UKE in this matter cannot be based on the subjective beliefs of subscribers arbitrarily determined by the authority on the grounds of a consumer survey. According to PTC, the President of UKE is not allowed to impose a fine without conducting formal proceedings.

### **Key legal problems of the cases**

The main question that arises in this context is whether the amount of the portability fee should reflect the costs of providing the service by the operators? Of fundamental importance is also the related question of whether the President of UKE can arbitrarily establish the level of the fee simply by publishing a statement to that effect on the website of UKE considering, in particular, that it is unclear what the legal nature of such statement might be?

SOKiK ruled that the survey conducted by the President of UKE was correct and showed what consumers expect to pay for number porting. In the opinion of SOKiK, the Operators infringed Article 71(3) of the PT by setting their porting fees on a level that would discourage their subscribers from exercising their right. SOKiK stated that according to Article 30(2) of the Directive, reflected by Article 71(3) of the PT, a one-off fee for number porting should be based on the subjective opinions of subscribers, while the costs incurred by operators shall be omitted. On this basis, SOKiK dismissed the appeals.

### **Key findings of SOKiK**

Considering the facts of the two cases, the determination of the level of the acceptable portability fee was based on a consumer survey carried out in 2006. According to its results, individual clients were willing to pay approximately PLN 46 for number porting while business subscribers accepted a fee of about PLN 60. According to the President of UKE, the only issue that needs to be taken into account when establishing the fee, is the amount that is acceptable to individual clients. On the basis of the survey, and taking into consideration the characteristics of European telecoms markets in 2006, the President of UKE decided that in Poland the porting fee should not exceed PLN 50. Higher fees were regarded as a deterrent for consumers to port their numbers. It is worth noting that the President of UKE set the porting fee without determining how to adjust it to reflect future developments of the telecoms sector or evolving consumer needs and expectations.

However, a decision of the President of UKE should not be based solely on the subjective beliefs of subscribers determined arbitrarily by the President on the grounds of a consumer survey. The question asked in the survey was: what level of porting fees do consumers expect? While it is certainly very helpful to be aware of the wishes of consumers, they should not constitute the only ground for establishing the permissible amount of the fee. Rather than stressing what consumers want or accept to pay, Article 71(3) of the PT expressly states that the decisive factor in this respect is that the fee should not discourage them from porting their number. Thus, in order to use the survey as the basis of a regulatory decision, it should have posed a question reflecting the language of the law far more closely than it actually did.

It is also surprising that the President of UKE seemed to expect immediate implementation of the tariff statement. It follows from the PTC decision, that the President of UKE considered a period of two months for adjusting the level of the

porting fee to be a penalty-inducing infringement of the law. However, the time given to firms to adjust to new legal rules should be reasonable and adequate to the business environment to which it applies.

There are no grounds for imposing a fine on PTK and PTC on the basis of the relevant provisions of the PT. According to its Article 209(1(16)), an operator that prevents its subscribers from exercising their rights to port numbers is subject to penalty. Considering the justification given by the President of UKE in these two cases, it appears that the authority equates the term “to prevent from exercising their rights” with the term “to discourage from using the rights”. This assumption leads the President of UKE to conclude that applying a higher porting fee than the amount determined in the tariff statement is synonymous with preventing subscribers from exercising their rights. However, “discouraging” differs substantially from “preventing”. Collecting a charge for number portability that is in excess of the fee determined by the President of UKE does not necessarily prevent subscribers from exercising their rights. In order for the President of UKE to impose a fine, it needs to be proven that such prevention occurred. No legal grounds can be found therefore for imposing a fine on operators for discouraging, rather than preventing, consumers from porting their numbers. If there is indeed a need to penalise operators for discouraging consumers, the wording of the relevant legislation should be changed and adjusted appropriately.

Moreover, the provisions of the Polish PT do not actually authorise the President of UKE to determine the level of the fee for number portability but only, to monitor its amount. It may be justified for the President of UKE to indicate the formulae for calculating the fee or to stress to operators the fact that its amount should not discourage subscribers from number porting. Even if the optimum amount of the fee were found through a properly conducted consumer survey, the amount proposed by consumers should not serve as the sole basis for determining the permitted level of the fee by the President of UKE, while the lack of the operators’ acceptance of the set amount, should not be the sole ground for imposing a fine. To impose a fine, it would be necessary to justify that the fee charged prevents subscribers from porting their numbers, a fact that has not been proven by the President of UKE or by SOKiK in these two cases.

Moreover, the amount of the fee may not be determined in total isolation from the costs that operators bear with respect to number porting. The Directive stipulates that the costs of number portability may be borne by the operator taking over the number as well as by the subscriber, keeping in mind that the latter should not be burdened to an extent that would discourage him/her from number porting. With respect to the costs, it seems advisable to refer to the jurisprudence of the European Court of Justice (hereafter, ECJ) regarding Article 30(2) of the Directive. ECJ stated in its judgment of 13 July 2006, (C-438/04, *Mobistar*) that number portability is intended to remove the obstacles to consumer freedom of choice, particularly in terms of switching mobile phone operators, and thus to ensure the development of effective competition on the mobile phone services market. To achieve these aims under Article 30(2) of the Directive, national regulators are obliged to ensure that pricing for interconnection related to the provision of number portability is cost-oriented and that direct consumer

fees do not act as a disincentive for the use of these facilities. ECJ indicated that the set-up costs may be passed on directly or indirectly to those subscribers who wish to make use of these facilities. This opinion of the ECJ applies to the two Polish cases that are considered here since Article 71(3) of the Polish PT implements Article 30(2) of the Directive.

### **Final remarks**

In the two commented judgments, SOKiK ruled that under Article 71(3) of the Polish PT, the fee for number portability should be determined solely by consumer preferences. However, this approach is difficult to accept – the portability fee should be determined on the basis of the actual costs of number porting. Therefore, fact that the President of UKE set the fee solely on the basis of a survey conducted among mobile phone subscribers (a survey which presented only their preferences without any consideration for the costs of the service) calls the fee determination process into serious question.

It is worth noting that porting fees that are not related to actual costs will lead to a situation where telecoms operators will consider them to be a penalty rather than a service consideration. In a market economy, the provision of services by a profit-oriented company may not occur at any cost; therefore, obligatory free-of-charge services constitute a punishment to those companies.

It has to be said with reference to the survey, that the President of UKE was obliged to assess whether the questionnaire has been properly conducted both as regards the selection of the respondents and the research method applied (for instance, phone-survey are considered to be less reliable). The choice of the representative group is particularly problematic here because the results of the survey did not state whether the respondents were actually subscribers, how they were selected or why only the opinions of those aged 15 and over were considered to be decisive.

It seems that in the context of the cases under consideration, the President of UKE did not prove that the amount of the portability fee charged by the appellants did not comply with the requirements set out in Article 71(3) of the Polish PT. By virtue of this legal provision, which implements into the Polish legal system the rules contained in Article 30(2) of the Directive, portability fees should not discourage subscribers from porting their numbers, they can, however, still reflect the costs of providing the service incurred by the telecoms operators.

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**How to determine a price of wholesale line rental?  
Case comment to the judgment of the Court of the Competition  
and Consumer Protection of 10 December 2007 – *Tele2*  
(Ref. No. XVII AmT 17/07)**

**Facts**

Tele2, one of the Polish alternative telecoms operators, applied on 2 November 2004 to the President of the Office of Electronic Communications (hereafter, UKE) for the issuance of a decision modifying the network interconnection agreement of Tele2 and the Polish incumbent telecoms operator Telekomunikacja Polska (hereafter, TP). Tele2 requested the imposition on TP of an obligation to offer Tele2 wholesale line rental (hereinafter, WLR). WLR services make it possible for alternative operators to purchase line rental from the incumbent for a wholesale price, in order for the alternative operators to be able to offer their own telecoms services in the fixed network to the clients of the incumbent.

In this context, Tele2 would take over from TP the whole process of serving its subscribers, as well as all of the costs associated with it. This way, subscribers would stay connected to the network of TP but use the telecoms services offered by Tele2 while remaining party to a contract with a single operator only. The introduction of WLR services helps to open the fixed telephone market to competition. It also creates the basis for cutting retail prices and makes it easier for subscribers to use telecoms services in the fixed network (one bill and one operator to contact).

The request submitted by Tele2 followed its earlier unsuccessful application made directly to TP on 1 July 2004, which contained a request to broaden the scope of the telecoms services provided by TP to Tele2. At that time, TP refused Tele2's request stating that it did not have WLR services in its offer. The President of UKE found this reply to constitute a refusal to provide telecoms access and, as a result, opened administrative proceeding against TP with the aim of issuing a decision on WLR. The proceedings ended on 13 July 2006 with a decision amending the interconnection agreement between TP and Tele2<sup>1</sup> by imposing on TP of an obligation to offer WLR services to Tele2. This decision was later amended as a result of an appeal lodged by

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<sup>1</sup> DRT-WWM-60600-43/04 (165) - available at: <http://www.uke.gov.pl>.

the incumbent. After a renewed assessment, the regulator issued on 29 December 2006 a new decision that contained amended annexes<sup>2</sup>.

The incumbent submitted an appeal to the Court of Competition and Consumer Protection (hereinafter, SOKiK). The appeal was examined by SOKiK which revoked the decision on 10 December 2007. The President of UKE appeal the judgment to the Court of Appeal.

### **Key legal problems of the case and key findings of SOKiK**

In its appeal, TP raised several major objections concerning the decisions taken by the President of UKE. Firstly, the incumbent argued that both decisions were issued by a person whose appointment as the President of UKE did not conform to the law. Secondly, TP stated that the scope of network interconnection was determined incorrectly. Thirdly, TP claimed that there was no legal basis for the imposition of a regulatory obligation to provide wholesale access to its network. Fourthly, TP argued that the WLR decisions contained regulatory obligations that are not set out in the legal provisions of the Polish Telecommunications Act (hereinafter, PT)<sup>3</sup>. Finally, TP stated that the price of WLR set by the President of UKE has been determined on the basis of a calculation method that is not provided in the PT.

One of the main legal problems assessed by SOKiK concerned the motion that both decisions were issued by a person whose appointment as the President of UKE did not conform to the law. With regard to this issue, SOKiK ruled in favour of the reasoning of TP. As a result, the regulatory decisions were said to have been issued in breach of law and thus, were null and void<sup>4</sup> since the President of UKE did not possess the necessary authorisation. However, the legality of the appointment of the President of UKE has been questioned on a number of occasions. In the end, the issue was resolved by the Polish Supreme Court stating that all of the decisions taken by the President of UKE were issued in conformity with the law and, that courts of general jurisdiction are not empowered to adjudicate the question of the legality of the appointment of the President of UKE<sup>5</sup>.

Considering TP's claim that there was no legal basis to introduce WLR, the fact should be noted that WLR services fall within the ambit of network interconnection as well as constitute an obligation that can be imposed on a telecoms operator with significant market power. Therefore, an operator may be obligated to offer WLR services as a transitional measure on the basis of the ONP regime and appropriate national provisions relating to network interconnection. Surprisingly, SOKiK did not

<sup>2</sup> DRT-WWM-60600-43/04 (180) - available at: <http://www.uke.gov.pl>.

<sup>3</sup> Act of 16 July 2004 (Official Journal 2004, No. 171, item 1800 (as. am.)).

<sup>4</sup> The Court based its reasoning on Article 156(1(2)) of Administrative Procedure Code according to which, an administrative decision is null and void when issued in breach of the provisions regulating the composition of a certain body, its representation or appointment. The Administrative Procedure Code Act of 14 June 1960, Official Journal 2000, No. 98, item 1071 (as am.).

<sup>5</sup> Judgment of 20 February 2008, III SZP 1/08, available at: <http://www.uke.gov.pl>

make any major reference to this claim in its judgment. On the other hand, this problem was analysed thoroughly by the President of UKE who initially even refused to impose an obligation to provide WLR services to Tele2 on the grounds that there was no appropriate legal basis for such an obligation. The position of the President of UKE changed however as a result of the consultation process and, in particular, in the light of the opinion expressed in this context by the European Commission.

The latest argument is closely connected to TP's objection relating to the improper definition of network interconnection. SOKiK found this claim unjustified. SOKiK rightly observed that the President of UKE legitimately applied the provisions of the PT in this context by stating that the obligation to provide telecoms access should consist, in particular, of the offering of wholesale services with the purpose of their resale by another firm as well as providing network or telecoms equipment interconnection and related facilities. This line of reasoning suggests that the scope of TP's obligation to provide telecoms access enables alternative operators to require the provision of WLR in every available variant, even where network interconnection is not necessary.

According to SOKiK, the President of UKE did not infringe the provisions of Article 31(2) of the PT by the fact that the WLR decision contained obligations that are not directly named by the legislator. SOKiK rightly observed that Article 31(2) of the PT contains the catalogue of compulsory elements that every network interconnection agreement should contain. The use of the term "at least" indicates however that the list has an open character. According to SOKiK therefore, the President of UKE was entitled to set out in the WLR decision additional elements of the contract that TP was meant to conclude with Tele2. TP claimed, in particular, that the President of UKE was not empowered to include in the decision rules relating to contractual fines. Despite being overlooked by SOKiK, this argument seems however to be incorrect in the light of Article 31(2(3(b))) of the PT according to which, every network interconnection agreement should include provisions regarding the non-performance or inadequate performance of mutually provided telecoms services. The above undoubtedly includes contractual fines.

Another key problem solved by SOKiK concerns the obligation imposed on TP to apply a price of its WLR of an amount calculated on the basis of a method other than the two contained in the PT, that is, other than "justified costs recovery" or "benchmarking of fees". The President of UKE determined the price of WLR in accordance with the so-called "retail minus" method which reflects the costs to be avoided by the incumbent as a result of ceasing to provide telecoms services to end-users as well as reflecting the incremental costs to serve WLR by alternative operators. The price of WLR should therefore reflect the necessity of the incumbent to bear its own costs of offering this wholesale service but also its need to make a profit out of it (bearing in mind that the incumbent will avoid costs of serving subscribers) while the alternative operator has to cover its own costs of providing services to subscribers as well as to make a profit. The regulator should set the fees on such a level however that would enable the alternative operator to provide services for prices that would be competitive to those offered by the incumbent. Having the above in mind, the

authority should analyse the rental fees applied by the incumbent, set the average and apply a discount reflecting the incumbent's cost-saving associated with the fact that the alternative operator takes over the costs of providing subscriber services.

Nevertheless, in the opinion of SOKiK, the fact that the President of UKE used the "retail minus" method to determine the price of WLR meant that an infringement of Article 39 and Article 221 (1(4(h))) of the PT took place. SOKiK explained that while Article 39 of the PT does indeed contain a rule permitting the limitation of the freedom of an undertaking to set its own prices, this provision has to be treated as an exception and thus, it cannot be interpreted in an extended way. When determining the content of an agreement, the President of UKE may therefore obligate an operator to base the level of its prices solely on criteria directly indicated by the legislator, in this case, the recovery of justified costs or benchmarking of fees applied in comparable competitive markets. SOKiK confirmed this position in a subsequent judgment concerning another decision of the President of UKE imposing on TP an obligation to provide WLR to Premium Internet (another alternative operator)<sup>6</sup>.

### Final remarks

The price of WLR should be primarily determined on the basis of costs in accordance with the cost methodology described in the secondary provisions and the decision of the President of UKE ("justified costs recovery"). However, such data did not exist at the time of the issue of the decisions. Alternatively, the President of UKE was entitled to determine the price of WLR on the basis of the level of fees applied in comparable competitive markets, as stated in Article 221(1(i)) of the PT ("benchmarking of fees"). In this case, the President of UKE found it impossible however to determine the price of WLR on the basis of this method also since the available data, originating from other member states of the EU that have introduced WLR in the past, was not comparable.

In the light of the above, the question of how to determine the price of WLR should be given serious consideration. The President of UKE tackled a very interesting problem: what pricing methodology should be applied when it is not possible to determine the appropriate fees for network interconnection on the basis of the two methods contained in the legislation? A strictly linguistic interpretation of the provision of the PT, as it was applied by SOKiK, can make it impossible for the President of UKE to set access prices, which is one of the most important powers of that this authority holds.

It is very important to emphasise that the price of WRL should be determined with great caution. If the price is too low, it may be unprofitable for the operator obliged to provide the wholesale service. If, in turn, the price is set too high, it may abate the interest on the side of alternative operators. The "retail minus" method seems

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<sup>6</sup> Judgment of 25 February 2008, XVII Amt 15/07/G, unpublished.

to be most appropriate in this context<sup>7</sup>, conforming also to the recommendations of the European Regulators Group<sup>8</sup>. Perhaps, in this case, it would have been worth considering the necessity to interpret domestic legislation in accordance with the Community legal regime and, specifically, with the provisions of Directive 97/33/EC<sup>9</sup> and Directive 2002/19/EC<sup>10</sup>.

The introduction of WLR is of great importance to the liberalisation of the Polish telecoms sector. Therefore, a decision of the President of UKE to impose on an incumbent of an obligation to provide WLR services to its competitor raised the hope that the alternative operator would be able to compete with the incumbent within this segment of the market. The initiative of the President of UKE met with the approval of the European Commission. It is thus all the more regrettable that it was blocked by SOKiK on the basis that the decisions were issued in breach of law and as such were null and void, due to the doubts concerning the legality of the appointment of the President of UKE especially, since a subsequent judgment of the Supreme Court adjudicated this problem differently.

However, the judgment of SOKiK may have some significance for the development of WLR services in Poland. It settled important problems relating to the scope of this service. It is too bad though that SOKiK abandoned the analysis of the legal basis of imposing an obligation to provide WLR services in Poland and did not refer to EC law when condemning the use of the “retail minus” method in order to determine the price of WLR.

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<sup>7</sup> J. Kubasik, *Stanowisko dotyczące projektu decyzji Prezesa UKE w sprawie z wniosku Tele2 z siedzibą w Warszawie z dnia 29 października 2004 r. o wydanie decyzji zmieniającej umowę o połączeniu sieci telekomunikacyjnych Tele2 oraz Telekomunikacji Polskiej SA z siedzibą w Warszawie zawartą w dniu 9 grudnia 2002 r.* [The position on the draft decision of the President of UKE on the application of Tele2, Warsaw submitted on 29 October 2004 on the issuance of a decision modifying the agreement on interconnection of networks belonging to Tele2 (the alternative operator) and TP concluded on 9 Decemebr 2002], p. 9.

<sup>8</sup> Principles of Implementation and Best Practice regarding the use and implementation of Retail Minus Pricing as applied to electronic communications activities.

<sup>9</sup> Directive 97/33/EC of the European Parliament and of the Council on interconnection in telecommunications with regard to ensuring universal service and interoperability through the application of the principles of open network provision (ONP), OJ [1997] L 199/32.

<sup>10</sup> Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ [2002] L 108/7.



# B O O K R E V I E W S

**Anna Fornalczyk, *Biznes a ochrona konkurencji*  
[*Business and the protection of competition*],  
Oficyna a Wolters Kluwer business, Kraków 2007, 220 p.**

One of the most interesting experiences a researcher can have is reading a book that deals with his or her academic discipline but from a completely different perspective. I had such an experience while reading the book of Prof. Anna Fornalczyk entitled “Business and the protection of competition”.

The book examines the issue of a company’s strategy from the perspective of the economic and legal protection of competition rather than purely from the classic perspective of management. For a specialist in the area of strategic management, as well as for a company’s manager, thinking about strategy starts with thinking about building a temporal monopoly – such is the meaning of the concept of competitive advantage – that allows the capture of additional (Ricardian) rent on a market. For a specialist in the field of economics, temporal monopoly means a *de facto* social loss and a reduction of the economic efficiency of the allocation of resources. In addition, for a specialist in the field of antitrust law (known today, with a touch of political correctness, as the law on competition and consumer protection) the construction of a temporal monopoly is exactly what should be forbidden, or at least strictly supervised, in the interest of social progress and justice.

It should be stressed that this strong conflict of interests exists but was in recent years frequently disregarded due to the belief in the beneficial effects of self-regulation of the market. Recently, because of the economic crisis it is clearly understood that the mechanism of the market is inefficient and morally indifferent. Managers striving to achieve the objectives set out by their shareholders (maximisation of economic value and profits in a relatively short period of time) often take actions that are very risky and could have traumatic economic, social and political consequences. Confidence in corporate social responsibility and rational behavior of managers (in the case of the current crisis mostly, but not exclusively, of managers in the financial sector) has proven to be a very naïve, if not irresponsible, belief. That is why both the marketplace and the behaviors of managers must be subjected to control and regulation. This extremely topical issue is the subject matter of Prof. Fornalczyk’s book. For me, as a researcher in the field of strategic management, the biggest advantage of this book is an analysis that shows in subsequent chapters how carefully the decisions and actions of large (dominant in their markets) companies must be shaped, as part of the process

of strategy development and implementation via pricing policies, strategic alliances, mergers and acquisitions, in order to avoid infringing antitrust laws.

The starting point for the author's analysis is the problem of strategy development seen from the legal and economic perspectives of competition protection. From the perspective of strategic management, a key element of formulating a strategy is to gain a competitive advantage. The author shows however, that from the perspective of competition and consumers the key issue lies in the correct definition of the firm's relevant market, because only proper market definition allows the company to legally assess its strategic position as well as the far-reaching legal consequences of that position.

The discussion of various Polish and European cases shows that this is not a trivial problem. All the required elements which are relevant to the competitive relationship must be analysed – from the utilitarian features of products and their use by buyers, the geographic and temporal dimension of the market, through demand and product substitutability, methods of sale, and the value chains of specific companies. On the one hand, each of these elements is an instrument of strategic management and can be used to gain a competitive advantage. On the other hand, the author shows that each of these elements can create barriers to entry and exit for current and potential competitors in the relevant market. As a result, it can be a key subject-matter of legal proceedings for the assessment of the degree of oligopolisation or monopolisation of the market.

The second chapter deals with the problem of abuse of market dominance by companies. It provides an overview and an analysis of the economic and legal criteria for dominance illustrated by examples of anti-monopolistic proceedings against Microsoft, United Brands Company, Telekomunikacja Polska (Polish Telecom), Tetra Pak, and examples from the pharmaceutical and chemical industries. The most interesting part of this chapter is a discussion of pricing practices of dominant firms used as an instrument for building high barriers to entry or creating high switching costs for customers. The author discusses different pricing policies from excessive prices, to predatory (abnormally low) and discriminatory prices. The strength of this chapter lies in the analysis of the diversity of possible price tactics of dominant companies, but I missed an analysis of the complex context of pricing decisions, which the author mentions only in passing, stating that “in practice, there may be a conflict between the business premises and the laws of competition” (p. 79). In practice, however, large companies always face a conflict because they must, and should, carry out their obligations towards their shareholders, suppliers and loyal customers on the one hand, which are often at odds with the expectations of market regulators, on the other hand.

The third chapter describes and analyses the issue of open and tacit agreements among enterprises – cartels (horizontal agreements between competitors) as well as distribution, price and wider-ranging strategic alliances. This chapter is also richly illustrated with examples of anti-trust proceedings and the rationale behind their final resolutions. An almost comical element of this chapter is the example of four Polish companies dealing with outdoor advertising services which intended to create

a cartel, and restrict the supply and demand governing prices for their services, but have stated their collusive intentions in a public press conference! This example shows how minimal is the actual state of knowledge among many managers (and consultants) concerning the complex rules of competition protection.

The fourth chapter examines the transactions of mergers and acquisitions, which are the daily bread of strategic management and represent the fastest, but also the most risky path of growth. The strategic management and finance field looks at the risks associated with such transactions primarily from the perspective of the potential increase of transaction costs of management, lack of synergies and poor implementation that can reduce the value of the company. The risks, which the author of the book examines, concern mainly conflicts with antitrust law, but – to my surprise – they are relatively rare in the European Union. While thousands of takeovers and mergers took place in the EC in the period from 1990 to 2006, the European Commission has issued only 19 decisions blocking a scrutinised transaction and 77 conditional approvals (p. 154). To me, this fact indicates two things. First, it shows the limited impact of those transactions on the real concentration of the European markets. Second, it shows that the European Commission takes a very balanced stance in relation to blocking mergers and acquisitions. Prof. Fornalczyk stresses this second aspect and shows the evolution of the legal treatment of mergers and acquisitions – a transition from thinking in terms of dominance, measured by market share – towards thinking in terms of real and potential benefits and losses of other market players, resulting primarily from the restrictions of competition by creating additional barriers to entry or stifling innovation.

The final chapter discusses the protection of competition in Poland, the evolution of legislation after 1989 and the functioning of the Anti-Monopoly Office renamed in 1996 as the Office of Competition and Consumer Protection (UOKiK). This is in my opinion the weakest chapter of the book since it provides only an overview of the powers of UOKiK and its president, and a specific list of activities during this period. However, taking into account that the author was the President of this Office during the period from 1990 to 1995, a thorough diagnosis of the entire process of creating a pragmatic competition law, the analysis of the successes as well as failures of this process and the application of the law could be expected. We also expected a thorough analysis of the Polish case law that would be very informative and useful considering that the publicly available information published by UOKiK are so general that they are of limited usefulness for practitioners of management in Poland. However, while in the earlier chapters the author often analyses particular cases (including Polish), this chapter lacks such an analysis which makes it more descriptive and less interesting.

To sum up, the review of Prof. Fornalczyk's book is very positive. The author directs her book to managers, consultants and specialists in the field of the theory of organisation and management. This book will be very interesting and instructive for them seeing as it contains an analysis of a variety of restrictions placed on the process of strategy building resulting from the law on the protection of competition. The analysis is richly illustrated with case studies. However, I do not agree with the author's statement in the introduction that the strategy of Polish companies "is

developed and implemented on the basis of the general knowledge and the intuition of managers, without analysis of opportunity and transaction costs, and optimisation of the scope and scale of operations” (p. 10). My experience suggests that Polish managers generally show a high degree of professionalism and a wide use of analytical methods in strategy development, especially in the case of large companies. Clearly however, even experienced managers relatively rarely take into account the legal aspects of the process of strategy development and the possible counter-productive consequences of a successful implementation of a strategy aiming at market domination.

This issue constitutes a real problem for a relatively limited number of Polish companies so far (classic examples include the Polish Telecom Group and Orlen SA) due to the relatively small scale of operations of Polish companies that are very far away from a dominant position on their respective relevant markets. The legal considerations of strategy development and implementation that Prof. Fornalczyk addresses in her book will become increasingly important with the inevitable process of concentration of Polish markets.

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**Tadeusz Skoczny, Agata Jurkowska (eds.),**  
***Orzecznictwo sądów wspólnotowych w sprawach konkurencji***  
***w latach 1964-2004***  
**[*Jurisprudence of the European Community Courts in competition matters***  
***in years 1964-2004*],**  
**Oficyna a Wolters Kluwer business, Warszawa 2007, 920 p.**

The subject of the study edited by Prof. Tadeusz Skoczny and Dr. Agata Jurkowska of the University of Warsaw (Centre of Antitrust and Regulatory Studies) is the jurisprudence of the European Community Courts (hereafter, EC Courts) concerning European competition rules. It focuses on the provisions relating to undertakings (Articles 81–82, 86 Treaty establishing the European Community – TEC) while the case law concerning state aid and other forms of infringements of competition law by Member States of the European Union is omitted. The review presents the jurisprudence of the EC Courts both in matters relating to the interpretation of competition rules (issued on the basis of Article 234 TEC) and in matters concerning the legality of the application of these rules (Articles 226–228, 230–233, 235–243 TEC). The jurisprudence under review covers the activities of the Court of Justice of the European Communities (hereafter, ECJ) and the Court of First Instance (hereafter, CFI) from the first judgments concerning competition rules decided in the 1960's<sup>1</sup> until the 30<sup>th</sup> of April 2004.

About 650 judgments were issued in the period covered, of which 72 are presented in this book by 27 different authors (including the editors), both scholars and practitioners. The relevant extracts of the judgments are translated from English by the authors. Bearing in mind the subject matter of this book, the choice of which judgments should be incorporated in it is of fundamental importance. The selection of 72 out of the over 600 competition-related judgments is, in itself a challenging task. The book opens with a broad introduction to various European competition law doctrines, developed over the years by the jurisprudential activity of the EC Courts. The introduction is followed by 3 chapters covering the selected judgments presented in chronological order, a table of all judgments issued in competition-related matters, a list of legal acts referred to and an index of key issues discussed in this book.

The introduction to the jurisdictional doctrines relating to competition rules, written by the editors (p. 25–66), covers various aspects of European competition law. The editors see 4 main fields of activity for EC Courts in this respect: 1) setting

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<sup>1</sup> The very first judgment being 13/61 *Bosch v de Geus*, [1962] ECR of 6<sup>th</sup> April 1962. This case is not presented in the book under review here.

the scope of the application of competition rules; 2) interpreting the basic concepts established in the TEC; 3) supporting the creation of the internal (initially: common) market; 4) setting the procedural rules (p. 26–28). They also give detailed information on the number and character of all the proceedings in competition matters (p. 30–33). Furthermore, the main analysis concerns different doctrines developed by the ECJ and the CFI in this field (p. 33–62), such as the “relevant market” doctrine (p. 33), the “*de minimis*” doctrine (p. 34), the “single economic unit” doctrine (p. 36), the “collective dominant position” doctrine (p. 43, 45) and many others. The introduction indicates obviously only the main ideas of the key judgments. It can, nevertheless, be of use for those readers that need a brief and comprehensive overview of all important aspects of European competition law jurisprudence.

The main study is divided into 3 chapters: the jurisprudence of the ECJ from 1962–1989 (p. 69–286, containing 28 judgments), the jurisprudence of the CFI from 1989–2004 (p. 287–519, containing 22 judgments) and, the jurisprudence of the ECJ from 1989–2004 (p. 521–774, containing 22 judgments). In each of these chapters the judgments are presented in chronological order rather than grouped according to their jurisprudential subject matter. The decision to present the selected jurisprudence in this particular way seems legitimate considering the variety of different legal matters under consideration. The index at the end of the book is thus of vital importance for those readers, who are looking for references to a specific competition-related issue. The presentation of each judgment covers its key-words, summary, and legal findings of the EC Courts. In cases where the factual situation and important judicial input are presented, this is followed by the authors’ comments on the judgment.

Referring to the 4 categories of activity of the EC Courts indicated by the editors, the judgments presented in this book concentrate on the first 2. The scope of the application of European competition rules is considered in several judgments including *Züchner*<sup>2</sup> (commented on by Justyna Majcher), where it is explained for the first time that competition rules apply to the financial sector (banks). The *Verband der Sachversicherer*<sup>3</sup> judgment, covered by Agata Jurkowska, further clarifies that Article 81 TEC applies to the insurance sector and defines the meaning of a “decision by an association of undertakings”. *ANTIB*<sup>4</sup>, presented by Małgorzata A. Nesterowicz, shows that general rules on competition also apply to transport on inland waters, regardless of Regulation 1017/68. The *Lucas Asjes*<sup>5</sup> judgment, discussed by Dawid Miąsik, answers two important questions: the fact that competition rules fully apply to the transport sector, regardless of the Council’s lack of activity under Article 84 TEC (in this case: air transport), and that Article 81 and 82 TEC are addressed both

<sup>2</sup> 172/80 *Gerhard Züchner AG v Bayerische Vereinsbank AG*, [1981] ECR 2021, no. 15 in the book.

<sup>3</sup> 45/85 *Verband der Sachversicherer e.V. v Commission of European Communities*, [1987] ECR 405, no. 23 in the book.

<sup>4</sup> 272/85 *Association Nationale des Travailleurs Independents de la Batellerie (ANTIB) v Commission of European Communities*, [1987] ECR 2201, no. 24 in the book.

<sup>5</sup> 209–213/84 *Ministere Public v Lucas Asjes*, [1986] ECR 1425, no. 22 in the book.

to undertakings and Member States of the European Union. *Woodpulp I*<sup>6</sup>, covered by Agata Jurkowska, is important mainly because it clarifies the scope of the territorial application of European competition rules. Furthermore, the *Almelo*<sup>7</sup> judgment, commented on by Marcin Kolasieński, confirms that energy should be treated as a “good” and that Articles 81 and 82 TEC are fully applicable to the energy sectors. *Connect Austria*<sup>8</sup>, presented by Piotr Lissoń, is one of the few judgments concerning the application of competition rules into the telecommunications sector.

The interpretation of basic concepts used in the TEC constitutes the core of the reviewed jurisprudence. Several judgments concern the very basic notion of “undertaking”. Among them are: *Höfner*<sup>9</sup> (presented by Michał Markowski); *Poucet & Pistre*<sup>10</sup> (covered by Małgorzata Kozak); *Albany International*<sup>11</sup> (commented on by Marcin Wnukowski) and *Wouters*<sup>12</sup> (discussed by Małgorzata Grzelak). One of the last judgments in this book – *Aéroports de Paris*<sup>13</sup> (presented by Krzysztof Murawski), confirms the broad definition of the notion of “undertaking” as an entity that, apart from its economic activity, can also exercise some public power.

The meaning and scope of Article 81 TEC is also extensively analysed. Its application to vertical restraints, mainly exclusive distribution and exclusive supply contracts, is analysed in the first judgments reviewed in this book (they include: *Société Technique Minière*<sup>14</sup>, *Völk v J. Vervaecke*<sup>15</sup> presented by Marek Sachajko; *Consten & Grundig*<sup>16</sup>, *Brasserie de Haecht*<sup>17</sup> and *Béquelin*<sup>18</sup> covered by Piotr Dębowski). Selective distribution systems are

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<sup>6</sup> 89, 104, 114, 116, 117, 125–129/85 *Woodpulp Producers v Commission of European Communities*, [1988] ECR 5193 of 27 September 1988, no. 27 in the book.

<sup>7</sup> C-393/92 *Gemeente Almelo & others v NV Energiebedrijf Ijsselmij*, [1994] ECR I-1477, no. 58 in the book.

<sup>8</sup> C-462/99 *Connect Austria Gesellschaft für Telekommunikation GmbH v Telekom Kontrol Kommission & Mobilom Austria AG*, [2003] ECR I-5197, no. 71 in the book.

<sup>9</sup> C-41/90 *Klaus Höfner & Fritz Elser v Macroton GmbH*, [1991] ECR I-1979, no. 52 in the book.

<sup>10</sup> C-159/91, C-160/91 *Christian Poucet v Assurances Generales de France et Caisse Mutuelle Regionale du Languedoc Rousillon, Daniel Pistre v Caisse Autonome Nationale de Compensation de l'Assurance Vieillesse des Artisans*, [1993] ECR I-637, no. 54 in the book.

<sup>11</sup> C-67/98 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECR I-5751, no. 65 in the book.

<sup>12</sup> C-309/99 *J.C.J. Wouters, J.W. Savelbergh, Price Watercoopers Belastingadviseurs BV*, [2002] ECR I-1577, no. 69 in the book.

<sup>13</sup> C-82/01 *Aéroports de Paris v Commission of European Communities*, [2002] ECR I-9297, no. 70 in the book.

<sup>14</sup> 56/66 *Société Technique Minière v Maschinenbau Ulm GmbH*, [1966] ECR 235, no. 1 in the book.

<sup>15</sup> 5/69 *Franz Völk v Etablissements J. Vervaecke*, [1969] ECR 295, no. 4 in the book.

<sup>16</sup> 56/64, 58/64 *Consten GmbH und Grundig-Verkaufs-GmbH v Commission of European Communities*, [1966] ECR 299, no. 2 in the book.

<sup>17</sup> 23/67 *Brasserie de Haecht v Wilkin and Wilkin*, [1967] ECR 407, no. 3 in the book.

<sup>18</sup> 22/71 *Béquelin Import Co v S.A.G.L. Import Export*, [1971] ECR 949, no. 5 in the book.

analysed in light of Article 81 in *Metro I*<sup>19</sup> (presented by Piotr Dębowski). In *Pronuptia de Paris*<sup>20</sup>, discussed by Eliza Misiejuk, the first judgment concerning franchise agreements for the distribution of goods in light of Article 81 TEC, the ECJ states that such agreements do not restrict competition in principle, as they are beneficial for both sides of the agreement and enable the creation of new markets. The *Windsurfing*<sup>21</sup> judgment, commented on by Justyna Majcher, concerns the legality of licensing agreements. *Société d'Hygiène Dermatologique de Vichy*<sup>22</sup> (presented by Piotr Dębowski) concerns the problem of admissibility of selective and exclusive distribution systems. *Delimitis*<sup>23</sup> (also discussed by Piotr Dębowski), the presentation of which opens chapter 3 of this book, concerns the legality of distribution agreements, in particular, the so called "beer ties" where networks of similar agreements are present. *Metro Grossmärkte*<sup>24</sup> (covered by Rafał Poździk) demonstrates the ECJ's position on selective distribution systems. The *Matra Hachette*<sup>25</sup> judgment, discussed by Agata Jurkowska, mostly concerns the application of Article 81(3) TEC to horizontal agreements. *Fiatagri*<sup>26</sup> (presented by Marek Sachajko) elaborates on the notion of "facilitating practices" as practices limiting competition.

The definition of a "concerted practice" and the first example of a horizontal cartel is analysed in *ICI*<sup>27</sup> by Agata Jurkowska who also further presents the *Suiker Unie*<sup>28</sup> judgment, which concerns both Articles 81 and 82 TEC, where the notion of "concerted practices" is defined more precisely, together with a test for its occurrence (p. 134). Also relevant in this context is the aforementioned *Züchner*<sup>29</sup> judgment, which clarifies that parallel behavior is one of the criteria suggesting the presence of concerted practices provided, that some other element of coordination of behavior also exists. In the judgment *Zink Producers*<sup>30</sup> (presented by Agata Jurkowska) two

<sup>19</sup> 26/76 *Metro SB-Grossmärkte GmbH & Co. KG v Commission of European Communities*, [1977] ECR 1875, no. 10 in the book.

<sup>20</sup> 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmegard Schillgallis*, [1986] ECR 353, no. 20 in the book.

<sup>21</sup> 193/83 *Windsurfing International Inc. v Commission of European Communities*, [1986] ECR 611, no. 21 in the book.

<sup>22</sup> T-19/91 *Société d'Hygiène Dermatologique de Vichy v Commission of European Commission*, [1992] ECR II-415, no. 30 in the book.

<sup>23</sup> C-234/89 *Stergios Delimitis v Henninger Bräu AG*, [1991] ECR I-935.

<sup>24</sup> C-376/92 *Metro Grossmärkte v Cartier*, [1994] ECR I-15, no. 57 in the book.

<sup>25</sup> T-17/93 *Matra Hachette SA v Commission of European Communities*, [1994] ECR II-595, no. 33 in the book.

<sup>26</sup> T-34/92 *Fiatagri UK Ltd & New Holland Ford Ltd v Commission of European Communities*, [1994] ECR II-905, no. 34 in the book.

<sup>27</sup> 48/69 *Imperial Chemical Industries Ltd. v Commission of European Communities*, [1972] ECR 619, no. 6 in the book.

<sup>28</sup> 40-48, 50, 54-56, 111, 113, 114/73 *Coöperatieve Vereniging „Suiker Unie” UE and others v Commission of European Communities*, [1975] ECR 1633, no. 9 in the book.

<sup>29</sup> 172/80 *Gerhard Züchner AG v Bayerische Vereinsbank AG*, [1981] ECR 2021, no. 15 in the book.

<sup>30</sup> 29, 30/83 *Compagnie Royale Asturienne des Mines SA & Société Rheinzink GmbH (Zink Producers) v Commission of European Communities*, [1984] ECR 1679, no. 17 in the book.

important issues are clarified: first, that the change in the name and legal form of an undertaking does not preclude its liability for its previous actions; second, that parallel behavior does not by itself constitute proof of a concerted practice, in particular, if parallel behavior can be explained by factors other than cooperation or coordination between parties. In *Wood Pulp II*<sup>31</sup> (covered by Dawid Miąsik) the definition of parallel behavior is confirmed, even though, in this case, no concerted practice was actually established as parallel behavior was not accompanied by the elimination of uncertainty about future behavior of competitors. The *FEDETAB*<sup>32</sup> judgment (presented by Agata Jurkowska) concerns a recommendation issued by an association of undertakings that was deemed to constitute a “decision of an association of undertakings” covered by Article 81(1) TEC. As the last judgment concerning Article 81 TEC, Agata Jurkowska presents *Courage*<sup>33</sup> - the first judgment confirming the possibility of claiming damages for an infringement of Article 81 TEC by any individual (including the party to the agreement).

The scope of the application of Article 82 TEC and the meaning of its provisions are explained in several judgments. First, in *Europemballage & Continental Can*<sup>34</sup> (covered by Marek Sachajko) Article 82 is said to be inappropriate to assess mergers. The same author presents the *Instituto Chemiterapico Italiano & Commercial Solvents*<sup>35</sup> judgment, which gives the definition of an “abuse” of a dominant position (it is the first judgment to analyse the market behavior known as a “refusal to deal” and the first example of the Commission’s decision where a positive action was imposed on an undertaking abusing its dominant position). *United Brands*<sup>36</sup> (discussed by Agata Jurkowska) is important as it delivers a precise definition of a “dominant position” as well as different examples of its abuse (mainly refusal to supply or price discrimination). It also clarifies issues such as the definition of a “relevant market” in its product and geographic dimension. *Hoffman-La Roche*<sup>37</sup>, commented on by Małgorzata Surdek, extends and deepens the findings of *United Brands*. It mainly gives guidance on the methods of establishing dominance on a relevant market and identifies objective criteria for finding abuse (its objective effect most of all).

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<sup>31</sup> 89/85, 104/85, 114/85, 116/85, 117/85, 125-129/85 *Ahlström Osakeyhtiö v Commission of European Communities*, [1993] ECR I-1307 of 31 March 1993, no. 55 in the book.

<sup>32</sup> 209-215, 218/78 *Heinz van Landewyck S.a.r.l., Federation Belgo-Luxembourgoise des Industries du Tabac A.c.b.l. (FEDETAB) v Commission of European Communities*, [1980] ECR 3125, no. 14 in the book.

<sup>33</sup> C-453/99 *Courage Ltd v Crehan*, [2001] ECR I-6297, no. 67 in the book.

<sup>34</sup> 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission of European Communities*, [1973] ECR 215, no. 7 in the book.

<sup>35</sup> 6/73, 7/73 *Instituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of European Communities*, [1974] ECR 223, no. 8 in the book.

<sup>36</sup> 27/76 *United Brands Company & United Brands Continental BV v Commission of European Communities*, [1978] ECR 207, no 11 in the book.

<sup>37</sup> 85/76 *Hoffman-La Roche & Co. AG v Commission of European Communities*, [1979] ECR 461, no. 12 in the book.

The judgment opening chapter 2 of this book – *Hilti AG*<sup>38</sup> (presented by Justyna Majcher) explains when the market practice of “tying” agreements constitutes an abuse (p. 294). In the CFI’s judgments: *Italian Flat Glass*<sup>39</sup> and *BPB Industries*<sup>40</sup>, presented by Renata Wójtuk-Janusz, additional issues concerning Article 82 TEC are clarified. *Flat Glass* gives the first definition of “collective dominance”, *BPB* explains that the issue of intentional fault is irrelevant for committing an abuse of a dominant position, seeing as establishing an abuse should be based solely on objective factors (p. 323). The *Irish Sugar*<sup>41</sup> judgment (discussed by Justyna Majcher) concerns the question of “collective dominance” and the possibility of its abuse, both individually and collectively, by participating undertakings. The *CMB*<sup>42</sup> judgment (commented on by Małgorzata A. Nesterowicz) further clarifies the definition of collective dominance and indicates the independence (understood as lack of relationship) of Articles 81 and 82 TEC. *Michelin I*<sup>43</sup> (presented by Eliza Misiejuk) deals with relevant markets on which subsidiaries act, rather than those of the main company; it also considers loyalty discounts to be a form of “abuse”. The same Author analyses *BAT*<sup>44</sup> where it is clarified that the acquisition of shares in a competing undertaking might only then constitute an abuse of a dominant position if an effective control or, at least, an influence on its commercial conduct, is exercised afterwards. This judgment accelerated the work on the preparation of Regulation 4064/89. Marek Szydło presents *Ahmed Saeed Flugreisen*<sup>45</sup> as the final judgment included in the section of this book dedicated to the activities of the ECJ until the creation of the CFI. The ECJ explains there three important issues: the relationship between Articles 81 and 82 TEC as provisions that can be applied simultaneously, the definition of a relevant “product market” and the scope of the application of European competition rules in relation to Member States (p. 278). In *Metropole Télévision*<sup>46</sup>

<sup>38</sup> T-30/89 *Hilti AG v Commission of European Communities*, [1991] ECR II-1439, no. 29 in the book.

<sup>39</sup> T-68/89, T-77/89, T-78/89 *Società Italiana Vetro SpA, Fabbrica Pisana SpA, PPG Vernante Pennitalia SpA v Commission of European Communities*, [1992] ECR II-1403, no. 31 in the book.

<sup>40</sup> T-65/89 *BPB Industries Plc, British Gypsum Ltd v Commission of European Communities*, [1992] ECR II-389, no. 32 in the book.

<sup>41</sup> T-228/97 *Irish Sugar plc v Commission of European Communities*, [1999] ECR II-2969, no. 40 in the book.

<sup>42</sup> C-286/95 P, C-396/95 P *Compagnie Maritime Belge Transports SA, Compagnie Maritime Belge SA & Dafra-Lines A/S v Commission of European Communities*, [2000] ECR I-1365, no. 66 in the book.

<sup>43</sup> 322/81 *N.V. Nederlandsche Banden-Industrie Michelin v Commission of European Communities*, [1983] ECR 3461, no. 16 in the book.

<sup>44</sup> 142 and 156/84 *British American Tobacco Company Limited, Reynolds Industries Inc v Commission of European Communities*, [1987] ECR 4487, no. 25 in the book.

<sup>45</sup> 66/86 *Ahmed Saeed Flugreisen, Silver Line Reisebüro GmbH v Centrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, [1989] ECR 803, no. 28 in the book.

<sup>46</sup> T-528/93, T-542/93, T-543/93, T-546/93 *Metropole Télévision SA & Reti Televisive Italiane SpA, Gestevisión Telecinco SA, Antena de Televisión v Commission of European Communities*, [1996] ECR II-649, no. 37 in the book.

(presented by Ewelina D. Sage) discriminatory membership criteria in an association of broadcasters are considered to be anticompetitive. *Michelin II*<sup>47</sup> (presented by Eryk Kosiński) concerns the abuse of a dominant position in the form of price rebates (loyalty rebates and fidelity rebates) that have no objective economic justification and exclude competitors from the market. The same problem is analysed in *British Airways*<sup>48</sup>, commented on by Justyna Majcher, where loyalty rebates are found to infringe Article 82 TEC when they increase loyalty towards the firm offering them, exclude competition by other providers or discriminate among clients. The *Tetra Pak*<sup>49</sup> judgment (presented by Barbara Pęczalska) concerns the existence of associative links between markets whereby their existence can be proof of dominance within the meaning of Article 82.

Among the judgments concerning Article 82 TEC, a series of cases is presented that proves important for the development of the “essential facilities” doctrine in European jurisprudence. The first *ENS* judgment<sup>50</sup>, presented by Agata Jurkowska, does not mention this doctrine directly. *Magill*<sup>51</sup> (discussed by Ewelina D. Sage) clarifies that the essential facilities doctrine can be applied to intellectual property rights (here: copyright). It also clarifies two other issues: it confirms that the European Commission can impose positive obligations on an undertaking abusing its dominant position and it states that, in certain circumstances, competition law can limit intellectual property rights where it leads to the imposition of an obligatory licence. The first direct reference to the essential facilities doctrine appears in the ECJ’s *Oscar Bronner*<sup>52</sup> judgment (presented by Małgorzata Surdek) applied, at least in this case, not to intellectual property rights. In the *IMS*<sup>53</sup> judgment, commented on by Justyna Majcher, the ECJ states that a dominant company might be obliged to grant access to its intellectual property rights to competitors, who wish to enter the same market. It also clarifies that a “refusal of access” constitutes an abuse of a dominant position, which is seen as a confirmation of the existence of the essential facilities doctrine in Community law.

Justyna Majcher comments on 3 judgments concerning the relationship between Article 82 and Article 86 of the TEC. The *Italy v Commission*<sup>54</sup> judgment is the first

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<sup>47</sup> T-203/01 *Manufacture Française des Pneumatiques Michelin v Commission of European Communities*, [2003] ECR II-4071, no. 49 in the book.

<sup>48</sup> T-219/99 *British Airways v Commission of European Communities*, [2003] ECR II-5917, no. 50 in the book.

<sup>49</sup> C-333/94 P *Tetra Pak International SA v Commission of European Communities*, [1996] ECR I-5951, no. 61 in the book.

<sup>50</sup> T-374/94, T-375/94, T-384/94, T-388/94 *European Night Services & others v Commission of European Communities*, [1998] ECR II-3141, no. 38 in the book.

<sup>51</sup> C-24/91 P, C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of European Communities*, [1995] ECR I-743, no. 60 in the book.

<sup>52</sup> C-7/97 *Oscar Bronner GmbH v Mediaprint & others*, [1998] ECR I-7791, no. 64 in the book.

<sup>53</sup> C-418/01 *IMS Health GmbH & Co.OHG v NDC Health GmbH&Co. KG*, [2004] ECR I-5039, no. 72 in the book.

<sup>54</sup> 41/83 *Italy v Commission of European Communities*, [1985] ECR 873, no. 18 in the book.

example of infringing Article 86 TEC by the Commission in its decision against British Telecom for abusing its dominant position. This judgment illustrates that an undertaking that was granted a legal monopoly can also infringe Article 82 TEC. Similarly, in *Bodson*<sup>55</sup> the scope of a state's responsibility under Article 86(1) TEC for infringement of Article 82 is set out. It is further clarified in *Télémarketing*<sup>56</sup> that Article 82 TEC is applicable to undertakings that are dominant on the market because they were granted a legal monopoly. Such companies can abuse their dominant position if they refuse access to a service necessary for other undertakings to act on a neighbouring market. The relationship between Article 82 and Article 86 TEC is further discussed in other judgments including: *Porto di Genova*<sup>57</sup> (discussed by Małgorzata A. Nesterowicz) and *Corbeau*<sup>58</sup> (commented on by Marek Szydło). In *Commission v Holland*<sup>59</sup> (covered by Małgorzata Szwaj and Piotr Skurzyński), the ECJ states that Article 86(2) TEC can justify an infringement of Article 28 and Article 31 TEC. The *Arduino*<sup>60</sup> judgment, presented by Marek Szydło, clarifies the meaning of the "state action" doctrine applied to anticompetitive behaviors of Member States.

Several judgments are of particular importance to mergers. Anna Jurkiewicz presents *Gencor*<sup>61</sup>, which has a 3 fold impact on European competition-related jurisprudence: explaining the territorial scope of the application of the Merger Regulation (previously 4064/89, at present 139/2004), elaborating on the definition of "collective dominance", and dealing with the obligations of the parties to modify the terms of their merger in order to ensure a competitive structure of the market. The same author describes *Kali & Salz*<sup>62</sup>, where it was stated that the "failing firm defense" can be applied under conditions of Regulation 4064/89. This Regulation was also said to be applicable in cases of collective dominance, even though in this very case, the European Commission did not prove its existence.

The scope of the judicial control of merger decisions of the European Commission is fully analysed in the "concentration cases" saga that occurred at the beginning

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<sup>55</sup> 30/87 *Corinne Bodson v SA Pompes Funèbres des Régions Libérées*, [1988] ECR 2479, no. 26 in the book.

<sup>56</sup> 311/84 *Centre Belge d'Etudes de Marché – Télémarketing (CBEM) v SA Compagnie Luxembourgeoise de Télédiffusion (CLT) & Information Publicité Benelux (IPB)*, [1985] ECR 3261, no. 19 in the book.

<sup>57</sup> C-179/90 *Merci Convenzionali Porto di Genova SpA v Siderurgica Gabrielli SpA*, [1991] ECR I-5889.

<sup>58</sup> C-320/91 *Paul Corbeau*, [1993] ECR I-2533, no. 56 in the book.

<sup>59</sup> C-157/94 *Commission of European Communities v Holland*, [1997] ECR I-5699, no. 62 in the book.

<sup>60</sup> C-35/99 *Criminal proceedings against Manuele Arduino*, [2002] ECR I-1529, no. 68 in the book.

<sup>61</sup> T-102/96 *Gencor Ltd v Commission of European Communities*, [1999] ECR II-753, no. 39 in the book.

<sup>62</sup> C-68/94, C-30/95 *France & Société commerciale des potasses et de l'azote (SCPA), Entreprise minière et chimique (EMC) v Commission of European Communities*, [1998] ECR I-1375, no. 63 in the book.

of the XXI Century. First, Tadeusz Skoczny comments on the *Airtours*<sup>63</sup> judgment, which, for the first time, annulled a decision taken by the European Commission to prohibit a merger. The most important finding of this judgment is the abolition of the presumption that the creation of collective dominance would automatically lead to anticompetitive effects on the relevant market. Further, Marcin Wnukowski comments on the T-77/02 *Schneider Electric*<sup>64</sup> judgment, complementary to the T-310/01 *Schneider*<sup>65</sup> judgment, presented by Małgorzata Grzelak. As the last in the concentration saga, the two *Tetra Laval*<sup>66</sup> judgments are commented on by Barbara Pęczalska. In all these judgments, the European Commission's decisions were annulled by the CFI due to insufficient economic analysis.

The support for the creation of the common market is not emphasised in the commented judgments. Only *Volkswagen*<sup>67</sup> (commented by Rafał Poździk) is concerned with the question of hindering parallel import as an infringement of Article 81(1) TEC.

The setting of procedural rules to be applied in competition-related proceedings appears in most of the presented judgments. The only case which sets out procedural rules as a whole is the *Camera Care*<sup>68</sup> order (commented on by Marek Sachajko). In this case there are important indications given as to the conditions of taking interim measures by the Commission. The procedural guarantees in proceedings before the European Commission are considered in several judgments of the CFI. Robert Gago comments on the monumental *Cimenteries CB*<sup>69</sup> judgment (consisting of 5134 points) exploring its importance for the definition of "concerted practices" and the method of proving them. Also clarified in this judgment is the scope of procedural guarantees available to the parties of administrative proceedings taking place before the Commission. More specifically, Karolina Gacka presents *Schöller*<sup>70</sup> - a judgment

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<sup>63</sup> T-342/99 *Airtours plc v Commission of European Communities*, [2002] ECR II-2585, no. 43 in the book.

<sup>64</sup> T-77/02 *Schneider Electric S.A. v Commission of European Communities*, [2002] ECR II-4201, no. 44 in the book.

<sup>65</sup> T-310/01 *Schneider Electric S.A. v Commission of European Communities*, [2002] ECR II-4071, no. 45 in the book.

<sup>66</sup> T-5/02 *Tetra Laval BV v Commission of European Communities*, [2002] ECR II-4381, no. 46 in the book, and T-80/02 *Tetra Laval BV v Commission of European Communities*, [2002] ECR II-4071 *v Commission of European Communities*, [2002] ECR II-4519, no. 47 in the book.

<sup>67</sup> T-62/98 *Volkswagen AG v Commission of European Communities*, [2000] ECR II-3453, no. 42 in the book.

<sup>68</sup> 792/79 R *Camera Care Ltd v Commission of European Communities*, [1980] ECR 119, no. 13 in the book.

<sup>69</sup> T-25-26/95, 30-32/95, 34-39/95, 42-46/95, 48/95, 50-65/95, 68-71/95, 87-88/95, 103-104/95 *Cimenteries CB & others v Commission of European Communities*, [2000] ECR II-491, no. 47 in the book.

<sup>70</sup> T-9/93 *Schöller Lebensmittel GmbH & Co v Commission of European Communities*, [1995] ECR II-1611, no. 35 in the book.

explaining the character of “comfort letters” (it also touches upon the question of defining the market and an “influence on competition”).

*Rendo*<sup>71</sup>, presented by Marek Kolasiński, explains the scope of the European Commission’s competence as far as the opening and continuation of its proceedings is concerned. The Commission is never obliged to issue a decision but it is obliged to justify the choice it made. This case also explains the possibility of applying Article 86(2) TEC in cases concerning electricity markets. Further, Małgorzata A. Nesterowicz comments on the *Atlantic Container Line*<sup>72</sup> judgment where the standard of legal protection of undertakings (right to be heard, rights of the defense) in competition law proceedings is set. *PCV I*<sup>73</sup> (commented on by Robert Gago) is also an important judgment of the ECJ on procedural guarantees concerning the European Commission’s activities, first and foremost, as far as the question of defining a “non-existent” Community act is concerned.

In their selection and presentation of European jurisprudence on EC competition law, the editors have certainly covered the most important and well known milestones of European jurisprudence on competition law. The scope of the work is monumental, and yet, considering the chosen form of the presentation, it manages to deliver a comprehensive analysis of most of the key issues relating to the application of European competition law. One critical, even though marginal, remark can be made as far as the title of the book and its further content are concerned. Namely the title of the book relates to the year 1964, the editors in the introduction and in the title of the first part indicate the year 1962 (with the very first judgment of the ECJ in competition-related matters) and the factual date of the first judgment is 1966. However this inconsequence does not in any way influence the merits of the presentation.

The book edited by Tadeusz Skoczny and Agata Jurkowska is the first study of existing jurisprudence of the EC Courts in the field of European competition law on the Polish market that has such an extensive scope. It will prove very useful to both academics and practitioners for several reasons: granting a reliable translation of the most important judgments in competition-related matters, emphasizing the key findings of those judgments for European competition law, and giving a coherent and comprehensive review of the main views presented on those judgments by West European authors.

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<sup>71</sup> T-16/91 *Rendo NV, Centraal Overijsselse Nutsbedrijven NV & Regional Energiebedrijf Salland NV v Commission of European Communities*, [1996] ECR II-1827, no. 36 in the book.

<sup>72</sup> T-191/98, T-212-214/98 *Atlantic Container Line AB & others v Commission of European Communities*, [2003] ECR II-3275, no. 48 in the book.

<sup>73</sup> C-137/92 *Commission of European Communities v BASF AG & others*, [1994] ECR I-2555, no. 59 in the book.

# A C T I V I T I E S     O F     C S A I R

## CSAiR Basic Information

### 1. The creation of CSAiR

- 1.1. On 21 February 2007 the Warsaw University Faculty of Management Council created *Centrum Studiów Antymonopolowych i Regulacyjnych (CSAiR) (Centre of Antitrust and Regulatory Studies)* as a so-called “other” unit, necessary to the realisation of the Faculty’s tasks (§ 20 paragraph 1 and 2 University of Warsaw Statute).
- 1.2. This document presents the origins and the justification for the creation of CSAiR (points 2 and 3) as well as its domain, extent, form of actions (points 4 and 5), organisational structure (point 6) and staffing (point 7).

### 2. The origins

- 2.1. In 1994, by a decision of the Dean of the Warsaw University Faculty of Management (hereafter, Faculty), which was approved by its Council, a research group chaired by Prof. Tadeusz Skoczny was created under the heading “Centre of Competition Law and Politics”. In the period between 1994 and 1996, widespread research was carried out in the framework of this Centre and some of its results were published (one book by Prof. T. Skoczny and two by W. Szpringer). The Centre also opened several publication series. The activities of the Centre came to a halt in the second half of the 1990’s when Prof. T. Skoczny became the Director of the Warsaw University Centre for Europe.
- 2.2. Early in 1999, several members of the Centre decided to expand and intensify their research activities under the new heading: “Centre for Competition and Regulation” (CeKiR). Research and publishing activities continued in the years that followed. The activities of CeKiR remained in close connection to Prof. T. Skoczny’s Independent Department of European Economic Law, which was granted in 1999 by the European Commission the status of a Jean Monet Chair on European Economic Law.

Under the continuing leadership of Prof. T. Skoczny, and with cooperation from several of his PhD students and external co-workers, CeKiR released a series of publications (6 volumes) under the common title “Competition Law of the European Community” (2002-2006). During that time, a special issue of the Faculty’s “Management Problems” periodical was also published under

the patronage of CeKiR entitled “Competition protection and sector-specific regulation” (Nr 3/2004).

- 2.3. In light of the extensive academic accomplishments of CeKiR, the launch of a “sector-specific regulation and competition protection” studies programme was proposed at the beginning of the academic year 2006/2007. At the same time, actions were taken to publish under the aegis of CeKiR a quarterly periodical entitled “Competition and Regulations; The issues in law, economics and management”. These plans caused a discussion among the staff of the Faculty which culminated in the submission of a proposal to the Faculty’s authorities concerning the creation of a new organisational unit on the basis of CeKiR.

### 3. Justification

#### 3.1. Requirements

- 3.1.1. The creation of CSAiR was mainly justified by the need to co-ordinate the activities of those members of the staff of the Faculty that engage in teaching, research or consulting activities, both of a purely academic as well as of a commercial nature, in the field of antitrust (market competition, the development and protection of competition) and regulation (sector-specific regulation, with emphasis on telecoms, the power industry, the media and the financial services sector). The coordination of these activities was expected to significantly improve the academic standing of the Faculty as a whole.
- 3.1.2. The intellectual potential and scientific achievements of the staff of the Faculty supported the belief that it should become the co-ordinator of the teaching, research and publishing activities of the whole Polish scientific community concerned with antitrust and regulatory issues.
- 3.1.3. Seeing as at the time there was no scientific body in Poland concerned exclusively, or at least primarily, with antitrust and regulatory issues, it was expected that creating it at the University of Warsaw would be positively perceived by those actually engaged in antitrust enforcement and regulatory activities – the competition authority and sectorial regulators on the one hand, and firms subject to antitrust surveillance and/or regulation on the other. Another argument in favour of creating such a body within the structures of Warsaw University was the practical observation that the relevant public authorities, as well as the headquarters of most of the biggest Polish businesses, were located in Warsaw.
- 3.1.4. Moreover, the fact should not be overlooked that this type of unit was already in existence in many countries, including other EC Member States, often based at universities located in their capitals. Co-operating with those units would allow CSAiR to become more “visible” in the European academic sphere, potentially even enabling it to apply for

grants in the framework of the European Community jointly with equivalent units abroad.

### **3.2. Opportunities**

- 3.2.1. The scientific environment of the Faculty continues to provide many opportunities for initiatives in the field of antitrust and regulation. When CSAiR was created, many members of the Faculty (irrespective of their position) had prior experience in dealing with antitrust and/or regulatory issues either from the perspective of public authorities (for example: Prof. S. Piątek, Prof. T. Skoczny, Prof. A. Sopoćko), or as members of a supervisory board of a company subject to antitrust surveillance and/or sectorial regulation (for example: Prof. G. Domański, Prof. K. Obłój, dr. L. Stępniaak, dr. M. Ramus), or purely from a scientific point of view (for example: P. Gajewski, Prof. A. Jaroszyński, Prof. R. Krzyzewski, Prof. K. Sobczak, Prof. W. Szpringer, Prof. J. Żyżyński). From the outset therefore, these members of the Faculty's staff already had extensive contacts (with the public authorities, businesses and academic units concerned with antitrust and regulation) which would prove essential for the functioning of CSAiR.
- 3.2.2. Unlike any other, the scientific environment of the Faculty was designed to undertake complex research covering the business side of antitrust and regulation (the processes of competition and monopolisation in the economy, competition strategies of companies, management of companies that are under strict antitrust surveillance or sectorial regulation) as well as its public sphere (combating cartels and the abuse of dominance, countering excessive concentration and anti-competition state aid, pro-effective, pro-consumer and pro-competitive regulation in sectors that are strongly concentrated or even monopolised). This was possible since the Faculty's academic base was composed of economists, specialists in the field of management and business organisation, as well as lawyers.
- 3.2.3. The individual accomplishments of its members, the publications carried out within the framework of CeKiR and the Jean Monet Chair on European Economic Law, the accumulated library collection, the existing research projects as well as the already established contacts, became the "dowry" of the newly created CSAiR. Also clearly beneficial to the new unit was the fact that the Faculty was vested with local headquarters and favourable financial conditions which allowed CSAiR to start its activities without undue delay.

## **4. The subject matter of the activities of CSAiR**

### **4.1. CSAiR will be pursuing two vast research topics:**

- a) the processes of competition as well as general and sector-specific competition protection;

- b) sector-specific regulation of dominant or monopolistic companies.
- 4.2. In relation to the former, CSAiR will investigate the processes of competition in the economy as a whole and in some specific sectors in particular. Its research will also cover actions taken to support the development and protection of competition (antitrust activities) including:
  - a) cartelisation, and the prohibition relating to competition restraining agreements;
  - b) monopolisation, and the prohibition of abuse of dominance;
  - c) concentrations, and preventive control of mergers and acquisitions;
  - d) public aid, and countering its anti-competition side effects.
- 4.3. In relation to the latter, CSAiR will investigate the behaviours of those Polish firms which are subject to regulation as well as the regulatory influence exercised on them by public authorities. The following infrastructure sectors will be considered in particular:
  - a) electronic communications, mainly telecoms;
  - b) postal services;
  - c) the power industry, including electricity, gas and heat-power engineering;
  - d) transport, with emphasis on railways and air transport;
  - e) audiovisual media; and,
  - f) the financial services sector.

## 5. The extent and the forms of activities of CSAiR

### 5.1. The basic extent of the activities of CSAiR.

#### 5.1.1. CSAiR will undertake actions in five areas:

- a) research;
- b) publishing;
- c) conferences;
- d) post-graduate studies;
- e) other (for example: consulting, training, co-operation).

### 5.2. Research

5.2.1. From the moment of its creation, CSAiR's research activities will be led by its Regular Members; they will be concerned with the issues of competition and its protection as well as regulation and the actions of companies in regulated sectors. Initially, they will be financed by the research funds allocated to particular members of the Faculty's staff in accordance with the procedural rules of the Faculty.

5.2.2. During the initial period (around two academic years), CSAiR will seek external funding for its research initiatives. However, the Faculty's research budget should be used to finance its research on a credit basis, in other words, covering costs which will be returned to the Faculty at a later date from CSAiR's future income (for example from the sale of its publications). The Dean of the Faculty has allocated limited funds to CSAiR out of the Faculty budget. However, CSAiR's budget

has a “task-based” character; it remains at the disposal of CSAiR, or more specifically, at the disposal of the heads of its particular research projects.

- 5.2.3. With time, CSAiR will undertake more contracted research activities, either directly commissioned or sponsored by external entities. It will also apply for public grants, both of Polish and of Community origin, for the realisation of research projects of a wider scale. As a result, CSAiR is expected to be able to gain its own budget from a wide range of sources (Faculty and external financing).

### 5.3. Publishing

- 5.3.1. Individual books by its members will constitute the core of CSAiR's publication activities; with the consent of its authors, they will be credited as the achievements of CSAiR. Collective works edited by members of CSAiR will be treated similarly, even if they are not formally signed by CSAiR.

- 5.3.2. Eventually, a publishing series entitled: “*Monografie i Studia Anty-monopolowe i Regulacyjne*” (“Antitrust and Regulatory Studies and Monographs”) should become the calling card of CSAiR. The series is planned to encompass two Polish books annually and at least one English-language book every 2-3 years. Initially, it will be published by the Faculty of Management Scientific Press; however there is a real possibility that in the future it will be transferred to a professional publishing house.

- 5.3.3. CSAiR's first periodical, a quarterly publication entitled: “*Studia Anty-monopolowe i Regulacyjne. Z zagadnień prawa, ekonomii i zarządzania*” (“Antitrust and Regulatory Studies; The issues of law, economics and management”) has already taken shape. It will be initially published by the Faculty of Management Scientific Press; an offer has already been made however to have it transferred to a professional publishing house. The publication of an English-language **Yearbook of Antitrust and Regulatory Studies** is also being prepared.

- 5.3.4. CSAiR will also publish its working papers (in Polish and English), either by small-scale print outs or as virtual publications on its website.

### 5.4. Conferences

- 5.4.1. CSAiR's practical operations will encompass the organisation of conferences, both national and international. For this purpose, CSAiR will engage in their actual preparation, including the necessary co-operation with partners in Poland and abroad, as well as the submission of an application for an appropriate grant and/or sponsorship request.

- 5.4.2. CSAiR will regularly hold meetings of Regular and Associate Members, as well as of its Permanent Cooperators that will be linked with the presentation of its research reports and/or publications. These meetings will be considered to constitute a specific type of CSAiR conference.

5.4.3. In the academic year 2007/2008, CSAiR will also develop the concept of workshops. These will give their participants a venue for a discussion on the most important issues concerning antitrust protection and sector-specific regulation. CSAiR might propose that these workshops have an online character or, at least, that CSAiR's website will contain a blog accessible to the participants of a workshop.

#### **5.5. Postgraduate Studies**

5.5.1. Regular Members of CSAiR will intensify their teaching activities within the Faculty represented, among other things, by courses such as: "The protection of competition and consumers" and "Competition and Consumers – legal conditions". The creation of CSAiR will enable the Faculty to offer additional courses for its BA and MA students in the field of antitrust and regulation.

5.5.2. Most importantly, a specialised, post-graduate study programme concerning antitrust and regulatory issues will commence under the patronage of CSAiR. The concept of such a programme has been the subject of wide-spread discussion inside, and outside, the Faculty. Since the idea found general approval, an announcement was made in the Faculty's post-graduate prospectus as Postgraduate Manager Studies (PSM) with the specialisation "the protection of competition and sector-specific regulation". The programme will be primarily aimed at managers and employees of the biggest Polish firms involved with antitrust and regulatory bodies, provided they already have an MA degree. The programme will take one academic year to complete and comprise of about 20 courses led mainly by the members of CSAiR.

5.5.3. CSAiR is simultaneously preparing the launch of a separate "Postgraduate Antitrust and Regulatory Studies" programme, outside of the PSM formula but still led by the Faculty. Unlike the PSM, this programme is aimed at the staff of antitrust and regulatory authorities.

#### **5.6. Other (Scientific cooperation with institutions in Poland and abroad, consulting and training)**

5.6.1. Consulting and training will be an auxiliary activity of CSAiR. They will be likely to commence in less than a year after its formal creation. They will be made available on a larger scale if demand for them becomes apparent from antitrust and regulatory authorities and/or companies subject to antitrust surveillance or sectorial regulation. The latter will be offered a so-called "Compliance Programme".

5.6.2. Consulting and training will, of course, be offered at a fee. The possible surplus of income over costs will be appropriated to financing research, publishing and conferences organised by CSAiR.

5.6.3. It is essential that CSAiR cooperates with equivalent institutions both in Poland and abroad. Such cooperation is important not only because it has great value upholding scientific contacts, but also because it will

be CSAiR's main tool in accomplishing its research, publishing and conference goals.

## 6. Organizational structure

- 6.1. On 29 March 2007, the Dean of the Faculty has named Prof. Dr. Tadeusz Skoczny as the Director of CSAiR.
- 6.2. In the initial phase, CSAiR's operations will be conducted by two fixed teams:
  - a) one team will deal with issues concerning competition protection and state aid (led by Prof. T. Skoczny) and,
  - b) the second team will deal with sectorial regulation (led by Prof. S. Piątek).
- 6.3. In the future, forming teams with a narrower field of activity will be possible (for example: teams dealing with regulatory issues in a specific sector).

## 7. Staff

### 7.1. Members of CSAiR

- 7.1.1. The staff of CSAiR will consist of its members (not employed by CSAiR) as well as its employees (permanent posts).
- 7.1.2. The key group of CSAiR members, the so-called *Członkowie Zwyczajni* (Regular Members), will consist of Faculty staff (professors and other staff with a degree equivalent to a PhD) who declare that they are prepared to join CSAiR on the specified terms.
- 7.1.3. CSAiR will also encompass *Członkowie Stowarzyszeni* (Associate Members), that is, the academic staff of other Polish (and sometimes foreign) universities, provided that they have a degree equivalent to a PhD and wish to join CSAiR.
- 7.1.4. Participation in CSAiR will also be made available to those outside of the academic field who declare that they are ready to cooperate with CSAiR on a constant basis, or at least within the framework of certain projects. They will be able to become CSAiR's *Stali Współpracownicy* (Permanent Cooperators). This form of membership will encompass PhD students, civil servants, lawyers, consultants and the staff of firms subject to sectorial regulation.

### 7.2. CSAiR employees

- 7.2.1. For the efficient functioning of CSAiR permanent employees will also be required.
- 7.2.2. At the beginning, the Director of CSAiR will be supported by the staff and PhD students associated with the "*Zakład Europejskiego Prawa Gospodarczego*" (Independent Department of European Economic Law) (Jean Monet Chair on European Economic Law). CSAiR might

employ further staff, potentially to be paid within the framework of certain projects, financed from external sources.

- 7.2.3. With time CSAiR, will require its own secretariat (possibly, to be shared with another unit of the Faculty).

***Prof. Tadeusz Skoczny***

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Jean Monnet Chair of European Economic Law  
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## CSAiR Report 2007

### 1. Creation and basic information

- 1.1. On 21 February 2007 the Council of the Warsaw University Faculty of Management (*Wydział Zarządzania Uniwersytetu Warszawskiego* hereafter, WZ WU) created the **Centre of Antitrust and Regulatory Studies** (*Centrum Studiów Antymonopolowych i Regulacyjnych* hereafter, CSAiR) in the form of “another ... unit crucial to the realisation of the faculty’s tasks” in accordance with Paragraph 20 (1), (2) of the Statute of the Warsaw University.
- 1.2. The creation of CSAiR was primarily warranted by the need to co-ordinate academic and market-based teaching, research and consultancy activities undertaken by a large number of the staff of WZ WU whose interests relate to antitrust issues and regulation. CSAiR was created upon the belief that WZ WU is a body particularly well equipped to act as a coordinator for the teaching, research and publishing activities of the whole Polish academic community in the field of antitrust and regulation, primarily in the light of the exceptional intellectual potential and academic achievements of its staff.
- 1.3. CSAiR’s field and type of activities as well as its membership criteria were set out as follows.
  - 1.3.1. It was decided that CSAiR’s activities will primarily focus on:
    - the processes of **competition** as well as general and sector-specific competition protection;
    - sector-specific **regulation** of companies functioning under conditions of dominance or monopoly;
  - 1.3.2. It was decided that the activities of CSAiR will take the form of:
    - **academic research and development**, including implementation projects that will encompass research sponsored or commissioned by the private sector as well as projects financed by public grants (EU or Polish);
    - **publishing** of individual books, as part of the “Studies and Monographs on Antitrust and Regulation” series (*Monografie i Studia Antymonopolowe i Regulacyjne*) in particular, as well as periodicals including the English language publication of the **Yearbook of Antitrust and Regulatory Studies**, the publication of its first issue is planned for autumn 2008;

- national and international **conferences, academic seminars and workshops** directed at practitioners dealing with competition protection and sector-specific regulations;
  - **teaching** including post-graduate studies, seminars for PhD students, consulting and training activities exemplified by the so-called “compliance program” for business;
  - **co-operation** with similar academic units in Poland and abroad.
- 1.3.3.** The possibility to become an active member of CSAiR was offered to:
- professors as well as other academic staff of the WZ WU provided that they have a doctorate; they were offered the chance to become Regular Members of CSAiR;
  - academic staff of other universities, including foreign universities; they were offered the possibility to become Associate Members of CSAiR;
  - others, in particular PhD students, civil servants, officials of national and international organisations, the staff of large companies, legal practitioners and consultants; they could become Permanent Cooperators of CSAiR.

**1.4.** CSAiR began its activities in the spring of 2007. One year after it was formally created, CSAiR had gained 25 Regular Members, 35 Associate Members and 33 Permanent Cooperators. At that time, almost half of its members had already taken part in at least one of the academic initiatives carried out by CSAiR. In its first year, CSAiR has: carried out two research projects (the publication of their results was planned for 2007/2008); organised two academic seminars and co-organised a conference; arranged one workshop (the publication of its results was planned for 2008; and, held two seminars for PhD students. Additionally a co-operation agreement with a sectorial regulator was initiated.

## **2. The research project “Regulating telecommunications markets”**

A major research project concerning the practice of regulating Polish telecoms markets was completed in 2007. The project was headed by Prof. Stanisław Piątek, a Regular Member of CSAiR and the director of the Chair on Economic Law which is part of the Legal Problems of Management and Administration Department of the WZ WU. The project had an interdisciplinary character, among its fourteen contributors were: economists, telecoms and management specialists, researchers, employees of telecoms providers (both dominant and not), lawyers employed in law firms in the country and abroad, as well as employees of the EC Commission dealing with the regulatory processes on the EC level. Most of the contributors were either Regular Members, Associate Members or Permanent Cooperators of CSAiR.

The research project covered the regulatory efforts undertaken by the Polish National Regulator, the Office of Electronic Communication (*Urząd Komunikacji Elektronicznej* hereafter, UKE), that have affected Polish telecoms markets (eighteen in

total: seven retail and eleven wholesale markets). Sectorial regulation was considered to be a crucial component of the wide ranging competition-creating program applied at that time to the Polish telecoms sector. The project analysed the basis, conditions, processes and outcomes of individual regulatory decisions taken by the President of UKE which imposed regulatory obligations on telecoms services providers holding a significant market position.

The research that was carried out considered the regulatory process from two different perspectives. On the one hand, particular groups on telecoms markets were analysed; this approach mostly illustrated the differences between retail and wholesale markets and the technological issues involved. On the other hand, the main regulatory problems were assessed in a cumulative horizontal context encompassing all markets concerned. This specific analytical framework was not meant to align the opinions of its participants and yet, the same issues were often brought to light by several researchers. Nonetheless, particular assessments sometimes contained very divergent opinions that reflected their author's experience and opinions. Although the project indeed managed to create an organised and comprehensive body of knowledge on the subject of telecoms regulation in Poland, conclusive answers to the questions posed in the project will be found only after the sector, and those in the EU, becomes competitive.

The project's findings were published under the title: "Regulating telecommunications markets" (*"Regulowanie rynków telekomunikacyjnych"*), edited by S. Piątek, Faculty of Management Scientific Press, Warsaw, 2007. This book commences the "Antitrust and Regulatory Studies and Monographs" series published under the patronage of CSAiR.

The project's findings were also discussed during the Conference on "Regulating Telecommunications Markets" organized by CSAiR on 23 April 2008; the Conference Report will be published in YARS vol. 2009, 2(2).

### **3. The research and implementation project: "Block exemptions from the prohibition of competition restricting agreements"**

Also completed in 2007 was an extensive research and implementation project concerning the justification and potential content of issuing in Poland new domestic block exemptions from the prohibition of competition restricting agreements. The project was commissioned by the Office of Competition and Consumer Protection (*Urząd Ochrony Konkurencji i Konsumenta* hereafter, UOKiK). CSAiR was given the specific task of preparing four draft regulations of the Council of Ministers, specifying the extent and conditions of block exemptions for particular types of agreements from the prohibition contained in the Polish equivalent of Art. 81 EC. The project was carried out by Prof. Andrzej Jasiński, Prof. Tadeusz Skoczny and Dr. Agata Jurkowska (Regular Members of CSAiR), Dr. Dawid Miąsik and Dr. Rafał Stankiewicz (Associate Members of CSAiR) and Dr. Ewelina D. Sage (Permanent Cooperator of CSAiR).

The results of the project were officially implemented in the form of four Regulations of the Council of Ministers, published in the Polish Journal of Laws (JoL):

- a) the Regulation of the Council of Ministers of 30 July 2007 concerning the exemption of certain types of technology transfer agreements from the prohibition of agreements restricting competition (JoL 2007 , No. 137, item 963);
- b) the Regulation of the Council of Ministers of 30 July 2007 concerning the exemption of certain types of agreements between companies in the insurance sector from the prohibition of agreements restricting competition (JoL 2007, No. 137, item 964);
- c) the Regulation of the Council of Ministers of 19 November 2007 concerning the exemption of certain types of specialization as well as research and development agreements from the prohibition of agreements restricting competition (JoL 2007, No. 230, item 1691);
- d) the Regulation of the Council of Ministers of 19 November 2007, concerning the exemption of certain types of vertical agreements from the prohibition of agreements restricting competition (JoL 2007, No. 230, item 1692);

The assignment that was received by CSAiR from UOKiK extended beyond the preparation of the draft regulations. CSAiR was also expected to conduct an extensive research project on the validity of issuing new domestic block exemption as well as on their necessary content. The research concluded that the issuing of the aforementioned acts was indeed justifiable in the Polish context. Keeping up with the developments of Community legislation and jurisprudence was found to constitute one of the main arguments in favour of domestic block exemptions. Among the other reasons supporting the issue of new legislation were found to be:

- a) the fact that even if the agreements at stake do restrict competition, the majority also simultaneously affect competition in a positive way (through improvement of efficiency);
- b) the reduction of legal barriers for co-operation in distribution, technology transfer and co-operation in the insurance sector in Poland;
- c) the provision of a predictable and stable legal climate for Polish businesses that would encourage them to co-operate within a clearly defined framework.

The research project determined the permissible extent of the exemptions in relation to each of the types of agreement. It also defined the essence of: co-operational agreements in general and those in the insurance sector in particular; vertical agreements, with emphasis on distribution agreements, selective distribution amongst them; as well as technological transfer agreements, license agreements in particular. Moreover, it specified what the appropriate market share thresholds should be for each type of the agreements and which contractual clauses should completely foreclose the possibility of the application of an exemption.

All of the findings of the research project were submitted to the UOKiK in the form of a 230 page long report entitled “Group exemptions from the prohibition of agreements restricting competition. Final report” (*„Wylączenia grupowe spod zakazu porozumień ograniczających konkurencję. Raport końcowy”*).

The report later became the foundation for a book entitled “Group exemptions from the prohibition of agreements restricting competition in the European Union and

in Poland” (*“Wyłączenia grupowe spod zakazu porozumień ograniczających konkurencję we Wspólnocie Europejskiej i w Polsce”*) which was edited by Agata Jurkowska and Tadeusz Skoczny and published in 2008 as the second publication from the CSAiR’s “Studies and Monographs on Antitrust and Regulatory” series. The book, containing also chapter on block exemptions existing only under the EC competition law, as well as the texts of the relevant Polish and EC legislation, will be reviewed in YARS 2009, vol. 2(2).

#### **4. The Small Insurance Forum I – Seminar on Horizontal co-operation in Insurance**

On 4 June 2007 the first meeting of the Small Insurance Forum took place that was organised by CSAiR with the help of the Polish Insurance Chamber. The meeting had the character of an academic seminar concerning the issue of horizontal co-operation of insurance companies in the context of the block exemption of agreements in the insurance sector. A full seminar report can be found in the current volume of YARS (page 311).

#### **5. Antitrust Private Enforcement. CSAiR Seminar**

On 20 June 2007 a meeting took place that marked the creation of CSAiR as well as the publication of a book entitled: “The Jurisprudence of the Community courts in competition-related cases 1962-2004” (*“Orzecznictwo sądów wspólnotowych w sprawach konkurencji 1962-2004”*), edited by Tadeusz Skoczny and Agata Jurkowska, Kluwer, Warsaw, 2007. Dr Jurkowska (Department of European Economic Law, Regular Members of CSAiR) presented a paper on the subject of the application of the EC and Polish prohibition of competition restricting actions by Polish courts; practical problems of private enforcement were also discussed. A full seminar report can be found in the current volume of YARS (page 306).

#### **6. Faculty conference “Competition and regulation in the economy”**

On 24 September 2007 the annual WU WZ conference took place. It was organised jointly by the WU WZ Chair of Legal Problems of Administration and Management and CSAiR and gathered around a hundred WU WZ staff and invited guests. The subject matter of the conference surrounded pro-competition public intervention into the economy. Five papers and several scientific reports were presented. In addition, representatives of public bodies dealing with competition protection and pro-competition regulation were invited to participate in a panel discussion moderated by Prof. Tadeusz Skoczny. Among them was: Marek Niechciał, President of UOKiK; Anna Streżyńska, President of UKE; Dr. Włodzimierz Antonowicz, Deputy President of the Office of Rail Transport; and Prof. Lesław Gajek, Chairman of the Department of Insurance Inspection of the Polish Financial Supervision Authority. The participants of the panel shared their experiences concerning the protection of competition in general, and regulatory actions supporting competition in particular. They spoke

of regulatory aims and strategies as well as the difficulties and problems in their implementation resulting from imperfect laws and shortage of well-trained staff. They stressed the role, expectations and conditions of co-operation with each other as well as with bodies concerned with competition protection and sectorial regulation in other EU countries and with the European Commission. Past successes were presented as well as future tasks. The members of the panel also answered numerous questions from other participants of the conference.

The papers and reports presented during the conference were published in the WU WZ's periodical entitled: "Management Problems" ("*Problemy Zarządzania*") edited by Stanisław Piątek and Tadeusz Skoczny, Faculty of Management Scientific Press, Warsaw, 2007.

### **7. Workshop: "The Judgment of the Court of First Instance in the *Microsoft* case – effects on innovation in the new technology sectors"**

On 7 November 2007 a workshop took place organised jointly by CSAiR and the law firm CMS Cameron McKenna entitled: "The Judgment of the Court of First Instance in the *Microsoft* case – effects on innovation in the new technology sectors". It was the first of a series of workshops that CSAiR intends to organise, each time together with a different law or consulting firm. The workshops will take the form of a discussion concerning key up-to-date issues in the field of competition protection (anti-trust workshops) or sector-specific regulation (regulatory workshops). The organisation of a particular workshop is intended to follow: a judgment of an EU or Polish court; a decision of the EC Commission, the President of UOKiK or one of the Polish National Regulators; the publishing of an important document affecting this field (for example: guidelines, a White or Green Paper, a draft of a regulatory act, a research report etc.) by the EC, by UOKiK or by Polish regulators; or the issue of new legislation etc.

In this case the workshop was organised after the issue by the Court of First Instance in Luxembourg on 17 September 2007 of its long awaited judgment in the *Microsoft v. Commission* case. This case has stirred up a lot of controversy concerning the boundaries of public intervention by antitrust bodies into the freedom of dominant firms to use the fruits of their innovation. The aim of the workshop was not only to elaborate on the main arguments presented in the judgment but, most importantly, to attempt to initiate a wider debate on the future use of laws and regulations prohibiting the abuse of dominance, on the conflict between competition law and intellectual property law and on the implications of the verdict for firms in the information technology sector.

The main discussion was preceded by the presentation of three academic papers:

a) "Refusal by Microsoft to supply its competitors with the information necessary to ensure interoperability of their servers" by Małgorzata Surdek (Partner at CMS Cameron McKenna, Permanent Cooperator of CSAiR);

b) "Tying sales of the Windows operating system to the Windows Media Player application" by Dr Dawid Miąsik (Department of Competition Law, Institute

of Legal Sciences of the Polish Academy of Sciences, Associate Member of CSAiR);

- c) “The practical implications of the *Microsoft* judgment in relation to Article 82 EC” by Prof. Tadeusz Skoczny (Director of CSAiR).

Considering that the workshop has generated a great response from the information technology sector as well as the Polish legal practitioners and consulting field, a selection of its materials, additional articles concerning the subject matter of the *Microsoft* judgment were edited by Dawid Miąsik, Tadeusz Skoczny and Małgorzata Surdek and published in 2008 as the third publication from the CSAiR’s “Studies and Monographs on Antitrust and Regulatory” series. The book, containing also the *Microsoft* judgment itself, will be reviewed in YARS 2009, vol. 2(2).

## 8. Seminars for PhD students

In the autumn of 2007, an academic seminar series for PhD students was initiated within the framework of the activities of CSAiR under the patronage of Prof. Tadeusz Skoczny. The seminar was directed primarily to graduate students supervised by WZ WU professors who are Regular Members of CSAiR. Whenever possible, participation in the seminar was also made available to other students aiming for a PhD degree in law or management supervised by Associate Members and Permanent Cooperators of CSAiR.

The seminar takes the form of a discussion concerning the specific assumptions, arguments or even particular fragments of a PhD thesis prepared by its participants. The first meeting took place on 27 November 2007 during which a paper on sanctioning violations of the prohibition of competition restricting actions was presented by Judge Marek Sachajko, supervised by Prof. Tadeusz Skoczny, who was at that time preparing for his final PhD viva. Participants of this seminar also included Prof. B. Popowska (Faculty of Law, University of Adam Mickiewicz in Poznań) and Prof. K. Strzyczkowski (Faculty of Law, University of Kardynał Stefan Wyszyński in Warsaw).

## 9. Cooperation with regulators

In 2007, CSAiR offered to enter into a close co-operation agreement with UOKiK, which successfully began with the research and implementation project concerning block exemptions, as well as with all Polish National Regulators. The basis of such co-operation with the Office of Rail Transport and the Office for Energy Regulation (URE) was established.

*Ewelina D. Sage, D.Phil. (Oxon)*  
CSAiR International Coordinator

## **Antitrust Private Enforcement. CSAiR Seminar. Report**

On 20 June 2007 the Centre of Antitrust and Regulatory Studies (CSAiR) organised at the Warsaw University Faculty of Management a seminar intended to be – first of all – a forum for a discussion on private enforcement of competition rules in Poland.

The seminar was opened by the Dean of the Faculty of Management, Prof. Alojzy Nowak. He first welcomed Andrzej Wróbel and Tadeusz Żyznowski, judges of the Polish Supreme Court, as well as Marek Niechciał, the President of the Polish Office of Competition and Consumer Protection (UOKiK). He then described CSAiR as an institution providing a scientific platform of effective discussion between academic researches interested in competition law and regulation, on the one hand, and entities who apply it in practice, on the other hand.

The next speaker was Prof. Tadeusz Skoczny, the Director of CSAiR. He specifically referred to the role CSAiR wishes to play in the field of competition law and regulatory studies in Poland.

These introductory remarks were followed by a presentation of the recent publication entitled *Orzecznictwo sądów wspólnotowych w sprawach konkurencji 1962-2004 [Jurisprudence of the European Community Courts in competition matters in years 1964-2004]* (edited by T. Skoczny and A. Jurkowska, Wolters Kluwer 2007) that contains a collection of 72 commentaries to the most important EC courts judgments in the field of EC competition law issued between 1962-2004. This book is the finalisation of the research project entitled “Competition Law of the European Community Jurisprudence” carried by CSAiR in 2005-2006.

The seminar was attended by numerous academics from the legal as well as economic field, representatives of law firms and consultants as well as government officials.

### **1. Presentation by Agata Jurkowska**

The main part of the seminar was opened by a presentation by Dr. Agata Jurkowska (Chair of European Economic Law, Faculty of Management, University of Warsaw) entitled “The application of EC and Polish competition law rules by Polish courts”. The main purpose of this presentation was to identify the main obstacles facing private enforcement of competition rules in Poland. In the opinion of this speaker, the need for private enforcement has already been decided on the EU level. As a result, it is necessary to discuss this issue also in Poland.

Dr. A. Jurkowska considered private enforcement of competition rules to be “the bringing of actions for infringements of antitrust rules by private entities (entrepreneurs and consumers) before civil courts”. The public enforcement system should not be seen, in the opinion of this speaker, as the opposite of private enforcement; instead, the two systems were said to complement each other. The reliance of court judgments on prior decisions of the competition authority was criticised, as was the obligation to suspend court proceedings when the competition authority acts in the same case. Nevertheless, this speaker stressed that the risk of divergence in the decisions taken by the courts and the competition authority should be minimised.

Dr. A. Jurkowska specified two groups of obstacles for effective private enforcement of competition rules in Poland. The first set concerns the problem related to private law. Noted here was, for example, the fact that the Act of 16 February 2007 on Competition and Consumer Protection (the Competition Act)<sup>1</sup> was always considered to form part of the public law system and thus, not useful in private proceedings. According to the speaker, an impression exists that discussing private enforcement constitutes a way in which public authorities try to shift onto private entities the burden of detecting competition law infringement. The second set of problems noted by Dr. A. Jurkowska concerns regulatory obstacles. Referred to, in particular, was here the problem of the legal basis associated with actions for infringements of antitrust rules and the relation between public and private enforcement of competition law. Considered was also the character of damages in civil cases concerning competition rules, the types of civil suits that can be filed in Polish courts and practical problems faced by complainants when bringing an action before a civil court. Dr. A. Jurkowska was especially in favour of consumer class actions where they could more effectively claim damages for breaches of competition rules.

## **2. The discussion**

### ***2.1. Comments to the presentation***

Prof. A. Wróbel, Judge of the Supreme Court, commented on the prior presentation. Set out here were also the main areas of the discussion on private enforcement of competition rules in Poland: the legal basis for civil suits, the relationship between public and private enforcement, the character of damages in civil cases concerning competition rules and the types of civil suits that can be brought before the courts.

### ***2.2. The legal basis for civil actions***

Marek Tadeusiak (attorney, Łódź) suggested first of all that a legal basis for civil actions does not exist because of the public law character of the Competition Act and the fact that it does not directly mention such a legal basis. Dr. Cezary Banasiński

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<sup>1</sup> Act of 16 July 2007 on Competition and Consumer Protection (Journal of Laws 2007 No. 50, item 331; amendments: Journal of Laws 2007 No. 99, item 660; Journal of Laws 2007 No. 171, item 1206).

(former president of UOKiK) pointed out that there is a need for such a legal basis directly provided in the Competition Act. Maciej Bernatt (Chair of European Economic Law, Faculty of Management, University of Warsaw) observed that the fact that the Competition Act does not directly contain a legal basis for private enforcement of competition rules hinders its popularisation in Poland; this fact was noted to be very different from EC law where, according to Regulation 1/2003, civil courts are entitled and obliged to directly apply Article 81 and 82 of the EC Treaty.

During the discussion most of the speakers were of the opinion that the Polish legal system does contain a legal basis for civil suits in competition law cases. Dr. Dawid Miąsik (Polish Academy of Sciences) stated that the infringement of the Competition Act can be classified, from a private law point of view, as an illegal act which is one of the elements of a claim based on the general damages provisions of the Polish Civil Code<sup>2</sup> (KC) - Article 415 or Article 471 or on the Act of 16 April 1993 on Combating Unfair Competition<sup>3</sup> (Unfair Competition Act). Dr. Małgorzata Krasnodębska-Tomkiel (Legal Department of UOKiK) suggested that the proper place to contain a direct legal basis for such actions is in the KC, not in the Competition Act. Dr. Michał Będkowski-Kozioł (Faculty of Law, Cardinal Stefan Wyszyński University in Warsaw) noted that under German Law, before the direct legal basis was introduced into the competition law system itself, the general provisions of the German Civil Code (§ 826 of BGB) were applied when filing a civil suit in competition law cases.

### *2.3. Types of claims in private enforcement*

The participants of the seminar generally agreed that there are three types of claims that can be applied when it comes to private enforcement of competition rules in Poland. First among them, are damage claims based on the general provisions of the KC. D. Miąsik and T. Żyznowski spoke also of claims based on the Unfair Competition Act. In their opinion, supported by M. Krasnodębska-Tomkiel, applied can be also Article 405 of the KC that contains rules on unjust enrichment. This approach is confirmed by the Polish Supreme Court which stated that benefits resulting from unlawful actions (among them – infringements of antitrust law) may be regarded as unjust enrichment (in the Supreme Court judgment of 10 August 2006 Article 405 of the KC was successfully used as a legal ground for damages in the case of a breach of the Unfair Competition Act<sup>4</sup>).

### *2.4. Procedural aspects of private enforcement in Poland*

The procedural difference between public enforcement under the Competition Act and private enforcement were discussed. The dissimilar roles of both models were also considered. C. Banasiński noted that there is a need of evolutionary changes in Poland, with due respect to the independence of Polish courts, disagreeing at the same

<sup>2</sup> Act of 23 April 1964 Civil Code (Journal of Laws 1964 No. 16, item 93, with amendments).

<sup>3</sup> Act of 16 April 1993 on Combating Unfair Competition (consolidated text: Journal of Laws 2003 No. 153, item 1503 with amendments).

<sup>4</sup> Judgment of 10 August 2006, V CSK 237/06, unpublished.

time with A. Jurkowska as to the risk of the growth of a litigation culture in Poland and the growth of the number of competition law cases pending before Polish courts. M. Krasnodębska-Tomkiel and Marcin Kolasiński (Baker McKenzie) suggested that the proper place to contain rules on private enforcement of competition rules is the KC and not the Competition Act. This solution has already been suggested by the UOKiK to the Polish Codification Commission of Civil Law.

The cooperation between courts and competition authorities was discussed as well. M. Krasnodębska-Tomkiel noted that such cooperation takes place quite often, in particular, when courts ask UOKiK for information connected with proceedings taking place before the authority. The example was also given of German courts that are bound by the decisions taken not only by the German Bundeskartellamt, but also those taken by other EC National Competition Authorities. This speaker agreed that there is need for bigger involvement of courts when it comes to private enforcement of competition rules.

M. Bernatt noted that the application of competition rules by the courts can pose risks for the coherence and uniformity of competition law enforcement in Europe (an opinion shared by William E. Kovacic). Especially the jurisprudence of the courts can be different from what the European Commission expects. T. Żyznowski stressed that for a judge a competition law case is one of many that must be deal with on a daily basis.

## 2.5. Character of the damages

When talking about the character of damages, M. Będkowski-Kozioł referred to the difference between the Polish and the German legal system – while the latter is based on the idea of financial compensation, the former is based on natural restitution. This fact can, in the opinion of this speaker, limit the popularity of private enforcement in Poland.

T. Żyznowski considered whether damages that are actually awarded should include interest (*lucrum cessans*); the question was also considered “what is the best way to calculate damages?”

Maciej Fornalczyk (Comper consulting firm, Łódź) considered what method should be used to calculate the amount of damages. In his opinion, the crucial factor to be considered here is the assessment of what market situation would have occurred if the breach of competition law would not have taken place.

## 2.6. Evidence

The participants discussed also practical issues connected with the burden of proof in competition law cases. D. Miąsik noted that the complainant is only likely to win if the defendant is a dominant market player. M. Surdek (attorney, CMS Cameron McKenna) and T. Żyznowski agreed that the burden of proof is too high. They also pointed out that, in practice, the chances to effectively prove the causative link and damages are very limited. In the context of calculating the damages to be awarded,

T. Żyżnowski noted that such calculation will be based on a probability test rather than having to prove them.

## 2.7 Standing

The question who is entitled to bring an action in competition law cases is the key issue for private enforcement. During the discussion, C. Banasiński was in favour of possibly wide standing. M. Kolasiński considered however whether the right to bring an action for damages should be limited to a competitor which sustained damages directly only or whether it should also encompass a competitor that suffered indirectly. Many of the speakers agreed that in the context of private enforcement of competition rules by consumers, class actions must be recommended because otherwise, suits filed by single consumers would have little chances to be successful before Polish civil court.

## 3. Closing remarks

In her final comments, A. Jurkowska agreed that the Polish legal order does contain the legal basis necessary for private enforcement of competition rules. In her opinion however, to make private enforcement of competition rules effective in Poland, changes are need as well as lots of incentives. The fact was also stressed that a greater involvement of Polish economists in the discussion on private enforcement is needed.

Prof. A. Wróbel concluded that the main problem in this context is that the standard of proof is too high and that the Polish legal system lacks class actions.

The seminar was closed by Prof. T. Skoczny who noted that this discussion was very fruitful and that a research project dedicated to the problem of private enforcement of competition rules in Poland is needed. He emphasised that the Ministry of Justice should be involved in this discussion.

### *Maciej Bernatt*

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## **The First Insurance Small Forum of CSAiR. Report**

1. On 4 June 2007 the Centre of Antitrust and Regulatory Studies (CSAiR) organised the first meeting of the Insurance Small Forum. The meeting focused on horizontal co-operation in the context of the Regulation exempting agreements in the insurance sector from the prohibition of cartels contained in Article 6 of the Act of 2007 on Competition and Consumer Protection. 30 participants gathered including researchers and representatives of the insurance sector. Among them was Marek Niechciał, the President of the Office for Competition and Consumer Protection (*Urząd Ochrony Konkurencji i Konsumenta*, UOKiK) and Tomasz Mintoft-Czyż, the President of the Polish Chamber of Insurance.

The meeting was opened by Prof. A. Nowak, the Dean of the Warsaw University Faculty of Management who outlined the future plans of CSAiR as well as his personal opinion on scientific research on insurance issues. Prof. T. Skoczny, the Director of CSAiR, began the substantive part of the meeting by presenting a report prepared on request of CSAiR that concerned the approaching expiration of previous Polish Regulation exempting agreements between insurance companies.

The report was intended to propose a scientific, national response to the question whether an adoption, based on the legislative delegation contained in Article 8 of the Act of 2007 on Competition and Consumer Protection, of a new Polish group exemption for the insurance sector is justified? The need to introduce a new act was associated not only with the expiration of the equivalent act of 2002, but also with the fact that the latter came into force before Poland's accession to the European Union (EU). Its value needed therefore to be verified once Poland became a member of the EU, in particular, in light of the new direct applicability of some provisions of Community law. Achieving the report's goals coincided with the publication by the European Commission of a preliminary report on business insurances that had actually proved a horizontal co-operation in insurance is marginal, both in a cross-border and national context (although the level of co-operation differs in various Member States).

Among arguments supporting the adoption of a new group exemption in Poland was the comparison resulting from changes in the Community legislation and case law. The introduction of a new act was also supported by its contribution towards: 1) the enhancement of the level of legal certainty for entrepreneurs active on the Polish insurance market (the level of legal certainty should not be lower than in the

Community); 2) the increase of the effectiveness of insurers that would positively influence the economic development of the whole country; 3) the achievement of a possible decrease of prices of insurance services (through decreasing the costs of insurers' activity; 4) the enhancement, *per saldo*, of the level of consumer welfare.

However, an argument against adopting a new group exemption could be found in the relative rarity of national exemptions of this type in other Member States. Considering the economic balance of costs and benefits linked to the introduction of such an act, the lack of adequate economic research in this field neither allowed to confirm nor deny the justification for adopting such an act in Poland.

If the adoption of a new exemption was decided to be justified, the Community pattern (Regulation No 358/2003) should be used in its drafting process. The report presented during the meeting by the Director of CSAiR contained a draft exemption for the Polish insurance sector, prepared against the background of the Community act. The permissible extent of co-operation in the insurance sector would have to cover activities in the following areas: a) joint establishment of risk calculations and tariffs; b) joint research; c) joint establishment and distribution of standard policy conditions; d) joint establishment and distribution of models illustrating the profits to be realised; e) joint co-insurance and co-reinsurance; f) joint establishment of technical specifications, rules or codes of practice concerning security devices.

In his opening speech, Prof. T. Skoczny posed several questions including: (1) is vertical co-operation/vertical integration, connected with the distribution of insurance products, not a more important problem of the Polish insurance market? (2) Is the market share threshold for co-operation, which is used as a condition for exemption from a prohibition of cartels, not set on a level that is too low? (3) If adopted, how long should a new act remain in force (3 or 7 years)?

The following speaker, the President of UOKiK, stressed that the specific character of the insurance sector requires the adoption of an act exempting some types of anticompetitive forms of co-operation. A new exemption was being prepared in accordance with the economic approach to antitrust. In the opinion of the President of UOKiK, the goal of a national group exemption would be to increase the number of transactions in the domestic insurance sector, to enhance the effectiveness of the market and to achieve benefits for consumers. However, one open question remains, that is, will insurers be eager to actually use the opportunities created by the exemption?

The President of the Polish Chamber of Insurance dedicated his speech primarily to the CEA's (*Comité Européen des Assurances*) assessment of the sector inquiry report prepared by the European Commission. In the opinion of the CEA and T. Mintoft-Czyż, group exemptions are a reflection of market liberalisation. Therefore, they should be supported by market players (entrepreneurs). They are also beneficial for consumers. CEA assessed positively the fact that the Commission initiated a survey of the insurance sector. Nevertheless, the conclusions of the report as well as the research methodology used by the Commission were notably criticised by the sector participants. The main argument against the methodology applied in the report concerned the fact that the Commission used the same measures for "old" and for "new" Member States of the EU, while market characteristics in countries of the "Fifteen" and in new Member

States are totally different (highly competitive markets in Western Europe and highly concentrated, underdeveloped market in most of Central and Eastern European countries). On the basis of the survey of the business insurances sub-sector only, the Commission formulated a general conclusion on a marginal suitability of a group exemption for agreements in the insurance sector, even though the exemption would be also applicable to insurances other than business ones (including, therefore, many insurances not covered by the survey conducted on the Commission's request).

The President of the Polish Insurance Chamber pointed out also to the ambiguities contained in the act that has been in force so far. Among these noted were the imprecise definition of "a relevant market" and the definition of "new risks" that does not respond to real market conditions. In his opinion, the scope of a national exemption should be broadened in order to include a co-operation in loss adjustment.

2. Participants of the subsequent discussion included: Prof. A. Fornalczyk, COMPER, former President of the Anti-monopoly Office; Prof. R. Holly, Warsaw School of Economics; Prof. I. Jędrzejczyk, University of Life Sciences; H. Karwat-Ratajczak, Polski Zakład Ubezpieczeń (PZU); Dr. M. Krasnodębska-Tomkiel, the UOKiK; M. Kurowski, Polish Chamber of Insurance; Prof. T. Michalski, Warsaw School of Economics; M. Niechciał, President of the UOKiK; Prof. T. Skoczny, Director of CSAiR, Faculty of Management, University of Warsaw; and, D. Wałcz, former President of the Office of Insurance Supervision. Various points were raised concerning the justification of adopting a national group exemption for co-operation in the insurance sector; other important issues were also considered.

Prof. A. Fornalczyk, who spoke first, expressed doubts about the need to adopt a national exemption when Community Regulation is directly applied in Member States. The Commission decided to refrain for issuing new sector exemptions in many areas. In the Commission's opinion, sector exemptions are dangerous, especially when only few players act on a particular market. However, according to Prof. Fornalczyk if the necessity of a group exemption in the insurance sector is accepted in the end, the new act should not remain in force for longer than three years.

Responding to the doubts expressed in relation to the appropriateness of adopting a new national exemption, Prof. T. Skoczny pointed out that the coverage of the Community Regulation is limited to cross-border co-operation and thus, a domestic exemption was needed to deal with potential co-operation at the national level. Prof. A. Fornalczyk claimed that while exemptions facilitated co-operation, but they could not force entrepreneurs to do so. Without considering the characteristics of the sector, it was therefore pointless to adopt an exemption.

Prof. R. Holly asked "what does deregulation, that is, adopting exempting regulations, through regulation serve for?" Does an exemption serve consumers and other market participants? Is public intervention for creating a market needed, if there are some problems with defining the insurance market? Prof. R. Holly emphasised the low level of development of the Polish insurance market which is poorer than the developed Western market because of lack of a distribution sector. Additionally, he focused on the fact that, concerning insurance services, an insurance company is actually a consumer as it creates demand for services.

H. Karwat-Ratajczak declared that an exemption for the insurance sector is not needed.

Dr. M. Krasnodębska-Tomkiel stressed that the question whether to adopt an exemption has already been discussed for several months. The Community regulation limits national legislation in existence. The Commission's report concludes that, basically, only very big companies function on the insurance market; co-operation between them is not always covered by the Polish exemption of 2002.

The President of UOKiK claimed that, seeing as the Community allowed sectorial exemptions, a non-adoption of an adequate act in Poland might be treated by the representatives of the Polish insurance sector as a basic barrier for sector development because of the lack of proper legal tools (for instance, to co-operate).

M. Kurowski confirmed that the European Commission was very skeptical about sectorial exemptions. The insurance market is characterised by an asymmetry of information – insurers have much less knowledge about customers than other market participants. On the other hand, a rule that a group exemption of some agreements requires the participation of all the entities functioning on the market discourages entities who want to co-operate. Undoubtedly, a solvency directive would push companies towards horizontal co-operation. Additionally, it must be stressed that the law on public procurement and the exempting regulation are inconsistent because the first does not allow insurance pools to participate in bids.

Prof. I. Jędrzejczyk pointed out that co-operation among insurers does indeed exist, for instance, in fire prevention (Germany, Slovakia). There is also a necessity for co-operation in the context of deception in damage claims combating alliances. Prof. T. Skoczny added that in these areas co-operation was not prohibited as it was not anti-competitive, so it was not subject to the prohibition of competition restricting agreements. However, soon it would be the functioning of financial conglomerates that would become a crucial problem for this sector (such as bank assurance), rather than the activities of individual insurance companies.

Summing up the meeting, Prof. T. Skoczny stressed that even though some doubts concerning the adoption of a new national exempting regulation have been raised, promoting co-operation is the most pro-market and pro-competitive form of public intervention into economy. In case of its absence, a market could start demanding another (new) regulation. The Commission may have chosen a wrong sub-sector of the insurance industry for its survey on co-operation. Unfortunately, knowledge on co-operation in this field in Poland is also very small. Thus, conducting additional research on co-operation between insurers in Poland should probably be recommended.

3. Participants were of the shared opinion that another meeting of the Small Insurance Forum should be organised dedicated to the problem of vertical relations, the insurance broker market and the insurance agency market.

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\* For the book review – see p. 277.

\*\* For the book review – see p. 281.

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